(12)

No. 02-516-CFX Title: Jennifer Gratz and Patrick Hamacher, Petitioners
v.
Lee Bollinger, et al.

Docketed: October 3, 2002 Court: United States Court of Appeals for the Sixth Circuit

Vide:

See also:
02-241
02-571

Entry	Date	Proceedings and Orders
	Oct 1 2002	Petition for writ of certiorari filed. (Response due November 2, 2002)
	Oct 1 2002	Appendix of petitioner Jennifer Gratz, et al. filed.
	Oct 3 2002	LODGING consisting of ten bound copies of related material received from counsel for petitioner.
	Oct 16 2002	Waiver of right of respondents Ebony Patterson, et al. to respond filed.
	Oct 27 2002	Brief of respondents Lee Bollinger, et al. in opposition filed.
	Nov 12 2002	Reply brief of petitioners Jennifer Gratz and Patrick Hamacher filed. VIDED.
	Nov 13 2002	DISTRIBUTED for Conference of November 27, 2002
	Dec 2 2002	The petition for a writ of certiorari before judgment is granted limited to Question 1 presented by the petition. SET FOR ARGUMENT April 1, 2003.
		**********
	Dec 20 2002	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioners.
	Dec 20 2002	Consent to the filing of amicus briefs in support of either party received from counsel for the respondents University of Michigan, Lee Bollinger, and James Duderstadt.
	Dec 26 2002	Consent to the filing of amicus briefs in support of either party received from counsel for respondents, Ebony Patterson, et al.
	Dec 30 2002	Consent to the filing of amicus briefs in support of either party received from counsel for petitioners Gratz and Hamacher.
	Jan 14 2003	Brief amicus curiae of Pacific Legal Foundation filed.
	Jan 15 2003	Brief amicus curiae of Center for New Black Leadership filed. VIDED.
	Jan 15 2003	Brief amicus curiae of National Association of Scholars filed.
	Jan 16 2003	Brief amicus curiae of United States filed.
	Jan 16 2003	Brief amicus curiae of Claremont Institute Center for Constitutional Jurisprudence filed. VIDED.
	Jan 16 2003	Brief amicus curiae of Anti-Defamation League filed. VIDED.
	Jan 16 2003	Brief amicus curiae of Equal Employment Advisory Council filed. VIDED.
	Jan 16 2003	Joint appendix filed.

4pp

No. 02-516-CFX

Entry	Date	Proceedings and Orders
	Jan 16 2003	Brief of petitioners Jennifer Gratz and Patrick Hamacher filed.
	Jan 16 2003	Brief amicus curiae of Center for Equal Opportunity, et al. filed. VIDED.
	Jan 16 2003	Brief amicus curiae of Cato Institute filed. VIDED.
	Jan 16 2003	Brief amicus curiae of Asian American Legal Foundation filed. VIDED.
	Jan 16 2003	Brief amicus curiae of Center for Individual Freedom filed. VIDED.
	Jan 16 2003	Brief amicus curiae of Michigan Association of Scholars filed. VIDED.
	Jan 16 2003	Brief amicus curiae of Center for the Advancement of Capitalism filed. VIDED.
	Jan 16 2003	Brief amici curiae of Florida, et al. filed. VIDED.
	Jan 16 2003	Brief amicus curiae of Duane C. Ellison filed.
	Jan 16 2003	Brief amicus curiae of Reason Foundation filed. VIDED.
	Jan 28 2003	CIRCULATED.
	Jan 31 2003	Brief amicus curiae of Hayden Family filed. VIDED.
	Jan 31 2003	Record filed.
	Jan 31 2003	Record filed.
	Feb 4 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Feb 13 2003	Brief amici curiae of Columbia University, et al. filed. VIDED.
	Feb 13 2003	Brief amici curiae of Richard A. Gephardt and Congressional Members filed. VIDED.
	Feb 14 2003	Brief amicus curiae of Northeastern University filed.
	Feb 14 2003	Brief amici curiae of American Council on Education, et al. filed.
	Feb 14 2003	Brief amicus curiae of New Jersey filed. VIDED.
	Feb 14 2003	Brief amici curiae of Human Rights Advocates and Univ.of MN Human Rights Center filed. VIDED.
	Feb 14 2003	Brief amicus curiae of Jennifer M. Granholm, Governor of Michigan filed. VIDED.
	Feb 14 2003	Brief amici curiae of Carnegie Mellon University, et al. filed. VIDED.
	Feb 14 2003	Brief amici curiae of Natl. Coalition of Blacks for Reparations in America, et al. filed. VIDED.
	Feb 14 2003	Brief amici curiae of Amherst, et al. filed. VIDED.
	Feb 14 2003	Brief amici curiae of American Jewish Committee, et al. filed. VIDED.
	Feb 18 2003	Brief of respondents Ebony Patterson, et al. filed.
	Feb 18 2003	Brief of respondent Board of Regents of University of Michigan filed. VIDED.
	Feb 18 2003	Brief amicus curiae of Howard University filed. VIDED.
	Feb 18 2003	Brief amici curiae of Massachusetts Institute of Technology filed. VIDED.
	Feb 18 2003	Brief amicus curiae of The College Board filed.
	Feb 18 2003	Brief amicus curiae of Authors of the Texas Ten Percent Plan filed. VIDED.

No. 02-516-CFX

Entry	Date	Proceedings and Orders
	Feb 18 2003	Brief amicus curiae of Members of the United States Congress filed.
	Feb 18 2003	Brief amici curiae of American Educational Research Association, et al. filed.
	Feb 18 2003	Brief amici curiae of John Conyers, Jr., et al. filed. VIDED.
	Feb 18 2003	Brief amici curiae of University of Pittsburgh, et al. filed. VIDED.
	Feb 18 2003	Brief amici curiae of Social Scientists Glenn Loury, et al. filed. VIDED.
	Feb 18 2003	Brief amicus curiae of General Motors Corporation filed. VIDED.
	Feb 18 2003	Brief amici curiae of United Negro College Fund and Kappa Alpha PSI filed. VIDED.
	Feb 18 2003	Brief amici curiae of 3M and other Leading Businesses filed. VIDED.
	Feb 18 2003	Brief amicus curiae of American Psychological Association filed. VIDED.
	Feb 18 2003	Brief amicus curiae of New America Alliance filed. VIDED.
	Feb 18 2003	Brief amici curiae of National Urban League, et al. filed. VIDED.
	Feb 18 2003	Brief amici curiae of Harvard University, et al. filed. VIDED.
	Feb 18 2003	Brief amici curiae of National Education Association, et al. filed. VIDED.
	Feb 18 2003	Brief amici curiae of City of Philadelphia, et al. filed. VIDED.
	Feb 18 2003	Brief amicus curiae of Black Women Lawyers Association of Greater Chicago filed. VIDED.
	Feb 18 2003	Brief amici curiae of Banks Broadcasting, Inc., and Media Companies filed. VIDED.
	Feb 18 2003	Brief amicus curiae of Bay Mills Indian Community filed.
	Feb 19 2003	Brief amici curiae of New York City Council Speaker A. Gifford Miller, et al. filed. VIDED.
	Feb 19 2003	Brief amici curiae of Leadership Conference on Civil Rights, et al. filed. VIDED.
	Feb 19 2003	Brief amici curiae of Latino Organizations, La Raza, et al. filed.
	Feb 19 2003	Brief amici curiae of Lawyers Committee for Civil Rights Under Law, et al. filed.
	Feb 19 2003	Brief amicus curiae of National School Boards Association filed. VIDED.
	Feb 19 2003	Brief amici curiae of Lt., Gen. Julius W. Becton, Jr. filed. VIDED.
	Feb 19 2003	Brief amicus curiae of AFL-CIO filed. VIDED.
	Feb 19 2003	Brief amici curiae of Maryland, et al. filed. VIDED.
	Feb 19 2003	Brief amici curiae of Senators Thomas Daschle, et al. filed. VIDED.
	Feb 19 2003	Brief amici curiae of NOW Legal Defense and Education Fund, et al. filed. VIDED.
	Feb 20 2003	LODGING consising of twenty bound copies of exhibits

No. 02-516-CFX

Entry	Date	Proceedings and Orders
		received from counsel for amici Natl. Asian Pacific American Legal, et al. and distributed. VIDED.
	Feb 24 2003	Motion of Exxon Mobil Corporation for leave to file a brief as amicus curiae filed.
	Feb 27 2003	Motion of respondents Ebony Patterson, et al. for additional argument time and for divided argument, or in the alternative, for divided argument filed.
	Mar 4 2003	Response of Bollinger, et al. to the motion of Patterson, et al. for additional argument time and for divided argument, or in the alternative, for divided argument.
	Mar 10 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Mar 10 2003	Motion of Exxon Mobil Corporation for leave to file a brief as amicus curiae GRANTED.
	Mar 10 2003	Motion of respondents Ebony Patterson, et al. for additional argument time and for divided argument, or in the alternative, for divided argument DENIED.
	Mar 17 2003	Motion of BP America Incorporated for leave to file a brief as amicus curiae filed.
	Mar 24 2003	Reply brief of petitioners Jennifer Gratz, et al. filed.
	Mar 28 2003	Record filed.
	Mar 28 2003	Motion of MTV Networks for leave to file brief amicus curiae in support of respondents out of time filed.
	Apr 1 2003	ARGUED.

02 516 OCT 1 - 2002

No. _____

OFFICE OF THE CLERK

In The Supreme Court of the United States

JENNIFER GRATZ AND
PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT,
AND THE BOARD OF REGENTS OF THE
UNIVERSITY OF MICHIGAN,

Respondents.

On Petition For Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Sixth Circuit

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QUESTIONS PRESENTED

1. Does the University of Michigan's use of racial preferences in undergraduate admissions violate the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), or 42 U.S.C. § 1981?

2. Did the district court correctly dismiss the plaintiff class's claim for injunctive relief with respect to the University of Michigan's use of racial preferences in undergraduate admissions?

3. Did the individual defendants violate the clearly established legal rights of plaintiffs, so that they are not entitled to summary judgment on the ground of qualified immunity?

PARTIES TO THE PROCEEDING

Petitioners are Jennifer Gratz and Patrick Hamacher. They are plaintiffs in the District Court and appellants in the Court of Appeals. They bring this action on their own behalf and petitioner Hamacher also brings it on behalf of a certified class of similarly situated persons.

Respondents are Lee Bollinger, James J. Duderstadt, and The Board of Regents of the University of Michigan. They were defendants in the District Court and appellees in the Court of Appeals.

The following additional respondents were defendant-intervenors in the District Court and appellants in the Court of Appeals:

> Ebony Patterson, Ruben Martinez, Laurent Crenshaw, Karla R. Williams, Larry Brown, Tiffany Hall, Kristen M.J. Harris, Michael Smith, Khyla Craine, Nyah Carmichael, Shanna Dubose, Ebony Davis, Nicole Brewer, Karla Harlin, Brian Harris, Katrina Gipson, Candice B.N. Reynolds, by and through their parents or guardians, Denise Patterson, Moises Martinez, Larry Crenshaw, Harry J. Williams, Patricia Swan-Brown, Karen A. McDonald, Linda A. Harris, Deanna A. Smith, Alice Brennan, Ivy Rene Carmichael, Sarah L. Dubose, Inger Davis, Barbara Dawson, Roy D. Harlin, Wyatt G. Harris, George C. Gipson, Shawn R. Reynolds, and Citizens for Affirmative Action's Preservation

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari before judgment to review a decision of a United States District Court for the Eastern District of Michigan. The decision of the District Court is presently pending in the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the District Court (App. at 1a) for which this petition is filed is reported at 122 F. Supp. 2d 811 (E.D. Mich. 2000). The decision of the District Court with respect to the arguments of the intervenors in this case (App. at 66a) is reported at 135 F. Supp. 2d 790 (E.D. Mich. 2001).

JURISDICTION

The District Court entered its order on January 30, 2001, and a judgment on February 9, 2001. The case is docketed in the court of appeals as Nos. 01-1333, 01-1416, 01-1418, and 01-1438. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Under 28 U.S.C. § 1254(1), this Court may grant a petition for a writ of certiorari to review any case that is "in" the court of appeals, even if a final judgment has not been entered by that court. *United States v. Nixon*, 418 U.S. 683, 692 (1974).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Equal Protection Clause of Section 1 of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

2. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d states:

> No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits

of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

3. 42 U.S.C. § 1981(a) states:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, . . . and to the full and equal benefit of all laws and proceedings for the security of person and property. . . .

4. 42 U.S.C. § 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioners request this Court to exercise its power and discretion under Rule 11 of its rules to grant a writ of certiorari before judgment to the United States Court of Appeals for the Sixth Circuit, which has not yet entered judgment on an appeal of this case pending before it. The case presents questions about what constitutes a compelling interest that may justify a state-supported university to give race-based preferences in student admissions to applicants from certain racial or ethnic groups. The district court resolved this issue by concluding that diversity is a compelling interest. The appeal of the case was heard by the Sixth Circuit, sitting *en banc*, on the same day (December 6, 2001) that it heard *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3154 (August 9, 2002) (No. 02-241), which involves similar claims made against the University of Michigan Law School. Although the Sixth Circuit had

ruled that the appeals of the cases would be expedited (*see* discussion *infra* at 13 & n.2), it has issued an opinion (filed on May 14, 2002) in *Grutter* only, in which it ruled, among other things, that diversity is a compelling interest justifying the use of racial preferences in university admissions. The Fifth, Ninth, Eleventh, and Sixth Circuits have split on this issue of profound national importance.

The case presents additional questions concerning what constitutes appropriate "narrow tailoring" of an admissions policy designed to achieve diversity; whether the district court correctly dismissed the plaintiff class's claim for an injunction; and whether the individual defendants were entitled to summary judgment on grounds of qualified immunity. The district court, although invalidating the University's racial preferences at issue for the years prior to, and for one year after the commencement of, the action (1995-1998), summarily dismissed the plaintiff class's request for injunctive relief in its entirety. It also upheld large, rigid, mechanical racial preferences in effect in 1999 and at the time of the district court's ruling in December 2000. The district court's conclusion that the later policies met narrow-tailoring requirements conflicts sharply with the approach to narrow tailoring taken by this Court and by other lower courts.

I. FACTUAL BACKGROUND

A. Plaintiffs

Plaintiffs Jennifer Gratz and Patrick Hamacher applied for admission to the University of Michigan's College of Literature, Science & the Arts (hereinafter "University" or "LSA") for the fall academic terms that commenced in 1995 and 1997, respectively. App. at 109a.[1]

[1] Many of the statements of facts contained in the petition herein are based on a "Joint Summary of Undisputed Facts" that was submitted by the parties to the district court and that is included in the appendix at App. 106a-118a. Additional citations herein are to documents contained in the

(Continued on following page)

Both Gratz and Hamacher were initially placed on a "waitlist" for admission, and were subsequently denied admission. They are both white and at all material times were residents of the state of Michigan. *Id.*

Ms. Gratz applied with a 3.8 high school grade point average and an ACT score of 25. JA at 543. She was notified by letter dated January 19, 1995, that the LSA had "delayed" a final decision on her application until early to mid-April. App. at 109a.

By letter dated April 24, 1995, the University wrote to inform Ms. Gratz that it was unable to offer her admission. *Id.* The University invited Ms. Gratz to place her name on an "extended waiting list," but went on to state that it "expect[ed] to take very few students from the extended waiting list," and "recommend[ed] students make alternative plans to attend another institution." *Id.* Ms. Gratz did so by accepting an offer for admission into the freshman class of another institution, the University of Michigan at Dearborn, where she enrolled in the fall of 1995 and graduated in 1999. *Id.*

Plaintiff Patrick Hamacher applied in 1996 for admission into the fall 1997 freshman class of the LSA. *Id.* He had a 3.32 high school grade point average and a 28 ACT score. JA at 280-95. By letter dated November 19, 1996, the University informed Mr. Hamacher that it "must postpone" a decision on his application until "mid-April." App. at 109a.

On or about April 8, 1997, the University informed Mr. Hamacher that after further review, it was unable to offer him admission to the LSA. *Id.* at 109a-110a. As a result of the denial, Mr. Hamacher accepted admission

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Joint Appendix ("JA") filed by the parties in the Sixth Circuit, or to record materials contained in the Lodging ("Lodg.") filed contemporaneously with this petition.

into another institution, Michigan State University, where he enrolled in the fall of 1997 and graduated in 2001.

B. The University's Admissions Policies and Practices

Defendants admit that they use race as a factor in making admissions decisions and that the race of plaintiffs Gratz and Hamacher was not a factor that "enhanced" the consideration of their applications. JA at 151. The University and LSA are the recipients of federal funds. *Id.*

Defendants justify the use of race as a factor in the admissions process on one ground only: that it serves a "compelling interest in achieving diversity among its student body." *Id.* at 314. Admission to the LSA is selective, meaning that many more students apply each year than can be admitted, and the University rejects many qualified applicants. App. at 108a. Defendants, however, have a policy to admit all qualified applicants who are members of one of three select racial minority groups – African American, Hispanic, and Native American – (which defendants often refer to as "underrepresented" groups):

> [M]inority guidelines are set to admit all students who qualify and meet the standards set by the unit liaison with each academic unit, while majority guidelines are set to manage the number of admissions granted to satisfy the various targets set by the colleges and schools.
>
> . . . .
>
> . . . Thus, the significant difference between our evaluation of underrepresented minority groups and majority students is the difference between meeting qualifications to predict graduation rather than selecting qualified students one over another due to the large applicant pool.

Lodg. at L.2, L.5. Defendants acknowledge that their consideration of race in the admissions process has the effect of admitting virtually every qualified applicant from any of the designated underrepresented minority groups.

App. at 111a. The University generally defines a "qualified" applicant as one who could be expected, on the basis of the information contained in his or her application, to achieve passing grades as a student in the school to which the applicant has applied for admission. JA at 331.

1. Admissions Policies for 1995-1997

Written "Guidelines" for all LSA classes commencing in 1995, 1996, and 1997 have in common the use of grids or tables that are divided into cells representing different combinations of small ranges of adjusted high school grade point averages and scores on ACT or SAT tests. App. at 111a-113a, 115a; Lodg. at L.8-11, L.17-18, L.25-26. The grade point averages are adjusted first by clerical employees and second by admissions counselors. App. at 111a-112a. The adjustments made by the admission counselors are based on application of separate written "SCUGA" guidelines, which result in a score on a four-point scale ("GPA 2") that is represented in the tables for each year. *Id.* The SCUGA guidelines call for addition or subtraction of points based on the quality of an applicant's high school ("S"), strength of curriculum ("C"), unusual circumstances ("U"), geographic factors ("G"), and alumni relationships ("A"). App. at 111a-112a; Lodg. at L.12-15, L.20-23, L.28-31.

Each cell in the Guidelines tables includes one or more possible actions for consideration by the admissions counselor reviewing an applicant's file. Generally, the Guidelines actions fall into one of the following categories: admission, rejection, delay (*e.g.*, for more information) or postpone ("wait-list" due to limited available spaces). The Guidelines for applicants in 1995 (which included Jennifer Gratz) had four *separate* tables, one for each of the following groups of applicants: in-state non-minority students; out-of-state non-minority students; in-state minority students; and out-of-state minority students. App. at 112a; Lodg. at L.8-11. For applicants for the 1996 and 1997 classes (which included Patrick Hamacher), there were two tables – for in-state and out-of-state applicants – and

minority and non-minority action codes are provided for *separately* in each of the individual cells, with the top row of the cell representing the Guidelines action for non-minority students and the bottom two rows for minority applicants and disadvantaged or other students designated as underrepresented. App. at 112a-115a; Lodg. at L.17-18, L.25-26. The addition of a new "SCUGA" factor for underrepresented minority status in 1997 had another consequence: underrepresented minorities, *solely based on their race*, had one-half point (.5) added to their grade point average calculation used in the already discriminatory Guidelines tables. App. at 115a; Lodg. at L.30.

The Guidelines establish that admissions decisions for non-minorities are generally more selective, requiring higher GPA 2 and test scores for admission, than admission decisions for minority applicants. *Id.* at L.8-11, L.17-18, L.25-26. In some cases, the Guidelines called for automatic rejection based on low grades or test scores; underrepresented minorities, however, were *never* rejected automatically. JA at 329, 338, 358.

In the case of Jennifer Gratz, her adjusted high school grade point average ("GPA 2") of 3.8 and ACT score of 25 placed her in a cell that called for a "postpone" on the first review under the 1995 Guidelines, which was the first action taken with respect to her. JA at 543; App. at 109a; Lodg. at L.8. For a minority applicant (in-state or out-of-state) with the same combination of "GPA 2" and test score, the Guidelines called for a decision to "Admit." *Id.* at L.10-11.

Patrick Hamacher had an adjusted grade point average ("Selection Index") of 3.0 and an ACT score of 28, which placed him in a cell in the 1997 Guidelines that called for postponement of non-minority students and delay or admission of minority students (whose Selection Index was augmented by .5 for race). JA at 280-95, 544; App. at 109a-110a; Lodg. at L.25.

The admissions data show that the two-track guidelines had their intended effect. Given comparable grades and test scores, the rates of admission for students from

the "underrepresented" racial and ethnic groups are generally much higher than the rates for students from the disfavored racial and ethnic groups. In 1995, for example, students whose grades and test scores placed them in the same "grid" as Jennifer Gratz had an admission rate of 100% (46/46), *id.* at L.61, while the rate of admission for students from other races and ethnicities in these grids was less than one in three (378/121), *id.* at L.62. The data show that the admission rates for "underrepresented" minorities within a given grid are often 90% to 100%, while the rates for students from other races in the same grids are usually far lower. *Id.* at L.61-66.

2. Admissions Policies for 1998-2000

The LSA Guidelines for fall 1998 freshman enrollments (adopted after commencement of the lawsuit) dispensed with the tables and cells used in prior years. The new guidelines used a "Selection Index" calculated on a variety of factors and scored on a scale of up to 150 points. App. at 116a; Lodg. at L.36-40. For example, the 1998 Guidelines actions to be taken on an application are divided linearly as follows: 100 to 150 points (admit); 95-99 points (admit or postpone); 90-94 points (postpone or admit); 75-89 points (delay or postpone); 74 points and below (delay or reject). App. at 116a; Lodg. at L.32-35.

The factors used to calculate an applicant's "Selection Index" under the 1998 Guidelines are similar to factors used in prior years. Up to 80 points can be based on high school grade point average (*e.g.*, 40 points for a 2.0 GPA; 60 points for a 3.0; and 80 points for a 4.0). App. at 116a; Lodg. at L.36-40. Up to 12 points, representing a *perfect* ACT/SAT score, can be earned for performance on either of the two standardized tests; up to 10 points for quality of school; from 8 to -4 points for strength or weakness of high school curriculum; 10 points for in-state residency; 4 points for alumni relationships; 1 point for an outstanding essay (changed to 3 points beginning in 1999); and 5 points for personal achievement or leadership on the national level. Under a "miscellaneous" category, 20 points are added

for one of several factors, including an applicant's membership in an underrepresented racial or ethnic minority group. App. at 116a; Lodg. at L.39-40.

The University adopted the 1998 Guidelines with the intent to admit and enroll the same composition of class as had been admitted and enrolled under the previous Guidelines. In adopting the 1998 Guidelines, defendants did not intend to increase or decrease from prior years the extent to which they considered race and ethnicity in the admissions process. The parties have stipulated that the change from the tables to the selection index did not constitute a substantive change in the way that race and ethnicity were considered in the admissions process. App. at 116a. Defendants continued to use the 150-point Selection Index system for years 1999 and 2000 (the year the district court heard the motions for summary judgment). *Id.* at 117a; Lodg. at L.41-60.

For years 1995-1998, defendants admitted all qualified applicants from the "underrepresented" minority groups as soon as possible, without deferring or postponing (waitlisting) their applications. App. at 113a. Students from other racial groups, like Jennifer Gratz and Patrick Hamacher, could have their applications deferred or postponed. Beginning in 1999, defendants abandoned their approach of "immediately" admitting all qualified underrepresented minority students. Instead, admissions counselors were permitted to "flag" for later consideration a file that fell into certain established classifications. *Id.* at 117a. One of those classifications consisted of qualified underrepresented minority students meeting a designated selection index score. *Id.*

For years 1995-1998, defendants also "reserved" or "protected" spaces in the class for members of certain groups of students, including students from one of the three underrepresented minority groups. *Id.* at 114a-115a. According to defendants, "as applicants from a particular group are admitted over the course of the admissions season, the protected spaces reserved for that group are used." JA at 310, 319. If the pool of qualified applicants

from these underrepresented minority groups never reached the number of "protected spaces," those slots "opened up" and could be filled by students who were not members of one of the underrepresented racial groups. *Id.*

II. PROCEEDINGS BELOW

A. The District Court

This action commenced in October 1997. The Complaint alleged that defendants operated an admissions system that illegally discriminated on the basis of race in violation of 42 U.S.C. §§ 1981, 1983, and 2000d. JA at 40-42. Plaintiffs sought, among other things, declaratory and injunctive relief, and damages. *Id.* at 41-42.

The district court certified a class of plaintiffs, pursuant to Federal Rule of Civil Procedure 23(b)(2), in an opinion and order filed December 23, 1998. The intervenors were made parties to this case following an order of the Sixth Circuit reversing the district court's order denying intervention. *See Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999) (reversing orders denying intervention in both *Gratz* and *Grutter*).

The district court heard the parties' motions for summary judgment on November 16, 2000. In an opinion filed on December 13, 2000, and order filed on January 30, 2001, the district court granted plaintiffs' motion for partial summary judgment with respect to declaring defendants' admissions system for years 1995-1998 unlawful, App. at 43a-48a; granted defendants' motion for summary judgment with respect to their 1999 and 2000 admissions systems and plaintiffs' claim for injunctive relief, *id.* at 34a-43a; granted the motion of defendants Bollinger and Duderstadt for summary judgment on grounds of qualified immunity, *id.* at 48a-50a; and denied defendant Board of Regents' motion for summary judgment on grounds of Eleventh Amendment immunity, *id.* at 50a-54a. The January 30, 2001, Order also included a certification pursuant to 28 U.S.C. § 1292(b). *Id.* at 58a. On February 9, 2001, the district court entered an order under Federal Rule of Civil

Procedure 54(b) for entry of judgment with respect to the Section 1983 claims against the individual defendants, *id.* at 60a-62a; and a judgment to that effect was entered on the same day, *id.* at 63a-64a. In a separate opinion filed on February 26, 2001, *id.* at 66a, and order filed on March 21, 2001, *id.* at 95a, the district court rejected the arguments of the intervening defendants for justifying the defendants' racial preferences.

In its December 13, 2000, opinion, the district court concluded that diversity was a compelling interest. *Id.* at 14a-32a. It did not expressly state that Justice Powell's diversity rationale in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), constituted the rationale for the holding of this Court in that case. *See Hopwood v. Texas*, 236 F.3d 256, 275 n.69 (5th Cir. 2000) ("Although decided contrary to *Hopwood II*, [78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996)], with respect to the constitutional validity of the diversity rationale, *Gratz* is nevertheless consistent with our position that the *Hopwood II* panel was neither constrained to accept, nor required to reject, diversity as a compelling state interest under binding Supreme Court precedent"). In fact, the district court stated that it did "not necessarily agree with the Ninth Circuit's conclusion [in *Smith v. University of Washington, Law Sch.*, 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001)] that Justice Powell's" analysis was the "narrowest" rationale for the holding of this Court by application of the analysis approved in *Marks v. United States*, 430 U.S. 188, 193 (1977). App. at 17a. Nonetheless, the district court added that it "reache[d] the same ultimate conclusion as the Ninth Circuit, *i.e.*, that under *Bakke*, diversity constitutes a compelling governmental interest in the context of higher education justifying the use of race as one factor in the admissions process, albeit through somewhat different reasoning." App. at 17a.

The district court held that the admissions policies for years 1995-1998 were not narrowly tailored, *id.* at 43a-48a, but that the policies in effect in 1999 and 2000 (when the motions for summary judgment were argued) were narrowly tailored, *id.* at 34-43a. It reached this bifurcated

result by concluding that there were substantive differences in the policies for these two time periods. The conclusion contradicted the parties' stipulated fact that the substance of defendants' consideration of race had not changed over these years. *Id.* at 116a.

Although the district court ruled the 1995-1998 admissions systems unlawful, it neither enjoined their use, as plaintiffs had sought, nor explained why an injunction was not appropriate. To the contrary, it granted defendants' motion for summary judgment with respect to the claims for an injunction. Finally, although the district court concluded that it was "clear" that the 1995-1998 admissions systems were the functional equivalent of a quota and "ran afoul of Justice Powell's opinion in *Bakke*," it dismissed plaintiffs' Section 1983 claims on qualified immunity grounds. *Id.* at 48a-50a.

B. The Court of Appeals

There were four separate appeals taken to the Sixth Circuit from the decisions of the district court. The district court had entered an order dated January 30, 2001, which both effectuated the decisions made in the December 13, 2000, opinion and made the necessary findings pursuant to 28 U.S.C. § 1292(b). Defendants filed a petition, and plaintiffs filed a cross-petition, seeking permission to appeal from the January 30, 2001, order. The Sixth Circuit granted both requests for permission to appeal by order dated March 26, 2001. The two appeals were docketed in the court of appeals as appeal numbers 01-1416, and 01-1418.

Plaintiffs also filed as a matter of right, pursuant to 28 U.S.C. § 1292(a), an appeal from the district court's summary judgment dismissing the plaintiff class's request for injunctive relief. In the same appeal, plaintiffs sought review as a matter of right, pursuant to 28 U.S.C. § 1291, of the district court's final judgment (for which it had directed entry pursuant to Rule 54(b)) dismissing their claims against the individual defendants in their individual capacities on grounds of "qualified immunity." This appeal was docketed as appeal number 01-1333.

The fourth appeal was filed by the intervenors with respect to the decision of the district court rejecting the intervenors' proffered justifications for the University's use of racial preferences in admissions. This appeal was docketed as appeal number 01-1438.

On April 2, 2001, defendants in this case and *Grutter v. Bollinger* moved to consolidate the two cases and expedite the appeals. Defendants cited both the need for clear instructions concerning their own admissions practices and the national significance of the issues as reasons to expedite both appeals.[2] On May 11, 2001, plaintiff filed a petition for initial hearing *en banc* of this case and *Grutter v. Bollinger.*

On August 28, 2001, the Sixth Circuit issued an order scheduling the case for oral argument on October 23, 2001, the same date that the court separately scheduled *Grutter v. Bollinger* for oral argument. On October 19, 2001 (four days before the scheduled panel argument), the court issued an order granting the petition for initial hearing *en banc* and rescheduling the oral argument in both cases for December 6, 2001. The order is contained in the appendix at App. 100a and is reported at 277 F.3d 803.

On May 14, 2002, the Sixth Circuit issued its 5-4 decision in *Grutter v. Bollinger*, 288 F.3d 732, 757 (6th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3154 (August 9, 2002) (No. 02-241). The court held that "diversity" was a compelling interest as a matter of law under the rationale articulated solely by Justice Powell in *Bakke*. *Id.* at

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[2] Although the Sixth Circuit did not directly address these motions with respect to the two cases, it subsequently issued orders referring to the two cases as "consolidated." App. at 101a; *id.* at 104a. It also ordered the appeal in *Grutter v. Bollinger* "expedited," *see Grutter v. Bollinger*, 247 F.3d 631, 633 (6th Cir. 2001), and twice subsequently scheduled oral argument of the two cases for the same day. *See also Grutter v. Bollinger*, 288 F.3d 732, 757 (6th Cir. 2002) (Moore, J., concurring) ("[T]he chief judge ordered that the appeals in *Grutter* and *Gratz* be expedited."), *petition for cert. filed*, 71 U.S.L.W. 3154 (August 9, 2002) (No. 02-241).

739-42. The Sixth Circuit also held that the law school's use of racial preferences was narrowly tailored to achieve the objective of diversity. *Id.* at 744-52. The plaintiff in that case has petitioned this Court for a writ of certiorari. *See* Docket No. 02-241

The May 14, 2002, opinion in *Grutter* noted that the Sixth Circuit would separately render its decision in this case in a "forthcoming" opinion. *See Grutter v. Bollinger,* 288 F.3d at 735 n.2. As of the date of filing of this petition, the Sixth Circuit has not issued its opinion in this case.

REASONS FOR GRANTING THE WRIT

I. This Court Should Exercise Its Power to Grant Review Before Judgment.

Rule 11 of this Court's rules provide that a writ of certiorari before judgment in a case pending in a court of appeals will be granted "only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." For several reasons, the circumstances of this case make it appropriate for granting such early review.

First, the case presents issues of fundamental national importance. *See* discussion *infra* at 24-30. It concerns important constitutional and civil rights, and the resolution of these issues will almost certainly have effects that extend far beyond the parties to the case.

Second, this Court has before it a petition for certiorari filed on August 9, 2002, in *Grutter v. Bollinger*, which seeks review of a decision by the same court of appeals in which this case is pending, which involves many of the

same parties,[3] and which presents issues that are in many respects identical or very similar to those raised in this case. There are, however, also differences between the two cases. Among other things, a comparison of the cases shows how racial preferences can take different forms, while inflicting the same kinds of harm. While each case itself is separately worthy of this Court's review, the two cases considered together will present the Court with a broader spectrum and more substantial record within which to consider and rule upon the common principles that they involve than if only one case is considered, or if they are resolved separately and at different times or in different terms. In a number of cases, this Court has found it appropriate to grant review before judgment when another similar case has already been accepted for review by the Court. For example, in considering a petition for certiorari in *Brown v. Board of Education*, 344 U.S. 1, 3 (1952), the Court took judicial notice of a similar case pending in the court of appeals and invited the filing of a petition for review in that case, *id.* at 3, which was subsequently granted, *see Bolling v. Sharpe,* 344 U.S. 873 (1952). *See also Taylor v. McElroy*, 358 U.S. 918 (1958) (certiorari granted before judgment "because of the pendency here" of another case, *Greene v. McElroy*, 360 U.S. 474 (1959), which involved the same important constitutional issues and which was pending in the same court of appeals); *Porter v. Dicken*, 328 U.S. 252, 254 (1946) (certiorari granted before judgment "by reason of the close relationship of the important question raised to the question presented" in a case for which the Court had already granted certiorari, *Porter v. Lee*, 328 U.S. 246 (1946)).

[3] The Board of Regents of the University of Michigan and Lee Bollinger, formerly president of the University and prior to that dean of its law school, are defendants in both the *Gratz* and *Grutter* cases.

Third, the absence of a decision from the Sixth Circuit in this case should make no difference on the common principal issues related to compelling-interest and narrow-tailoring analyses raised by the two cases. The Sixth Circuit decided the first issue as a matter of law in *Grutter v. Bollinger,* 288 F.3d at 738-44 (holding diversity to be a compelling interest). Presumably, in eventually deciding this case, the Sixth Circuit would follow its own recent precedent as to those issues. Accordingly, this Court already has for evaluation the reasoning of the Sixth Circuit on compelling-interest analysis. As to narrow-tailoring, the Sixth Circuit has also already laid out its analytical approach to the issue. *Id.* at 744-52.

The sharp division in the lower courts (*see* discussion *infra* at 20-24) has itself created circumstances whereby the various competing arguments on compelling interest and narrow tailoring have been fully developed. These considerations, plus the circumstance that the district court decided the case on summary judgment, subjecting it to *de novo* review by this Court and the Sixth Circuit, militate against waiting for a decision from the Sixth Circuit. This is particularly true given the benefits of having the cases considered together.

Fourth, the effect on members of the class caused by the Sixth Circuit's delay is also a consideration that weighs in favor of granting review at this time. Because the University starts making admissions decisions in the fall for the class to be enrolled in the following fall, inaction by the Sixth Circuit has already meant that many members of the class now applying for admission will compete for scarce admissions spots under a race-based dual system. Although it is unknown when the Sixth Circuit would eventually render a decision in this case, the delay that has already occurred – nearly ten months since the case was argued and over nineteen months since the appeal was filed – is incompatible with the time-sensitive nature of the admissions process (and with the Sixth Circuit's ruling (*see* discussion *supra* at 13 & n.2) that the appeal would be expedited). *See Aaron v. Cooper*, 357 U.S. 566, 567 (1958) (denying petition for review before

judgment in school admissions case where belief expressed that court of appeals would "recognize the vital importance of the time element in this litigation" and would act "in ample time to permit arrangements to be made for the next school year"). *Cf. United States v. Clinton*, 524 U.S. 912 (1998) (denying petition for review before judgment while noting that "[i]t is assumed the Court of Appeals will proceed expeditiously to decide this case").

Finally, granting review at this time will not deny the Court the time to reflect adequately on the important issues at stake. The petition has been filed in time to permit, if it is granted, briefing on the merits in the normal course and consideration by this Court during the 2002 term. Moreover, if the Court grants review in *Grutter v. Bollinger*, the two cases could, at the Court's direction, be briefed on the merits under a simultaneous schedule, argued on the same day, and decided during the same term.

Although this Court rarely exercises its power to grant review before judgment, this is one of the rare cases where the Court should grant the petition before judgment.

II. The *Bakke* Case

This Court has not directly addressed the issue of permissible race-conscious admissions policies in higher education since it did so nearly twenty-five years ago in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). In *Bakke,* this Court found that the admissions program of the University of California Medical School at Davis, which set aside 16% of the places in the class for educationally or economically disadvantaged minorities, violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Five Justices, including Justice Powell, held that the Davis program unlawfully considered race in the admissions process.

Another group of five Justices, also including Justice Powell, reversed the judgment of the California Supreme

Court enjoining Davis from using race as a factor in admissions under any circumstances. In this conclusion, Justice Powell was joined by Justice Brennan, who wrote an opinion joined by Justices Blackmun, Marshall, and White that would have upheld the Davis admissions system.

Justice Powell, applying strict scrutiny to the Davis program, concluded that academic freedom, although not a specifically enumerated Constitutional right, was a "special concern" of the First Amendment and thus a sufficiently compelling interest to meet strict scrutiny. *Bakke*, 438 U.S. at 312 (Powell, J.). "Academic freedom" included the freedom to determine who would be allowed to study at a state university. *Id.*

While rejecting the argument that Davis's specific program of reserving spaces for disadvantaged minorities was necessary to achieve the robust exchange of ideas that the Regents allegedly wanted, Justice Powell did state that race and ethnicity could be considered as "plus" factors by universities seeking to achieve that goal. He cited to the text of the so-called "Harvard plan," which he said would pass constitutional muster under his approach. *Id.* at 316-18.

Justice Powell specifically disapproved of an admissions system that reserved a specified number of spaces in the class for members of particular minority groups or that operated "as a cover for the functional equivalent of a quota system." *Id.* at 315, 318. He found that the Davis "dual admission" or "two-track" system, *id.* at 314-15, in which a number of seats in the medical school class were reserved on the basis of an "explicit racial classification," *id.* at 319, violated the Equal Protection Clause, *id.* at 319-20.

Although Justice Brennan seemingly rejected "strict scrutiny," *Bakke,* 438 U.S. at 357 (Brennan, J.), he borrowed a scrutiny level from gender-discrimination cases that he characterized as "strict and searching." *Id.* at 362. Specifically, he required the use of race to serve important

governmental objectives and to be substantially related to achieving those objectives. *Id.* at 359.

Justice Brennan concluded that the Davis program met his "strict and searching" scrutiny analysis because remedying the effects of past societal discrimination was a sufficiently important governmental objective, and because the Davis program was, in his view, substantially related to achieving that objective. In reaching the latter conclusion, Justice Brennan stated that remedies for past discrimination need not be limited to victims identified by specific proof, but that they should be limited to those "within a general class of persons likely to have been the victims of discrimination." *Id.* at 363. In finding that the Davis program met that requirement, Justice Brennan emphasized:

> [T]he Davis admissions program does not simply equate minority status with disadvantage. Rather, Davis considers on an individual basis each applicant's personal history to determine whether he or she has likely been disadvantaged by racial discrimination. The record makes clear that only minority applicants likely to have been isolated from the mainstream of American life are considered in the special program; other minority applicants are eligible only through the regular admissions program.

Id. at 377. *Cf. id.* at 275 n.4 (Powell, J.) (the admissions chairman would confirm "disadvantage" of individual applicants).[4]

Justice Brennan did not mention or endorse the "academic freedom" or "diversity" rationale of Justice Powell. He did state that something like the "Harvard

[4] Indeed, that is how Justice Brennan viewed the "Harvard plan" – an admissions system that "openly and successfully employs a racial criterion for the purpose of ensuring that some of the scarce places in institutions of higher education are allocated to *disadvantaged* minority students." *Bakke*, 438 U.S. at 379 (Brennan, J.) (emphasis added).

plan" would be "constitutional under our approach, *at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination.*" *Id.* at 326 n.1 (Brennan, J.) (emphasis added). While recognizing that no one opinion spoke for the Court, Justice Brennan purported to describe the "central meaning" of the various opinions without any reference to the "academic freedom" or "diversity" rationales:

> Government may take race into account when it acts not to demean or insult any racial group, but to *remedy disadvantages cast on minorities by past racial prejudice*, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.

Id. at 325 (emphasis added).

In the only part of Justice Powell's Equal Protection analysis that was joined by Justice Brennan, Part V-C, nothing was said, much less endorsed, about justifying racial preferences on grounds of diversity or academic freedom. *Id.* at 320 (Powell, J.).

III. The Lower Courts Are Divided.

Aside from Justice Powell's opinion in *Bakke*, the opinions of this Court have never before or since addressed whether diversity or academic freedom are compelling interests justifying racial preferences in university admissions. Subsequent opinions have included comment on the fractured nature of the *Bakke* opinions. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 218 (1995) ("*Bakke* did not produce an opinion for the Court."); *Alexander v. Sandoval*, 532 U.S. 275, 308 n.15 (2001) (Stevens, J., dissenting) (The five Justices in *Bakke* who voted to overturn the injunction imposed by the lower courts "divided over the application of the Equal Protection Clause – and by extension Title VI – to affirmative action cases. Therefore, it is somewhat strange to treat the opinions of those five Justices in *Bakke* as constituting a

majority for any particular substantive interpretation of Title VI").

In other contexts, this Court's more recent decisions have recognized only one interest as sufficiently compelling to justify racial classifications: remedying past, identified discrimination. *Shaw v. Hunt*, 517 U.S. 899 (1996) (voting rights and redistricting). It has expressed disapproval of recognizing as "compelling" interests that are "amorphous" and that have "no logical stopping point." *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 498-99 (1989) (O'Connor, J.); (citing and quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275 (1986) (plurality opinion)); *id.* at 520 (Scalia, J.).

Not surprisingly, then, the lower courts have struggled and disagreed about whether academic freedom or diversity are interests that can justify racial preferences in student admissions. The Fifth and Eleventh Circuits have held that Justice Powell's opinion in *Bakke* with respect to diversity *did not* constitute a rationale for the holding of the Court. In *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996), the Fifth Circuit determined that Justice Powell spoke for no other Justice concerning diversity, and that Justice Brennan had implicitly rejected diversity as a compelling governmental interest. *Id.* at 944. *See also Hopwood v. Texas*, 236 F.3d 256, 274-75 (5th Cir. 2000) (Wiener, Stewart, JJ.). Concluding that this Court's precedents had not resolved whether diversity was a compelling interest, the Fifth Circuit analyzed the question and determined that it was not. *Hopwood*, 78 F.3d at 945-46.

The Eleventh Circuit, in a case involving a challenge to racial preferences in admissions at the University of Georgia, reviewed the opinions in *Bakke* and determined that the *Marks* analysis did not support a conclusion that Justice Powell's opinion concerning diversity was the holding of the Court. *Johnson v. Board of Regents of Univ. of Georgia*, 263 F.3d 1234, 1247-49, 1254-64 (11th Cir.

2001). Ultimately, the Eleventh Circuit concluded that whether diversity was a compelling interest was an "open question," but that it need not be decided in the case before it because the University of Georgia's racial preferences under review were not narrowly tailored to achieve an interest in diversity. *Id.* at 1250, 1254-64.

In contrast, the Sixth and Ninth Circuits have concluded that Justice Powell's opinion with respect to diversity constitutes the rationale for the holding of the Court in *Bakke* through application of the *Marks* analysis. *Grutter v. Bollinger*, 288 F.3d at 738-44; *Smith v. University of Washington Law Sch.*, 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001).

Other courts of appeals have noted expressly or implicitly that this Court has not resolved whether diversity is a compelling interest. *Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123, 130 (4th Cir. 1999) (elementary school student admissions) ("whether diversity is a compelling governmental interest remains unresolved"), *cert. denied*, 529 U.S. 1019 (2000); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 704-05 (4th Cir. 1999) (same); *Wessmann v. Gittens*, 160 F.3d 790, 796 (1st Cir. 1998) (middle school student admissions) ("[W]e need not definitively resolve this conundrum [whether diversity is compelling] today."). *Cf. Taxman v. Board of Educ.*, 91 F.3d 1547, 1563-64 (3rd Cir. 1996) (holding that "[w]hile the benefits flowing from diversity in the education context are significant indeed," they did not satisfy requirements for use of racial preferences under Title VII), *cert. granted*, 521 U.S. 1117, *appeal dismissed per stipulation*, 522 U.S. 1010 (1997); *McNamara v. City of Chicago*, 138 F.3d 1219, 1222 (7th Cir.) (preferences in employment) ("whether [non-remedial] justifications are possible is unsettled"), *cert. denied*, 525 U.S. 981 (1998); *Lutheran Church – Missouri Synod v. FCC*, 141 F.3d 344, 354-56 (D.C. Cir. 1998) (rejecting racial diversity as a compelling interest justifying racial preferences in the award of broadcast licenses).

The district court's narrow-tailoring analysis with respect to the 1999-2000 admissions policies also diverges from the approach taken by other circuits. In upholding an admissions system that mechanically grants a large, fixed racial preference to all members of specified racial minorities, the decision is inconsistent with the results in other cases. For example, the Eleventh Circuit considered and struck down on narrow-tailoring grounds an admissions system at the University of Georgia that was in many ways comparable to the system at issue here. *See Johnson v. Board of Regents of the Univ. of Georgia*, 263 F.3d at 1254-61.

Justice Powell made clear that a race-based "two-track" admissions system, or one that amounted to the "functional equivalent of a quota system" would be illegal. *Bakke*, 438 U.S. at 316, 319 (Powell, J.). The district court failed to address or explain how the mechanical, rigid, 20-point preference granted by the defendants to all members of specified racial minorities was "functionally" any different from a quota system. *See Tuttle v. Arlington County Sch. Bd.*, 195 F.3d at 707 ("Although the Policy does not explicitly set aside spots solely for certain minorities, it has practically the same result by skewing the odds of selection in favor of certain minorities.").

The district court openly acknowledged that the diversity interest was a permanent one, and yet it did not find this incompatible with the traditional narrow-tailoring requirement that race-conscious remedies be temporary. App. at 26a. Finally, on the questions of the availability of race-neutral alternatives and the indefinite duration of the preferences, the district court's approach was much less rigorous than that employed by other courts. *See, e.g., Tuttle*, 195 F.3d at 706; *Johnson v. Board of Regents of Univ. of Georgia*, 263 F.3d at 1261; *id.* at 1254 ("We have held that only as a 'last resort' may race be used in awarding valuable public benefits. . . . That principle applies equally to the university admissions process.").

Quite demonstrably, the lower courts are fractured in their understanding about whether diversity is a compelling interest; whether Justice Powell's rationale

articulating the diversity interest is controlling; and even on what Justice Powell meant when he discussed what he considered to be the permissible scope of the use of race as a factor in admissions decisions. Many questions cry out for resolution. If universities may select the racial groups to which they give preferences based on "underrepresentation" of these groups in the student body, how is diversity different in practice from objectives of simple racial balancing? If achieving diversity is a compelling interest sufficient to justify racial preferences in education because of the beneficial effects of obtaining diverse viewpoints, what limiting principle prevents diversity from justifying racial preferences in other areas of life where diverse viewpoints may also be beneficial, like jury selection or employment in positions with responsibility for management or creation of public policy?

If Justice Powell's articulation of the diversity rationale is held to be controlling, then what constitutes the "functional equivalent" of a quota, which his rationale forbids? Is a mechanical, point-based system that automatically awards points to some students solely because of their race or ethnicity consistent with the requirements of narrow tailoring? Is such a system just a "plus" system involving no "facial" intent to discriminate, with "good faith" presumed, *Bakke*, 438 U.S. at 318-19 (Powell, J.)? May a college or university have dual admissions standards, whereby all members of some races are admitted if they meet minimum qualifications, while students from other races are required to compete for admission even though they meet the same minimum qualifications? May a "plus" for race be of any size or substance, so long as the language of a "quota" or "set aside" is avoided? Do traditional factors associated with narrow tailoring, such as the requirement that preferences be temporary, have no application to the diversity rationale?

IV. This Case Presents Issues of Fundamental National Importance.

There can be no serious doubt that the case presents (as does *Grutter v. Bollinger,* in which a petition for

certiorari is pending (02-241)), an issue of great national importance. At the most fundamental level the question it raises is whether our Nation's principles of equal protection and non-discrimination mean the same thing for people of all races. This Court has said in the past that it does. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 222 (1995) (standard of review for racial classifications is the same for all races). But the proposition is tested again by this case, and especially by the justifications for unequal treatment put forth by the University and intervenors.

The University of Michigan employs, formally and functionally, a race-based two-track admissions system. It is a quota system more egregious than the one at issue in *Bakke* because the University's preferences have the purpose and effect of admitting *all* qualified applicants from the select minority groups, while requiring qualified students from other racial groups to compete based on the limited number of spaces in the class; in *Bakke*, the quota was limited to 16% of the spaces in the class, and only disadvantaged applicants from the minority groups could be considered for the reserved seats. *Bakke*, 438 U.S. at 274-75.

It is a measure of how formless, standardless, arbitrary, and unlimited in scope the diversity rationale is or has become that the University puts it forward in defending the quota system at issue here. To uphold a quota system like the University's on the basis of Justice Powell's opinion in *Bakke* is either to mock the opinion or to demonstrate how meaningless it has been rendered. Justice Powell did, after all, vote with four other Justices to *strike down* the system at issue in *Bakke*.

This Court has rejected as compelling certain interests that indisputably are good and important, like remedying the lingering effects of societal discrimination and promoting role models for school children. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 470 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275-77 (1986) (plurality opinion). *Cf. Palmore v. Sidoti*, 466 U.S. 429, 433

(1984) (consideration of "best interests" of child is a substantial governmental interest, but cannot justify consideration of race in making custody determinations). There may be many reasons why an interest is not sufficiently compelling to withstand the strict scrutiny to which all racial classifications must be subjected, but among them certainly are that an interest is by its nature poorly defined, without reasonably ascertainable or objective standards or scope, or "ageless in [its] reach into the past, and timeless in [its] ability to affect the future." *Wygant*, 476 U.S. at 276 (plurality opinion).

The diversity rationale articulated by the University and accepted by the district court is one that "could be used to 'justify' race-based decisionmaking essentially limitless in scope and duration." *J.A. Croson Co.*, 488 U.S. at 498 (O'Connor, J.) (quoting *Wygant*, 476 U.S. at 276 (plurality opinion)). It has "no logical stopping point." *J.A. Croson Co.*, 488 U.S. at 498. Indeed, an interest founded on "underrepresentation" could quite readily justify measures that extend until minority representation in the classroom "mirrors the percentage of minorities in the population as a whole." *Id.* It is a rationale that gives essentially unchecked authority to admissions officers to define what "diversity" or "critical mass" mean; which racial and ethnic groups, among many, are to be considered "underrepresented" or are to receive preferences; the size of the preferences or "plus"; and their duration.

So defined, such an interest is at least as ill-defined and "amorphous" as an interest founded on remedying the lingering effects of societal discrimination or fostering role models for school children. *Wygant*, 476 U.S. at 276 (plurality opinion). *See also Johnson v. Board of Regents of Univ. of Georgia*, 263 F.3d 1234, 1250 (11th Cir. 2001) (noting that interest in student diversity is "similar" to other interests rejected as compelling, including remedying effects of societal discrimination and providing role models).

Enshrined as a compelling interest, diversity will instead give the Nation, as the district court's opinion

foreshadows, its first *permanent* legal justification for racial classifications. App. at 26a. That justification, despite the language or label applied, will be one that is indistinguishable from an interest in simple racial balancing. *See Lutheran Church – Missouri Synod v. FCC*, 141 F.3d 344, 356 (D.C. Cir. 1998) (noting "how much burden the term 'diversity' has been asked to bear in the latter part of the 20th Century" and that "[it] appears to have been coined both as a permanent justification for policies seeking racial proportionality in all walks of life ('affirmative action' has only a temporary remedial connotation) and as a synonym for proportional representation itself"); *Wessmann v. Gittens*, 160 F.3d 790, 799 (1st Cir. 1998) ("Underrepresentation is merely racial balancing in disguise – another way of suggesting that there may be optimal proportions for the representation of races and ethnic groups in institutions.")

The absence of a limiting principle in the diversity rationale also raises the serious specter that it cannot logically be confined to the higher education context. The University and some of its *amici* have sometimes justified diversity in education based on the segregated lives that students allegedly live prior to entering higher education and by the benefits that supposedly stay with students after they have graduated and joined the workforce.

If diversity is compelling in part because of what goes on *before* and *after* students enter higher education and because it is an antidote to societal discrimination and prejudice, it is hard to imagine why it should not also be sufficiently compelling to support racial preferences in other areas of American life. That is especially so – if it is deemed that racial diversity brings viewpoint diversity – where it can be persuasively argued that having "diverse" viewpoints is beneficial. The possibilities are numerous, including primary and secondary education, employment in management or public policy positions, and jury selection. Although this case does not directly raise these other issues, the answer (and the reasons for the answer) to whether diversity is a compelling interest in higher

education are likely to have important implications outside the higher education context.

There is also a qualitative difference between using race to remedy past, identified instances of governmental discrimination and using it instead to achieve "diversity." When race is used in a narrowly-tailored manner to remedy past, identified discrimination, it is arguably done to right a specific wrong; to *further* the principle of equality by correcting injury done to the principle in defined instances. When, however, race is used to pursue an open-ended objective like "diversity," it is used in *spite* of the principle of equality to further an interest in – diversity. Covering the diversity rationale with arguments about "academic freedom" does not offer it legitimacy under the Constitution or the Nation's civil rights laws: This Court has never held that educational institutions have a First Amendment right to practice race discrimination in admissions. Such a conclusion would be anathema to the outcome and principles articulated in cases like *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Runyon v. McCrary*, 427 U.S. 160, 175-77 (1976) (striking down admissions system that discriminated on the basis of race despite First Amendment rights asserted by school on behalf of parents), and *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-05 (1983) (upholding IRS revocation of tax-exempt status of university because of its racially discriminatory admissions system).

These important issues, about whether the University's preferences survive strict-scrutiny review under the Equal Protection Clause, and whether they violate federal civil rights statutes, Title VI (42 U.S.C. § 2000d) and 42 U.S.C. § 1981, are squarely presented by the first of the Questions Presented in the petition for certiorari. The second and third questions relate to the appropriate remedies for violations of the constitutional and civil rights at issue. Because this is a class action, the rights of many individuals other than the named plaintiffs are at stake. Each year, thousands of students apply to defendants' University in hope of obtaining a place in the class. If this Court finds the defendants' use of racial preferences

unlawful, it should enjoin the use of those unlawful preferences, or direct the lower courts to do so in order that these students can compete for admission under a lawful system.

The district court summarily dismissed petitioner's request for an injunction even though the district court also found the admissions system for 1995-1998 to be unlawful. It never explained the reasons for its grant of summary judgment to defendants on this claim. Under well settled principles, defendants' voluntary cessation of illegal activity – particularly *after* litigation has begun – does not moot a claim for an injunction. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982). This is because such belated changes imply that there is still a danger of future violations. Moreover, defendants have continued to defend the system found to be illegal, and they acknowledge that their subsequent admission systems (for years 1999-2000) are not substantively different from the illegal system. A reasonable trier of fact could use that fact to infer a possibility of future harm as well. Given these circumstances, there is at least a reasonable possibility that future violations will resume or continue, so that an injunction is necessary and appropriate; at the very least, sufficient inferences were available to preclude summary judgment. Moreover, if this Court finds the defendants' racial preferences unlawful, the lower courts would benefit from this Court's consideration of the proper scope of an injunction.

Finally, an examination of the lawfulness of the defendants' racial preferences should include review of the district court's judgment in favor of the individual defendants on grounds of qualified immunity. The district court was very explicit about its conclusion with respect to the unlawfulness of the 1995-1998 admissions policies: "It is *clear* that the LSA's system operated as the functional equivalent of a quota and therefore, ran afoul of Justice Powell's opinion in *Bakke*." App. at 45a (emphasis added). Inexplicably and untenably, however, the district court dismissed the claims for damages against the individual defendants on grounds of qualified immunity, *i.e.*, on a

theory that defendants had not violated plaintiffs' "clearly established rights." *Id.* at 48-50. It simply cannot logically be the case that defendants' racial preferences were both a "clear" instance of the "functional equivalent of a quota" in violation of a nearly twenty-five year-old Supreme Court case and that plaintiffs' "clearly established" rights were not thereby violated. If the Court accepts this case for review, petitioner respectfully requests it to review the district court's decision with respect to qualified immunity.

CONCLUSION

For the foregoing reasons, Jennifer Gratz and Patrick Hamacher respectfully request the Court to grant their petition for certiorari before judgment.

Respectfully submitted,

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Supreme Court, U.S.
FILED

No. _____ 02 516 OCT 1 - 2002

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In The
Supreme Court of the United States

JENNIFER GRATZ AND
PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT,
AND THE BOARD OF REGENTS OF THE
UNIVERSITY OF MICHIGAN,

Respondents.

On Petition For Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Sixth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JENNIFER GRATZ and PATRICK HAMACHER, for themselves and all others similarly situated,

Plaintiffs,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Defendants,

and

EBONY PATTERSON, RUBEN MARTINEZ, LAURENT CRENSHAW, KARLA R. WILLIAMS, LARRY BROWN, TIFFANY HALL, KRISTEN M.J. HARRIS, MICHAEL SMITH, KHYLA CRAINE, NYAH CARMICHAEL, SHANNA DUBOSE, EBONY DAVIS, NICOLE BREWER, KARLA HARLIN, BRIAN HARRIS, KATRINA GIPSON, CANDICE B.N. REYNOLDS, by and through their parents or guardians, DENISE PATTERSON, MOISE

CASE NO.:
97-CV-75231-DT
HON.
PATRICK J. DUGGAN

OPINION

MARTINEZ, LARRY
CRENSHAW, HARRY J.
WILLIAMS, PATRICIA
SWAN-BROWN, KAREN A.
MCDONALD, LINDA A.
HARRIS, DEANNA A.
SMITH, ALICE BRENNAN,
IVY RENE CHARMICHAEL,
SARAH L. DUBOSE, INGER
DAVIS, BARBARA DAW-
SON, ROY D. HARLIN,
WYATT G. HARRIS,
GEORGE C. GIPSON,
SHAWN R. REYNOLDS,
AND CITIZENS FOR AF-
FIRMATIVE ACTION'S
PRESERVATION,

Defendant-Intervenors.

OPINION

(Filed Dec. 13, 2000)

On October 14, 1997, Plaintiffs filed a class action against the University of Michigan and various university officials asserting that the University's College of Literature, Science, and the Arts ("LSA") had violated Title VI of the Civil Rights Act, as well as the Equal Protection Clause of the Fourteenth Amendment, by considering race as a factor in admissions decisions. Plaintiffs seek injunctive, declaratory, and monetary relief.

On December 23, 1998, this Court issued an Order bifurcating the action into a "liability" and "damages" phase. This matter is currently before the Court on cross-motions for summary judgment with respect to the

"liability" phase only, which has been previously defined as "whether [D]efendants' use of race as a factor in admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution,"[1] and has been specifically limited to Plaintiffs' request for injunctive and declaratory relief.[2] Oral argument was heard on November 16, 2000.

For the reasons set forth herein:

Plaintiffs' motion for summary judgment shall be granted with respect to the LSA's admissions programs in existence from 1995 through 1998, and the admissions programs for such years shall be declared unconstitutional;

The University Defendants' motion for summary judgment shall be granted with respect to the LSA's admissions programs for 1999 and 2000;

Plaintiffs' request for injunctive relief shall be denied;

---

[1]. Because Title VI "proscribe[s] only those racial classifications that would violate the Equal Protection Clause," it is not necessary for the Court to engage in a separate analysis regarding Plaintiffs' claims under Title VI. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287, 98 S. Ct. 2733, 2746, 57 L. Ed. 2d 750 (1978).

[2] In the same Order, this Court certified a class consisting of:

> Those individuals who applied for and were not granted admission to the College of Literature, Science & the Arts of the University of Michigan for all academic years from 1995 forward and who are members of those racial or ethnic groups, including Caucasian, that defendants treated less favorably on the basis of race in considering their application for admission.

(12/23/98 Op. at 15).

Defendants Duderstadt and Bollinger's motion for summary judgment on grounds of qualified immunity shall be granted; and

The Board of Regent's motion for summary judgment on grounds of Eleventh Amendment immunity shall be denied.[3]

Background

The University of Michigan ("University") is a public institution of higher education located in Ann Arbor, Michigan. According to Defendants, admission to the University is selective, meaning that many more students apply each year than can be admitted. The University received some 13,500 applications for admission to the LSA in 1997, from which it elected to enroll 3,958 freshmen. Among its stated admissions objectives, the University strives to compose a class of students from diverse races, ethnicities, cultures, and socioeconomic backgrounds. The University views diversity as an integral component of its mission. According to the University, diversity "increase[s] the intellectual vitality of [its] education, scholarship, service, and communal life." (Jt. Summ. Facts at 1).[4] To facilitate the University's goal of

[3] This Opinion and its corresponding order shall address only the University Defendants' arguments regarding diversity. The Intervenor-Defendants' arguments regarding remedial measures shall be addressed in a supplemental opinion and order.

[4] The parties have provided the Court with a Joint Summary of Undisputed Facts Regarding Admissions Process, which was filed on December 13, 2000.

diversity, it is undisputed that the LSA employs race as a factor in its admissions decisions.

Plaintiffs Jennifer Gratz and Patrick Hamacher are Caucasion residents of the State of Michigan, both of whom applied for admission into the 1995 and 1997 classes of the LSA, respectively. On January 19, 1995, Plaintiff Gratz was notified that a final decision regarding her admission had been delayed until early to mid April 1995, as she was considered by the LSA as "well qualified, but less competitive than the students who ha[d] been admitted on first review." (*Id.*). On April 24, 1995, Plaintiff Gratz was notified that the LSA was unable to offer her admission. Thereafter, Plaintiff Gratz enrolled in the University of Michigan at Dearborn, from which she graduated in the spring of 1999.

Similarly, Plaintiff Hamacher was notified on November 19, 1996, that a decision regarding his admission was "postponed" until mid-April of 1997. According to the LSA's letter, a decision regarding Plaintiff Hamacher had been postponed because, "[a]lthough [his] academic credentials [were] in the qualified range, they [were] not at the level needed for first review admission." (*Id.* at 2). On April 8, 1997, Plaintiff Hamacher's admissions application was rejected. Thereafter, Plaintiff Hamacher enrolled at Michigan State University.

The Defendant-Intervenors are seventeen African American and Latino students who have applied for, or intend to apply for, admission to the University, joined by the Citizens for Affirmative Action's Preservation, a nonprofit organization whose stated mission is to preserve opportunities in higher education for African American

and Latino students in Michigan. According to Defendant-Intervenors, the resolution of this case directly threatens African American and Latino students' access to higher education.

Plaintiffs have filed a motion for summary judgment asserting that the LSA's use of race as a factor in admissions decisions violates Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and the Equal Protection Clause of the United States Constitution. The University Defendants have filed a cross-motion for summary judgment asserting that the LSA's use of race as a factor in admissions decisions is, as a matter of law, constitutional. Defendant-Intervenors have filed responses to both motions, supporting the University Defendants' assertion that the LSA's admissions policies are constitutional.

Standard of Review

Summary judgment is proper only if there is no genuine issue as to any material fact, thereby entitling the moving party to judgment as a matter of law. *Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 709 (6th Cir. 2000); *see also* FED. R. CIV. P. 56(c). There is no genuine issue of material fact for trial unless, by viewing the evidence in a light most favorable to the nonmoving party, a reasonable jury could "return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). On a motion for summary judgment, the moving party bears the initial responsibility of informing the Court of the basis for its motion and identifying those portions of the record that establish the absence of a material issue of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Once the moving party has met its burden, the nonmoving party must go beyond the pleadings and come forward with specific facts to show that there is a genuine issue for trial. FED. R. CIV. P. 56(e); *Celotex*, 477 U.S. at 322-24, 106 S. Ct. at 2552-53. The nonmoving party must do more than show that there is some metaphysical doubt as to the material facts. *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 800 (6th Cir. 1994). The nonmoving party must present significant probative evidence in support of its opposition to the motion for summary judgment. *Moore v. Philip Morris Co., Inc.*, 8 F.3d 335, 339-40 (6th Cir. 1993). If, after adequate time for discovery, the party bearing the burden of proof fails to make a showing sufficient to establish an essential element of his claim, summary judgment is appropriate. *Celotex*, 477 U.S. at 322-24, 106 S. Ct. at 2552-53.

Discussion

As previously mentioned, this phase of the litigation has been explicitly limited to the issue of "liability," defined as "whether Defendants' use of race as a factor in admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution," as well as Plaintiffs' request for injunctive and declaratory relief. (12/23/98 Op. at 15; 5/1/00 Op. & Order at 4). Specifically, Plaintiffs seek a declaratory judgment that the LSA's admission policies and practices for the academic years 1995 through the present violate Plaintiffs' rights under the Constitution and 42 U.S.C. §§ 1981, 1983, and 2000d. Without such a declaration, Plaintiffs' claims for monetary relief fail. Plaintiffs further seek an order permanently enjoining the LSA from engaging in illegal, racially discriminatory admissions practices in the future.

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST., amend. XIV, § 1. The "central mandate" of the Fourteenth Amendment "is racial neutrality in governmental decisionmaking." *Miller v. Johnson,* 515 U.S. 900, 904, 115 S. Ct. 2475, 2482, 132 L. Ed. 2d 762 (1995) (citing *Loving v. Virginia,* 388 U.S. 1, 11, 87 S. Ct. 1817, 1823, 18 L. Ed. 2d 1010 (1967); *McLaughlin v. Florida,* 379 U.S. 184, 191-92, 85 S. Ct. 283, 287-88, 13 L. Ed. 2d 222 (1964)). "The basic principle is straightforward: 'Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.'" *Id.* (quoting *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 291, 98 S. Ct. 2733, 2748, 57 L. Ed. 2d 750 (1978) (Powell, J.)). Accordingly, the Supreme Court has explicitly clarified that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227, 115 S. Ct. 2097, 2113, 132 L. Ed. 2d 158 (1995).

Two interests have been asserted in support of the LSA's race conscious admissions policies. The University Defendants assert that the LSA has a compelling interest in the educational benefits that result from having a diverse student body, whereas the Defendant-Intervenors assert that the LSA has a compelling interest

in remedying the University's past and current discrimination against minorities.[5] Therefore, the two issues this Court must decide in resolving the parties' motions for summary judgment are: (1) whether Defendants have asserted a compelling governmental interest in support of the LSA's use of race and (2) whether the measures by which the LSA has used race as a factor in admissions decisions were narrowly tailored to serve such interest.

Both the Plaintiffs and the University Defendants have agreed to the material facts relating to the mechanics of the LSA's admission policies, and that the Court has, in the record currently before it, all the evidence they wish to present. Therefore, both Plaintiffs and the University Defendants agree there is no need for a trial with respect to the issue of whether diversity constitutes a compelling interest under strict scrutiny, and whether the LSA's admissions programs were narrowly tailored to achieving that interest, and that, based upon the record before the Court, such issues may be resolved by summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

The Diversity Rationale

Both parties assert that with respect to the University Defendants' "diversity" rationale, the Supreme Court's decision in *Regents of the University of California v. Bakke,*

[5] Only the Defendant-Intervenors have asserted that the LSA's admissions policies serve a remedial purpose. The University Defendants have never justified the LSA's race-conscious admissions policies on remedial grounds.

438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978), governs this dispute. In support of their motion for summary judgment, the University Defendants, supported by Defendant-Intervenors and a number of amici, contend that under Justice Powell's decision in *Bakke,* the University has a compelling governmental interest in the educational benefits that flow from a racially and ethnically diverse student body. The University Defendants also contend that under *Bakke,* the LSA's admissions policies were properly tailored to achieve the University's stated interest in diversity.

Plaintiffs, however, contend that Justice Powell's decision in *Bakke* has never garnered a majority of support from the Justices and that subsequent Supreme Court cases have confirmed that "diversity" and "academic freedom" are not compelling governmental interests that can ever justify the use of race in the admissions process. In the alternative, Plaintiffs contend that even if this Court were to find "diversity" to be a sufficiently compelling interest, they are nonetheless entitled to summary judgment because the manner in which the LSA used race in admissions decisions for the years at issue in this case, 1995 through the present, is inconsistent with that specifically endorsed by Justice Powell in *Bakke.*

1. The "Bakke" Decision

In *Bakke,* a rejected applicant challenged the University of California at Davis Medical School's admissions program, which consisted of two systems: a regular admissions system for non-minority applicants, and a special admissions system strictly for minorities. *Bakke,* 438 U.S. at 273-75, 98 S. Ct. at 2739-40. In contrast to the regular

admissions system, the special minority admissions system operated with a separate committee, a majority of whom were members of minority groups. Special applicants were rated by the special committee in a manner similar to the regular admissions system, except that the special applicants did not have to meet the 2.5 minimum GPA applied to non-minority applicants.

Under the university's special admissions system, the special applicants were never compared against the non-minority applicants. The special admissions committee would continue to recommend special applicants for admission until a specific number of minority applicants were admitted, which was predetermined by faculty vote. For example, in 1973 and 1974, sixteen out of the one hundred available seats were reserved for special applicants.

According to the university, its special admissions system served the purposes of: "(i) 'reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession,' (ii) countering the effects of societal discrimination, (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body." *Id.* at 306, 98 S. Ct. at 2756-57.

The Supreme Court of California sustained the applicant's challenge, holding that the university's admission program violated the California Constitution, Title VI, and the Equal Protection Clause of the Fourteenth Amendment. On appeal, the United States Supreme Court, through a majority formed by Justices Powell, Stevens, Burger, Stewart and Rehnquist, affirmed the

California Supreme Court's finding that the university's special admissions system was invalid, as was its order directing the university to admit the respondent to the Medical School. The Supreme Court also, through a different majority formed by Justices Powell, Brennan, White, Marshall, and Blackmun, reversed the California Supreme Court's order enjoining the university from ever considering race in making admissions decisions. An examination of the separate opinions in *Bakke*, however, clearly illustrates that there were no clear grounds upon which a majority of the Court agreed in reaching their respective decisions.

Justice Powell's Opinion

Justice Powell, writing solely for himself, supplied the pivotal vote in both affirming the California Supreme Court's finding that the university's admission program was unlawful, and reversing the California Supreme Court's order "enjoining [the university] from according any consideration to race in its admission process." *Id.* at 272, 98 S. Ct. at 2738.

Applying strict scrutiny, Justice Powell found that to the extent that the university's purpose was to "assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected, not as insubstantial, but as facially invalid." *Id.* at 307, 98 S. Ct. at 2757. Justice Powell also rejected the university's proffered interests in countering the effects of societal discrimination and improving the delivery of healthcare to disadvantaged communities. *Id.* at 307-10, 98 S. Ct. at 2757-59.

However, Justice Powell found that the university's fourth goal, "the attainment of a diverse student body," was "clearly" a "constitutionally permissible goal for an institution of higher education." *Id.* at 311-12, 98 S. Ct. at 2759. Relying upon the "four essential freedoms" that constitute "academic freedom," *i.e.* "'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study,'" Justice Powell concluded that "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body." *Id.* at 312, 98 S. Ct. at 2759 (quoting *Sweezy v. New Hampshire,* 354 U.S. 234, 263, 77 S. Ct. 1203, 1218, 1 L. Ed. 2d 1311 (1957) (Frankfurter, J., concurring)). According to Justice Powell, "[t]he atmosphere of 'speculation, experiment and creation' – so essential to the quality of higher education – is widely believed to be promoted by a diverse student body." *Id.* at 312, 98 S. Ct. at 2760. Furthermore, "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Id.* at 313, 98 S. Ct. at 2760.

According to Justice Powell, a university's "interest in diversity is compelling in the context of a university's admissions program," in which "[e]thnic diversity . . . is only one element in a range of factors a university properly may consider in attaining the goal of a heterogenous student body." *Id.* at 314, 98 S. Ct. at 2760-61.

Justice Brennan's Opinion

Applying intermediate scrutiny, Justice Brennan, joined by Justices White, Marshall, and Blackmun, found that the university's articulated purpose of remedying the

effects of past societal discrimination was "sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities."[6] *Id.* at 362, 98 S. Ct. at 2784.

Justice Stevens's Opinion

Based upon the fact that *Bakke* was not a class action, but rather a "controversy between two specific litigants," Justice Stevens, joined by Chief Justice Burger, Justice Stewart, and Justice Rehnquist, viewed "the question of whether race can ever be used as a factor in an admissions decision" as an issue not before the Court. *Id.* at 408 & 411, 98 S. Ct. at 2808 & 2809. Justice Stevens also declined to address the issue on constitutional grounds, relying solely upon Title VI's prohibition instead, which Justice Stevens viewed as "crystal clear: Race cannot be the basis of excluding anyone from participation in a federally funded program." *Id.* at 418, 98 S. Ct. at 2813.

2. Diversity as a Matter of Law

In support of their motion for summary judgment, the University Defendants contend that under Justice Powell's reasoning in *Bakke,* the University has, as a matter of law, a compelling governmental interest in the educational

[6] As noted *supra,* the Supreme Court has since clarified that all racial classifications are subject to strict scrutiny review. *See Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995).

benefits that flow from a racially and ethnically diverse student body.[7] According to the University Defendants, Justice Powell's opinion in *Bakke* stands as the narrowest grounds offered in support of the judgment in that case and is therefore also binding precedent on this Court.

"When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks v. United States,* 430 U.S. 188, 193, 97 S. Ct. 990, 993, 51 L. Ed. 2d 260 (1977) (quoting *Gregg v. Georgia,* 428 U.S. 153, 169 n.15, 96 S. Ct. 2909, 2923 n.15, 49 L. Ed. 2d 859 (1976)). As explained by the Sixth Circuit, "[w]here a Justice or Justices concurring in the judgment in such a case articulates a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree, that standard is the law of the land." *Triplett Grille, Inc. v. City of Akron,* 40 F.3d 129, 134 (6th Cir. 994).

It is clear that a majority of the Justices in *Bakke* expressly agreed that the California Supreme Court erred in enjoining the university from ever considering race in its admissions programs. Therefore, to the extent that the University Defendants assert *Bakke*'s holding to be that "'a properly devised admissions program involving the competitive consideration of race and ethnic origin'" is

[7] Defendant-Intervenors join in the University Defendants' assertion that racial diversity is a compelling governmental interest in the context of higher education. (Def.-Intervenors' 8/11/00 Resp. to Defs.' Mot. at 3-5).

constitutional, this Court agrees. *See Bakke,* 438 U.S. at 320, 98 S. Ct. at 2763; *see also Minnick v. California Dep't of Corr.,* 452 U.S. 105, 115 & n.17, 110 S. Ct. 2211, 2217 & n.17, 68 L. Ed. 2d 706 (1981) (recognizing that the opinions of Justices Brennan, White, Marshall, Blackmun, and Powell "unequivocally stated that race may be used as a factor in the admissions process in some circumstances"); *Oliver v. Kalamazoo Bd. of Educ.,* 706 F.2d 757, 763 (6th Cir. 1983) (citing *Bakke* for proposition that "affirmative action admission programs of educational institutions may take race into account"). What is less clear, however, is whether five Justices implicitly agreed that diversity can be a compelling interest in the context of higher education, *i.e.,* whether universities have a compelling interest in the educational benefits that flow from a racially and ethnically diverse student body.

It is clear that no five Justices in *Bakke* expressly held that diversity was a compelling interest under the Equal Protection Clause. The most that can be garnered from *Bakke*'s splintered decision is that five Justices reached the same conclusion, *i.e.* that universities may take race into account in admissions when done so properly, for separate, unrelated reasons.

The University Defendants, relying upon *Smith v. University of Washington,* Nos. 99-35209, 99-35347, 99-35348, 2000 WL 1770045 (9th Cir. 2000), contend that Justice Powell's opinion is the "narrowest opinion" of the

Court and therefore, diversity is a compelling governmental interest as a matter of law.[8]

While this Court does not necessarily agree with the Ninth Circuit's conclusion that Justice Powell's "analysis is the narrowest footing upon which a race-conscious decision making process could stand," *Smith,* 2000 WL 1770045 at *10, this Court reaches the same ultimate conclusion as the Ninth Circuit, *i.e.,* that under *Bakke,* diversity constitutes a compelling governmental interest in the context of higher education justifying the use of race as one factor in the admissions process, albeit through somewhat different reasoning.[9]

Plaintiffs, relying on the Fifth Circuit's decision in *Hopwood v. State of Texas,* 78 F.3d 932 (5th Cir. 1996), *cert. denied,* 518 U.S. 1033, 116 S. Ct. 2581, 135 L. Ed. 2d 1095 (1996), and more recently, the United States District Court for the Southern District of Georgia's decision in *Johnson v. Board of Regents of University System of Georgia,* 106 F. Supp. 2d 1362, 1375 (S.D. Ga. 2000), contend that, as a matter of law, "diversity" and "academic freedom" are not compelling governmental interests that can ever justify the use of race in the admission process. This Court disagrees.

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[8] In their briefs, the University Defendants rely on the district court's opinion in *Smith,* No. C97-3352 (W.D. Wash. Feb. 12, 1999). On December 4, 2000, however, the Ninth Circuit affirmed the district court's decision.

[9] Recognizing that neither the Supreme Court nor the Sixth Circuit have definitively held that diversity can never be a compelling interest under strict scrutiny, this Court is satisfied that the University's argument remains viable.

In *Hopwood,* two of the three judges on the Fifth Circuit panel held "that any consideration of race or ethnicity . . . for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment." *Hopwood,* 78 F.3d at 944. The Fifth Circuit reasoned that by explicitly agreeing with a portion of Justice Powell's opinion, but remaining silent in regard to Justice Powell's diversity rationale, the Justices who joined Justice Brennan's opinion in *Bakke* "implicitly rejected" Justice Powell's position regarding diversity. *Id.* This Court, however, believes that the panel in *Hopwood* reads too much into the other Justices' silence regarding Justice Powell's diversity rationale. It is just as likely that the other Justices felt no need to address the issue of diversity based upon their finding that under intermediate scrutiny, the program at issue was justified as a means to remedy past discrimination.

For example, Justice Brennan's silence regarding diversity could just as easily be interpreted as "implicit approval" that, in an appropriate case, diversity may constitute a compelling governmental interest. In fact, in *Metro Broadcasting, Inc. v. F.C.C.,* 497 U.S. 547, 568, 119 S. Ct. 2997, 3010, 111 L. Ed. 2d 445 (1990), *rev'd on other grounds, Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995), Justice Brennan specifically described the Supreme Court's decision in *Bakke* as recognizing that "a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated." In this Court's opinion, Justice Brennan's statement in *Metro Broadcasting* further supports a conclusion that his silence regarding the diversity interest in *Bakke* was not an implicit

rejection of such an interest, but rather, an implicit approval of such an interest. As the Ninth Circuit recognized in *Smith:*

> True it is that Justice Brennan did not specifically say that "race" could be used to achieve student body diversity in the absence of any societal discrimination, but, then, there was no need for him to do so in light of his view about past societal discrimination. Yet, we can hardly doubt that he would have embraced that somewhat narrower principle if need be, for he thought that it was simply an allotrope of the principle he was propounding.

Smith, 2000 WL 1770045 at *10.

Although this Court agrees that since *Bakke,* no Supreme Court decision has explicitly accepted the diversity rationale under strict scrutiny, this Court does not agree that under recent Supreme Court precedent, the diversity interest can never constitute a compelling state interest, especially in the context of higher education. In fact, none of the cases relied upon by the Fifth Circuit involved the issue of whether the educational benefits that flow from a racially and ethnically diverse student body can ever constitute a compelling governmental interest in the context of higher education, most likely because the Supreme Court has not been faced with this precise issue since *Bakke. See Hopwood,* 78 F.3d at 944-45; *Johnson,* 106 F. Supp. 2d at 1367-70.

In *Hopwood,* the Fifth Circuit relied upon the Supreme Court's decision in *City of Richmond v. J.A. Croson,* 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989), in reaching its conclusion that diversity can never justify the use of racial classifications. *Croson,* however, involved a

minority set-aside program in the context of government construction contracts. This Court agrees with Judge Wiener's concurring opinion in *Hopwood* that the public graduate or professional school context is distinguishable from the employment, minority business set-aside, and redistricting contexts in that, unlike the other cited contexts, the higher education context implicates "the uneasy marriage of the First and Fourteenth Amendments."[10] *Hopwood*, 78 F.3d at 965 n.21 (Wiener, J., concurring).

As Justice Powell recognized in *Bakke*, "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." *Bakke*, 438 U.S. at 312, 98 S. Ct. at 2759. This "freedom" has always been viewed as including "[t]he freedom of the university to make its own judgments as to education," including "the selection of its student body." *Id.* (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 263, 77 S. Ct. 1203, 1218, 1 L. Ed. 2d 1311 (1957) (Frankfurter, J., concurring); *Keyishian v. Board of*

[10] As the First Circuit recognized in *Wessmann v. Gittens*, 160 F.3d 790, 795-96 (1st Cir. 1998):

> In the education context, *Hopwood* is the only appellate court to have rejected diversity as a compelling interest, and it did so only in the face of vigorous dissent from a substantial minority of the active judges in the Fifth Circuit. *See Hopwood v. State of Texas*, 84 F.3d 720, 721 (5th Cir. 1996) (Politz, C.J., with whom King, Wiener, Benavides, Stewart, Parker, and Dennis, JJ., joined, dissenting from denial of rehearing en banc). The question that divided the Fifth Circuit centered on the precedential value of Justice Powell's controlling opinion in *Bakke*. The panel in *Hopwood* pronounced that opinion dead. The dissenting judges countered that the reports of *Bakke*'s demise were premature.

Regents, 385 U.S. 589, 603, 87 S. Ct. 675, 683, 17 L. Ed. 2d 629 (1967)).

Moreover, that section of Justice O'Connor's opinion in *Croson* that is most often cited for the proposition that race-based classifications must be "strictly reserved for remedial settings" did not enjoy a majority of the Court. *Croson*, 488 U.S. at 493, 109 S. Ct. at 722. In his concurring opinion, Justice Stevens specifically disagreed with the premise that seemed to underlie Justice O'Connor's opinion, *i.e.*, "that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong." *Id.* at 511, 109 S. Ct. at 731. In Justice Stevens's opinion, Justice O'Connor's approach "overlook[ed] the potential value of race-based determinations that may serve other valid purposes." *Id.* at 511 n.1, 109 S. Ct. at 731 n.1.

In short, this Court is not convinced that recent Supreme Court precedent has established, as a matter of law, that the consideration of race in an attempt to attain the educational benefits that flow from a racially and ethnically diverse student body in the context of higher education can never constitute a compelling interest under strict scrutiny. To that end, this Court agrees with Judge Wiener's concurring opinion in *Hopwood* that applicable Supreme Court precedent has never held "squarely and unequivocally either that remedying the effects of past discrimination is the only compelling state interest that can ever justify racial classification, or conversely that achieving diversity in the student body of a public graduate or professional school can never be a compelling governmental interest." *Hopwood*, 78 F.3d at 964 (Wiener, J., concurring); *see also Smith*, 2000 WL 1770045 at *11

("For now, therefore, it ineluctably follows that the Fourteenth Amendment permits University admissions programs which consider race for other than remedial purposes, and educational diversity is a compelling governmental interest that meets the demands of strict scrutiny of race-conscious measures."); *Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123, 130 (4th Cir. 1999) (noting that issue of whether diversity constitutes a compelling interest remains unresolved); *Boston's Children First v. City of Boston*, 62 F. Supp. 2d 247, 258 (D. Mass. 1999) (rejecting plaintiff's contention on motion for preliminary injunction that diversity can never be compelling governmental interest); *Hunter v. Regents of Univ. of Cal.*, 971 F. Supp. 1316, 1324-27 (C.D. Cal. 1997) (rejecting plaintiff's contention that remedying past discrimination is only compelling state interest). Accordingly, this Court is satisfied that, if presented with sufficient evidence regarding the educational benefits that flow from a diverse student body, there is nothing barring the Court from determining that such benefits are compelling under strict scrutiny analysis.

The University Defendants have presented this Court with solid evidence regarding the educational benefits that flow from a racially and ethnically diverse student body. According to Patricia Y. Gurin, Professor of Psychology at the University of Michigan and Interim Dean of the LSA, "[s]tudents learn better in a diverse educational environment, and they are better prepared to become active participants in our pluralistic, democratic society once they leave such a setting." (Gurin Rep. at 3; *see also* U.S. Br. at 20-24; Association of American Law Schools

("ALS")[11] Br. at 6-10). Diversity in higher education also serves to break "patterns of racial segregation and separation historically rooted in our national life." (*Id.*).

Gurin reports that "multi-institutional national data, the results of an extensive survey of students at the University of Michigan, and data drawn from a specific classroom program at the University of Michigan" show that "[s]tudents who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills." (*Id.* at 5). Such students were also "better able to understand and consider multiple perspectives, deal with the conflicts that different perspectives sometimes create, and appreciate the common values and integrative forces that harness differences in pursuit of common ground." (*Id.* at 5-6; *see also* ALS Br. at 11-13; American Council on Education ("ACE")[12] Br. at 9-11).

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[11] The Association of American Laws Schools, National Association of State Universities and Land Grant Colleges, Committee on Institutional Cooperation (an academic consortium including Indiana University, Michigan State University, Northwestern University, The Ohio State University, Pennsylvania State University, Purdue University, the University of Chicago, the University of Illinois, the University of Iowa, the University of Michigan, the University of Minnesota, and the University of Wisconsin-Madison), and Wayne State University have joined in one amicus brief in support of the University, together representing over 360 institutional members of the professional higher education community.

[12] The American Council on Education is joined by twenty-four other associations, councils, and other groups representing the higher education community throughout the United States.

Members of heterogeneous working groups also offer more creative solutions to problems than do homogeneous groups, and show a greater potential for critical thinking because heterogeneity "eliminates a problem termed 'group think,' an organizational situation in which group members mindlessly conform." (*Id.* at 17) (internal citation omitted). Students who had experienced the most diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills. (*Id.* at 35-36 & Tables C1, C2, M1, M2, I1). Gurin also concludes that on average, students who attend more diverse institutions exhibit a greater "intellectual engagement and motivation index" and a greater "citizenship engagement index." (*Id.*, Figs. 3 & 4).

A number of amici have filed briefs concurring with the University that diversity results in a richer educational experience for students.[13] In support of its position, the United States cites a study by Alexander Astin, Director of the Higher Education Research Institute at the University of California, in which Astin associates diversity with increased satisfaction in most areas of the college experience and an increased commitment to promoting

[13] Along with the ALS and ACE, the following have filed amicus briefs in support of the University's position: the United States, the State of Ohio, the Michigan Attorney General, General Motors Corporation, Steelcase, Inc., joined by nineteen other global corporations, and the National Association of Social Workers, joined by the Council on Social Work Education, the Association of Baccalaureate Social Work Program Directors, Inc., and the Group for the Advancement of Doctoral Education in Social Work.

racial understanding and participation in cultural activities, leadership, and citizenship. (U.S. Br. at 20-21; *see also* ALS Br. at 6; ACE Br. at 15).

The over 360 institutions represented by the Association of American Law Schools assert that they have learned through their extensive experience in the educational realm that the quality of education for all students is greatly enhanced when student bodies include persons of diverse backgrounds, interests, and experiences, including racial and ethnic makeups. (ALS Br. at v). According to these institutions, a decision adverse to the University Defendants would significantly undermine their ability to provide the highest quality of academic experience and to prepare their students to effectively contribute to society after graduation. (*Id.* at vi).

Plaintiffs have presented no argument or evidence rebutting the University Defendants' assertion that a racially and ethnically diverse student body gives rise to educational benefits for both minority and non-minority students. In fact, during oral argument, counsel for Plaintiffs indicated his willingness to assume, for purposes of these motions, that diversity in institutions of higher education is "good, important, and valuable." Counsel for Plaintiffs, however, contends that "good, important, and valuable" is not enough, and that the diversity rationale is too amorphous and ill-defined, and "too limitless, timeless, and scopeless," to rise to the level of a compelling interest. According to counsel for Plaintiffs, the University's diversity rationale has "no logical stopping point" but rather is a "permanent regime" in direct conflict with the strict scrutiny standard.

This Court, however, is not convinced that what may be too amorphous and ill-defined in other contexts, *i.e.* the construction industry context, is also necessarily too amorphous or ill-defined in the context of higher education. In this Court's opinion, the fact that the University cannot articulate a set number or percentage of minority students that would constitute the requisite level of diversity does not, by itself, eliminate diversity as a potentially compelling interest.

Furthermore, unlike the remedial setting, diversity in higher education, by its very nature, is a permanent and ongoing interest. As previously noted, diversity is not a "remedy." Therefore, unlike the remedial setting, where the need for remedial action terminates once the effects of past discrimination have been eradicated, the need for diversity lives on perpetually. This does not mean, however, that Universities are unrestrained in their use of race in the admissions process, as any use of race must be narrowly tailored. Hopefully, there may come a day when universities are able to achieve the desired diversity without resort to racial preferences. Such an occurrence, however, would have no affect on the compelling nature of the diversity interest. Rather, such an occurrence would affect only the issue of whether a university's race-conscious admissions program remained narrowly tailored. In this Court's opinion, the permanency of such an interest does not remove it from the realm of "compelling interests," but rather, only emphasizes the importance of ensuring that any race-conscious admissions policy that is justified as a means to achieve diversity is narrowly tailored to such interest.

The only argument rebutting the University Defendants' assertions regarding the educational benefits of a

diverse student body comes from the National Association of Scholars ("NAS"), which has filed a brief as amicus curiae in support of Plaintiffs. Contrary to the amici in support of the University Defendants, the NAS contends that "*intellectual* diversity bears no obvious or necessary relationship to *racial* diversity." (NAS Br. at 3). NAS specifically takes issue with the studies relied upon by the ALS, contending that such studies really report that "outcomes are generally not affected" by racial diversity on campus. (*Id.* at 6-7).

NAS also asserts that none of the variables Gurin uses in her studies as proxies for racial diversity on college campuses actually requires the presence of other-race students on campus. (*Id.* at 8). For example, NAS asserts that Gurin relies on a student's attendance at an ethnic studies course coupled with either participation in a racial/cultural awareness workshop or a discussion regarding racial issues. (*Id.*). As NAS points out, neither of these necessarily requires the presence of other-race students.

NAS also attacks Gurin's study as providing no indication of the number of minority students that are needed to achieve the effects reported. (*Id.* at 9). According to NAS, "[i]t is possible that the positive outcomes that Gurin catalogues do not require any more racial diversity than that which would occur without racial preferences." (*Id.*). This argument, however, does not go to the core issue of whether the educational benefits that flow from a diverse student body constitute a compelling governmental interest, but rather, whether the means employed to achieve that interest are narrowly tailored.

This Court is persuaded, based upon the record before it, that a racially and ethnically diverse student body

produces significant educational benefits such that diversity, in the context of higher education, constitutes a compelling governmental interest under strict scrutiny.

3. Narrowly Tailored Analysis

Having determined that the educational benefits flowing from a racially and ethnically diverse student body are a sufficiently compelling interest to survive strict scrutiny, the Court must now determine whether the LSA's admissions policies for the years at issue (1995-present) were narrowly tailored to achieving that interest.

Although Justice Powell found diversity to be a compelling interest in the context of a university's admissions program, Justice Powell ultimately found that the particular admissions program at issue in *Bakke* was not a narrowly tailored means of achieving such interest and accordingly, the program was nonetheless unconstitutional. According to Justice Powell, the fatal flaw in the University of California's program was that:

> It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class.

Bakke, 438 U.S. at 318, 98 S. Ct. at 2763. However, "[i]n enjoining [the university] from ever considering the race of

any applicant," the California Supreme Court had "failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Id.* For that reason, Justice Powell concluded that so much of the California court's judgment that enjoined the university from *any* consideration of an applicant's race had to be reversed.[14]

In contrast to the University of California's special admissions system, Justice Powell cited Harvard's admissions program as an example of how race could properly be taken into account in an effort to achieve diversity. *Id.* at 316, 98 S. Ct. at 2762. As Justice Powell described Harvard's admissions program:

> In such an admissions program, race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to

[14] In contrast, Justice Brennan found that there was "no sensible, and certainly no constitutional, distinction between, for example, adding a set number of points to the admissions rating of disadvantaged minority applicants as an expression of the preference with the expectation that this will result in the admission of an approximately determined number of qualified minority applicants and setting a fixed number of places for such applicants." *Bakke*, 438 U.S. at 378, 98 S. Ct. at 2793.

> exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a particular quality may vary from year to year depending upon the "mix" both of the student body and the applicants for the incoming class.

Id. at 317-18, 98 S. Ct. at 2762.

According to Justice Powell, such a program was appropriate because it "treat[ed] each applicant as an individual in the admissions process." *Id.* at 318, 98 S. Ct. at 2762. "The applicant who loses out on the last available seat to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant." *Id.* An applicant whose qualifications had been weighed "fairly and competitively" had no basis to complain of unequal treatment under the Fourteenth Amendment. *Id.*

Although the Harvard plan spoken of approvingly by Justice Powell did not set target-quotas for the number of

minorities to be admitted in a given year, the plan clearly used race as a factor in admissions. *Id.* at 316, 98 S. Ct. at 2761-62. Therefore, to the extent that Plaintiffs contend that race can never be used as a factor during admissions decisions, their argument must be rejected.

It is also clear that under the Harvard plan, "race may tip the balance in [an applicant's] favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases." *Id.* at 316, 98 S. Ct. at 2761. Therefore, in some cases, an applicant may constitutionally be granted admission over another applicant solely on account of his race.

Furthermore, a university may "pay[ ] some attention to distribution among many types and categories of students," as more than a "token number of blacks" is necessary to fully achieve the educational benefits that flow from a racially and ethnically diverse student body. *Id.* at 316-17, 98 S. Ct. at 2762. As Harvard explained in regard to its admission program:

> In Harvard College admissions the Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. At the same time the Committee is aware that if Harvard College is to provide a truly heterogen[e]ous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers. It would not make sense, for example, to have 10 or 20 students out of 1,100 whose homes are west of the Mississippi. Comparably, 10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view,

> backgrounds and experiences of blacks in the United States.

Id. at 323, 98 S. Ct. at 2765.

As is clear from Justice Powell's opinion in *Bakke*, a university's interest in achieving the educational benefits that flow from a diverse student body does not justify an admissions program designed to admit a predetermined number or proportion of minority students. Instead, a university must carefully design its system to fall between these two competing ends of the spectrum, *i.e.*, between a system that completely fails to achieve a meaningful degree of diversity, under which the benefits associated with a diverse student body will never be realized, and a rigid quota system, which is clearly unconstitutional under Justice Powell's opinion in *Bakke*.

In striving to achieve such a system, "race or ethnic background may be deemed a 'plus' in a particular applicant's file," as long as this plus "does not insulate the individual from comparison with all other candidates for the available seats." *Id.* at 317, 98 S. Ct. at 2762. As Justice Powell explained with reference to the Harvard plan, an admissions program that takes race into consideration must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Id.* at 317, 98 S. Ct. at 2761. It is exactly because race need not necessarily be accorded the same weight as other objective factors that, in some instances, "race may tip the balance in an applicant's favor." *Id.* at 316, 98 S. Ct. at 2761.

The instant action involves the LSA's admissions programs from 1995 through the present. In 1995 and 1996, admission decisions were based primarily on a set of guideline tables referred to as grids, with GPA 2 ranges represented on the vertical axis, and ACT/SAT scores represented on the horizontal axis.[18] In 1995, four grids were used: (1) in-state non-minority applicants, (2) out-of-state non-minority applicants, (3) in-state minority applicants, and (4) out-of-state minority applicants. In 1996 only two grids were used: (1) in-state and legacy applicants and (2) out-of-state applicants – with non-minority applicant action codes listed in the top row of the grid's cells, and minority action codes listed in the bottom row. In 1997, the same grids as in 1996 were used. However, in 1997, the LSA also added .5 to under-represented minority applicants' GPA 2 scores.

From 1998 through the present, the LSA has used a 150 point system, under which admission decisions were generally determined by the applicant's rank on the 150 point scale. Under-represented minority applicants automatically receive 20 points based upon their membership in one of the identified under-represented minority categories. In 1999 and 2000, the LSA also added a system whereby certain applicants, including under-represented minority applicants, could be "flagged," thereby keeping

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[18] An applicant's GPA 2 was calculated by adjusting the applicant's high school GPA based upon several factors, including the quality of the applicant's high school, the strength of the applicant's high school curriculum, any unusual circumstances, the applicant's geographical residence, and the applicant's alumni relations, if any.

such applicants in the review pool for further consideration.

Beyond the fact that rigid quotas are impermissible, Justice Powell's opinion in *Bakke* fails to set forth any bright line regarding what constitutes a permissible consideration of race in admissions decisions. Furthermore, in situations such as this, it is often a thin line that divides the permissible from the impermissible. Applying the principles set forth by Justice Powell in *Bakke*, this Court is satisfied that when examined in its entirety, the LSA's current admissions program (1999-present) represents a permissible use of race. At the same time, however, the Court is satisfied that although the LSA views its current system as "chang[ing] only the mechanics, not the substance" of its prior systems, its prior systems, when examined in their entirety, cross that thin line from the permissible to the impermissible.[16]

A. The LSA's Current System (1999-Present)

Foremost in the Court's decision that the LSA's current admissions program is constitutional is the fact that the LSA's current program does not utilize rigid

[16] It is understandable that the LSA does not contend that there is any "substantive" difference between its current and prior admissions programs. To acknowledge a substantive difference in such programs would give some support to Plaintiffs' claims that the admissions programs in effect from 1995 through 1998 were not "narrowly tailored." Furthermore, the University Defendants' contention that "only the current system can form the basis for [injunctive relief]," and their arguments in support of this contention, (Defs.' 8/11/00 Br. at 92), suggest that there are some significant differences between the LSA's current admissions programs and those used from 1995 through 1998.

quotas or seek to admit a predetermined number of minority students. Therefore, the LSA's current program does not contain the fatal flaw identified by Justice Powell in *Bakke*. Instead, race is taken into account in two ways under the LSA's current program. First, admissions counselors may assign each under-represented minority applicant twenty points in calculating their selection index score on account of their race. Second, under the LSA's current program, counselors may "flag" applicants that possess certain qualities or characteristics the LSA deems important to the composition of its freshman class, one of which is "under-represented race," thereby keeping an applicant who may not necessarily pass the LSA's initial admit threshold in the review pool for further consideration.[17] Such uses of race, however, operate as nothing more than the "plus" spoken of with approval by Justice Powell in *Bakke*.

In response, Plaintiffs contend that the LSA's practice of adding twenty points to under-represented minority applicants' selection index scores really operates as the functional equivalent of a quota. Justice Powell, however, rejected essentially the same argument in *Bakke* explaining:

> It has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated – but no less effective – means of according racial preference than the Davis program. A facial intent to

[17] Other qualities or characteristics include high school class rank, unique life experiences, challenges, circumstances, interests or talents, socioeconomic disadvantage, and geography.

discriminate, however, is evident in petitioner's preference program and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic background is simply one element – to be weighed fairly against other elements – in the selection process. "A boundary line," as Mr. Justice Frankfurter remarked in another connection, "is none the worse for being narrow." *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 329, 64 S. Ct. 1023, 1025, 88 L. Ed. 1304 (1944). And a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith would be presumed in the absence of a showing to the contrary in the manner permitted by our cases. *See e.g., Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976); *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965).

Id. at 318-19, 98 S. Ct. at 2762-63.

Minority applicants are not insulated from review by virtue of these twenty points any more than other applicants are insulated from review by virtue of the six points awarded for geographic factors, four points awarded for alumni relationship, three points awarded for an outstanding essay, five points awarded for leadership and service skills, twenty points awarded for socioeconomic status, or twenty points awarded for athletes. In fact, the Court notes that in certain circumstances, these points may be combined for a total of up to forty. The fact that these points may "tip the balance" in favor of a particular

applicant, however, does not necessarily lead to a conclusion that such applicants have been insulated from competition in the sense that Justice Powell spoke of in *Bakke*.

The Court agrees that in certain situations, a preexisting commitment to a fixed preference may translate into an exact proportion of the favored group being selected. This is most clearly illustrated by programs in which a preference is only available for one factor, for example race. However, under the LSA's admissions program, there are many factors that may entitle an applicant to a preference, thereby making the results of any one factor less predictable.

Plaintiffs also contend that the LSA's program, under which twenty points may be added to the selection index score of under-represented minority applicants, operates as the same type of "dual" or "two-track" system prohibited by Justice Powell in *Bakke*. (Pls.' 8/11/00 Br. at 15). The "two-track" system Justice Powell spoke of in *Bakke*, however, was not a two-track system that employed lower thresholds for minority applicants *vis a vis* majority applicants. Such a conclusion is evident from the fact that not once in his narrowly tailored analysis did Justice Powell ever discuss the fact that under the University of California's admissions program, majority students were subject to a 2.5 minimum GPA requirement, whereas there was no minimum GPA requirement for minority students. *See id.* 274-75, 98 S. Ct. at 2739-40.

Instead, the "two-track" system of which Justice Powell spoke was the university's system under which one group of students, *i.e.* minority students, competed for one set of seats, and another group of students, *i.e.* majority students, competed for another set of seats, thereby in

effect creating two separate admissions systems. Justice Powell's statement that the university's interest in genuine diversity would not be served by "expanding [the university's] two-track system into a multitrack program with a prescribed number of seats set aside for each identifiable category of applicants" further confirms that the two-track system Justice Powell spoke of related to the university's practice of setting seats aside for minority applicants, not the university's practice of employing different GPA requirements for minority *vis a vis* majority applicants. *Id.* at 314, 98 S. Ct. 2761.

Furthermore, unlike the University of California, the LSA does not utilize a separate admissions review committee for under-represented minority applications. Instead, admission counselors are assigned to specific geographic areas. Each counselor reviews all applications from his or her territory, under-represented minority and non-minority alike. There is no separate review or assignment of under-represented minority applicants as there was in *Bakke*. (Spencer Dep. at 273; Gauss Dep. at 31, Vanhecke Dep. at 99).

Moreover, whenever a point-based system such as the LSA's is used in making admissions decisions, any factor that may result in points being added to an applicant's total score will necessarily have the effect of lowering that applicant's admission threshold. For example, any time an applicant receives three points for an outstanding essay, it can just as easily be said that the threshold for admission for that applicant has now been reduced by three points. The same is true for each of the other factors used during the admissions process, *e.g.,* geographic location, alumni relationship, socioeconomic status, etc. Such a result is the natural byproduct of using such a point system.

What Plaintiffs really appear to contest is the fact that race is accorded twenty points, while other factors that may more consistently favor non-minority students are not typically accorded the same weight. However, as Justice Powell recognized in *Bakke,* universities may accord an applicant's race some weight in the admissions process and, in doing so, universities are not required to accord the same weight to race as they do other factors. *Bakke,* 438 U.S. at 317-18, 98 S. Ct. at 2762. As long as the admissions program does not work to isolate the applicants from review, it withstands constitutional muster, despite the fact that it may provide individuals with a "plus" on account of their race.

Plaintiffs also attack the LSA's "flagging" system. According to Plaintiffs, the files of under-represented minorities remain "protected" insofar as the LSA's flagging procedure ensures that the files of such students remain in the "review pool" because of their race.

Under the LSA's current admissions system, a counselor *may* "flag" an applicant if (1) in the counselor's estimation, the applicant is academically prepared for the University, (2) has a selection index score of at least 80 for residents, or 75 for non-residents, and (3) possesses a quality or characteristic the LSA deems important to the composition of its incoming class, including under-represented minority status. Counselors, however, are not *required* to flag every under-represented minority applicant. Furthermore, applicants other than under-represented minority applicants may also be flagged. For example, other factors a counselor may consider in flagging applications include whether the applicant was in the top of his class, resided in a preferred county of Michigan, exhibited any "unique life experiences, challenges, circumstances,

interests or talents," exhibited a disadvantaged background, had an important connection to the University community, or was a recruited athlete. (Defs.' Exs., Ex. Z at 3-4). Given that any number of applicants, including applicants other than under-represented minority applicants, may be "flagged" under the LSA's current system, the Court rejects Plaintiffs' contention that under-represented minorities remain "protected" by virtue of such system.

Plaintiffs also contend that the University Defendants have failed to sustain their burden of showing that it considered race-neutral alternatives to its current program. For example, according to Plaintiffs, one obvious race-neutral mechanism would be to randomly select all or a portion of the class from the entire pool of 'qualified' applicants, regardless of race. Plaintiffs, however, fail to explain how randomly selecting all or a portion of the class from the entire pool of applicants would produce a sufficiently diverse student body. As discussed *supra,* to achieve the educational benefits associated with a racially and ethnically diverse student body, more than a token number of under-represented minority students is required. Given the small size of the applicant pool, it is highly unlikely that a random selection process would result in a sufficiently diverse student body.

Furthermore, the University Defendants have presented evidence that a race-neutral admission program would substantially reduce the number of under-represented minority students in the LSA's incoming student body. (*See* Raudenbush 2/24/00 Supp. Rep. at 4-5; Raudenbush 3/3/99 Supp. Rep. at 9-11). If race were not taken into account, the probability of acceptance for

minority applicants would be cut dramatically, while non-minority students would see only a very small positive effect on their probability of admission, due largely in part to the size of their respective applicant pools. (*See* Raudenbush 3/3/00 Supp. Rep. at 11).

The University Defendants have also presented evidence that a system that relied entirely on test scores would also lead to the rejection of a number of qualified minority applicants. (Bowen Rep. at 10). This is due to the fact that nationally, minorities are very under-represented at the higher level of standardized test scores, and over-represented at the lower level. (*Id.* at 10).

The University Defendants have also presented the expert opinion of William G. Bowen that the race-neutral admissions program currently used by the University of Texas, under which all students who finish in the top ten percent of their high school class are guaranteed admission, and any system based purely on an applicant's income level, would not be as effective in enrolling "an academically well prepared and diverse student body." (Bowen Rep. at 12). According to Bowen, the Texas approach would have the effect of "admit[ting] some students from weaker high schools while turning down better-prepared applicants who happen not to finish in the top tenth of their class in academically stronger schools." (*Id.*). Bowen further hypothesizes that "[s]o long as high schools differ so substantially in the academic abilities of their students and the level of difficulty of their courses, treating all applicants alike if they finished above a given high school class rank provides a spurious form of equality that is likely to damage the academic profile of the overall class of students admitted to selective institutions." (*Id.*).

According to Bowen, income-based strategies are just as ineffective as there "are simply too few blacks and Latinos from poor families who have strong enough academic records to qualify for admission to highly selective institutions." (*Id.* at 13). Bowen also reports that if universities were totally eliminated from considering race during the admissions process, "over half of the black students in selective colleges today would have been rejected." (*Id.*).

Furthermore, the University has attempted to enlarge its pool of under-represented minority applicants through vigorous minority recruitment programs, which have all proved to be unavailing. For example, the University's efforts have included personal contact with minority students at symposia, attendance at recruiting fairs, direct mailings, campus visits, and offices in Detroit. (Vanhecke Dep. at 11-12; Spencer Dep. at 29, 196-97). Nevertheless, according to the University, its pool of qualified minority applicants for the LSA has remained small, most of whom are also highly recruited by other selective institutions and universities. (Defs.' 7/17/00 Br. at 27).

The Court also rejects Plaintiffs' contention that the LSA's current system amounts to nothing more than racial balancing. Unlike the cases relied upon by Plaintiffs, the LSA does not seek to achieve a certain proportion of minority students, let alone a proportion that represents the community. To that end, the Court agrees with the Fourth Circuit in *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 687, 707 (4th Cir. 1999), that an educational institution's goal of achieving the educational benefits associated with a diverse student body "do[es] not require racial balancing." However, the University's interest does require a sufficiently diverse student body and therefore, requires

that some attention be given to the composition of the student body. Although fixed racial quotas and racial balancing are not necessary to achieving that goal, the consideration of an applicant's race during the admissions process necessarily is.

In summary, the Court is satisfied that the LSA's current admissions program, under which certain minority applicants receive a "plus" on account of their race but are not insulated from all competition with other applicants, meets the requirements set forth by Justice Powell in *Bakke* and is therefore constitutional. Accordingly, the University Defendants' motion for summary judgment shall be granted with respect to the LSA's current admissions program, and Plaintiffs' motion for injunctive relief shall be denied.

B. The LSA's Prior Programs (1995-1998)

Although the Court finds the LSA's current admissions program to be permissible under the principles set forth by Justice Powell in *Bakke*, the Court is similarly satisfied that the LSA's prior admissions programs, when examined in their entirety, represent an impermissible use of race. One of the most significant factors that transforms the permissible into the impermissible in this case is the LSA's prior practice of "protecting" or "reserving" seats for under-represented minority applicants. As explained by the LSA itself:

> Because the class is selected on a rolling basis, rather than at one point in time, a certain number of seats is designated during the admissions cycle for in-state students and for certain other

> groups of students, including, for example, athletes, foreign applicants, *underrepresented minority candidates,* and ROTC candidates (sometimes referred to as "protected" space). This space is "protected" to enable OUA to achieve the enrollment targets of the University and of the individual units while using a rolling admissions system. If this space is not filled by qualified candidates from the designated groups toward the end of the season, it used to admit students from the postponed pool or the extended waiting list, applicants to other units, etc.

(Defs.' Answer Interrog. No. 1) (emphasis added); (*See also* Pls.' 4/9/99 Exs., Vol. 1, Exs. P, Q, & R) (showing number of protected seats for particular academic years). The LSA has also explained this practice in the following manner:

> LSA admissions occur on a "rolling" basis: rather than waiting for one date in late winter to notify all applicants of the disposition of their applications, LSA admits applicants throughout the admissions season. Under such a process, offers of admissions must be carefully monitored and managed to ensure that sufficient spaces are reserved, or protected, for attractive applicants who apply later in the cycle. The number of protected spaces is determined by the expected pool size of various groups of applications. *As applicants from a particular group are admitted over the course of the admissions season, the protected spaces reserved for that group are used.* If the pool of qualified applicants never reaches the number of protected spaces, those slots are filled with qualified applicants off the wait list.

(Pls.' 4/9/99 Br. at 7 n.4) (quoting Defendants' Motion for Reassignment or Designating Actions as Companion Cases in *Grutter v. Bollinger,* 97-CV-5928-DT).

Other memoranda refer to these "protected" seats as being "reserved" for particular groups of applicants. (*See* Pls.' 4/9/99 Exs., Vol. I, Ex. M). In fact, one memorandum specifically states that the number of "protected groups" for Fall 1997 would be decreased, thereby "opening up slots for non-protected applicants." (*Id.,* Ex. O). This evidence clearly indicates that these slots were not merely protected from the admissions process itself, but from competition by non-protected applicants. It is clear that the LSA's system operated as the functional equivalent of a quota and therefore, ran afoul of Justice Powell's opinion in *Bakke.*

In this Court's opinion, there is no significant difference between the LSA's prior practice of "protecting" or "reserving" seats and the University of California's quota system. The fact that non-minority applicants may have had a chance at any "leftover" spots at the end of the admissions cycle does not change this conclusion. Under both systems, preferred minority applicants were insulated from competition from non-preferred applicants for a given number of seats. The fact that this number may have changed from year to year, or even during any one particular admissions cycle, does not change this fact. It can hardly be said that those non-preferred applicants who, by pure chance, may have had an opportunity to compete for one of the leftover seats, were allowed to compete on equal footing for every seat in the class.

Furthermore, it is undisputed that from 1995 through 1997, the LSA used facially different grids and action

codes based solely upon an applicant's race. Under these differing grids, a certain group of non-preferred applicants were automatically excluded from competing for a seat in the class without any type of individualized counselor review solely on account of their race,[18] whereas, preferred minority applicants were never automatically rejected, regardless of their grades and test scores. Rather, all minority applicants received some type of individualized counselor review. (McKinney Dep. at 41, Spencer Dep. at 105). This practice of "automatic exclusion" continued into the 1998 academic year despite the LSA's switch to the selection index system. (McKinney Dep. at 97-98, 150-52).

The Court agrees with the University Defendants' assertion that all who are ultimately admitted to the LSA are "qualified" academically, and neither Plaintiffs nor this Court seek to imply that those minorities who are admitted under the lower admissions standards are not academically qualified for admission. It cannot be seriously disputed, however, that the effect of the LSA's differing standards was to systematically exclude a certain group of non-minority applicants from participating in the admissions process based solely on account of their race.

For example, in 1995 and 1996, the LSA used two grids for instate applicants,[19] one for "non-minority" applicants and another for "minority" applicants. The non-minority grid indicated that an applicant with a GPA 2 of

[18] The Court notes that the LSA's practice of automatically rejecting applicants also ended with the 1999 academic year.

[19] The Court notes that another set of grids was used for out-of-state applicants, for a total of four grids.

3.2-3.3 and ACT of 18-20/SAT of 400-500 would be automatically rejected, whereas a minority applicant with the same grade/score would have most likely been admitted.[20]

In so doing, the LSA's policies foreclosed each of the automatically rejected applicants from further consideration for a seat simply because they were not of a favored race or ethnicity. These applicants were never accorded any further individualized review as envisioned by Justice Powell in *Bakke*. In this Court's opinion, the LSA's different treatment of preferred minority applicants *vis a vis* non-preferred applicants at this stage of the admissions process further adds to the infirmity of the LSA's prior programs.

Moreover, the only distinguishing factor between the grids used by the LSA during these years was the applicant's race. Therefore, to the extent admissions counselors used such grids in making admissions decisions, it is clear from the face of the grids themselves that in some cases, the *only* defining factor was race.

Although the LSA's use of facially different grids/action codes based upon an applicants' race, in and of itself, may not have been constitutionally impermissible, when combined with the other components previously discussed by the Court, *i.e.* the LSA's use of protected seats and the LSA's system of automatic rejection, the Court is convinced that the LSA's prior programs, when examined in their entirety, fall within the impermissible under the

[20] The minority grid also contained the option of delaying such a minority applicant "for senior year SAT's or ACT's."

principles enunciated by Justice Powell in *Bakke*. Accordingly, Plaintiffs' motion for summary judgment shall be granted with respect to the LSA's admissions programs employed from 1995 through 1998.

Qualified Immunity

Defendants Bollinger and Duderstadt, who have been sued in their individual capacities under 42 U.S.C. § 1983, have moved for summary judgment on grounds of qualified immunity. Under the qualified immunity doctrine, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). "The question of whether qualified immunity attaches to an official's actions is a purely legal question for the trial judge to determine prior to trial." *Garvie v. Jackson*, 845 F.2d 647, 649 (6th Cir. 1988).

In order to determine whether an official is entitled to qualified immunity, a court must first consider, "whether, based on the applicable law, a constitutional violation occurred." *Dickerson v. McClellan*, 101 F.3d 1151, 1157 (6th Cir. 1996) (citing *Centanni v. Eight Unknown Officers*, 15 F.3d 587, 589 (6th Cir. 1994)). As discussed *supra*, the Court is satisfied that although diversity is a sufficiently compelling interest to survive strict scrutiny, the LSA's prior admissions programs (1995-1998) were nonetheless impermissible under the principles enunciated by Justice Powell in *Bakke*. Therefore, the Court is satisfied that a constitutional violation has occurred.

Next, the Court must determine whether the constitutional violation involved "'clearly established constitutional rights of which a reasonable person would have known.'" *Id.* at 1158 (quoting *Christophel v. Kukulinsky*, 61 F.3d 479, 485 (6th Cir. 1995)). "In determining whether a constitutional right is clearly established, a district court must find binding precedent by the Supreme Court, its court of appeals, or itself." *Sheets v. Moore*, 97 F.3d 164, 166 (6th Cir. 1996) (citing *Ohio Civil Serv. Employees Ass'n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988)). Neither party disputes the fact that under the Fourteenth Amendment, every individual is entitled to equal protection of the laws. To date, however, there has been only one Supreme Court decision addressing the extent to which a university may take race into consideration during the admissions decision, *i.e.*, the Supreme Court's decision in *Bakke*. As is illustrated by the foregoing discussion, the binding effect of Justice Powell's opinion in *Bakke* has been the subject of much debate in recent years.

Furthermore, to defeat a claim of qualified immunity, Plaintiffs must show that Defendants "knew or reasonably should have known" that their actions were unconstitutional. *Harlow*, 457 U.S. at 816, 102 S. Ct. 2727; *see also Dickerson*, 101 F.3d at 1151 (quoting *Russo v. City of Cincinnati*, 953 F.2d 1036, 1042 (6th Cir. 1992)). "'[T]he unlawfulness must be apparent.'" *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987)).

In finding the University of California's admission program unconstitutional, Justice Powell relied exclusively upon the fact that the university employed a rigid quota. In light of the principles enunciated by Justice Powell in *Bakke*, the Court does not believe that it would

necessarily have been unreasonable for an official in Defendants' position to conclude that the LSA's admissions policies were constitutional. It is clear that the University did not employ the same type of rigid quota renounced by Justice Powell in *Bakke*. Moreover, the mere fact that this Court has disagreed with Defendants as to whether the LSA's programs were constitutional does not automatically defeat qualified immunity. As the Supreme Court has explained, "[t]he qualified immunity standard gives ample room for mistaken judgment by protecting all but the plainly incompetent or those who knowingly violate the law. This accommodation for reasonable error exists because officials should not err always on the side of caution because they fear being sued." *Hunter v. Bryant,* 502 U.S. 224, 229, 112 S. Ct. 534, 537, 116 L. Ed. 2d 589 (1991).

Applying the defense of qualified immunity in this case is, in this Court's opinion, consistent with the qualified immunity standard. Courts themselves have been struggling for well over two decades to fully understand what constitutes a properly devised admissions program under *Bakke*. This Court cannot say that a reasonable official in Defendants' position should have known that the LSA's prior admissions programs were unconstitutional. Accordingly, Defendants' motion for summary judgment based upon the doctrine of qualified immunity shall be granted.

Eleventh Amendment Immunity

The Board of Regents ("the Board") also seeks summary judgment with respect to Plaintiffs' Title VI claims on grounds of Eleventh Amendment Immunity. In general,

Eleventh Amendment immunity bars plaintiffs from bringing claims for damages against a state or its officials acting in their official capacities unless the state has waived its immunity, or Congress has exercised its power to override that immunity. *See Will v. Michigan Dep't of State Police,* 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989). With respect to Title VI, Congress has enacted a specific provision abrogating the states' Eleventh Amendment immunity. *See* 42 U.S.C. § 2000d-7(a)(1).[21]

In fact, the Board specifically recognizes that Congress has abrogated its Eleventh Amendment immunity with respect to claims under Title VI, and that by accepting federal funds, it has consented to being sued for damages in federal court. (Defs.' 5/3/99 Br. at 68). In support of its motion for summary judgment, however, the Board contends that the *scope* of that agreement does not encompass Plaintiffs' claims because the Board was not on "notice" that its conduct in this case would subject it to liability. (*Id.* at 68-69). According to the Board, its actions must violate "*clearly established* legal principles" for its Eleventh Amendment immunity to be abrogated. (*Id.*) (emphasis in original).

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[21] 42 U.S.C. § 2000d-7(a)(1) specifically provides:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C.A. § 794], title IX of the Education Amendments of 1972 [20 U.S.C.A. § 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C.A. § 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

None of the cases relied upon by the Board, however, support its claim that its Eleventh Amendment immunity cannot be abrogated unless it had notice that its conduct was unconstitutional. In *Gebser v. Lago Vista Independent School District,* 524 U.S. 274, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998), the Supreme Court faced the issue of whether a plaintiff could maintain a cause of action for sexual harassment against a school under Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681, based upon a theory of *respondeat superior* or constructive notice. Because the express remedial scheme of Title IX was based upon notice to an appropriate person and an opportunity to rectify the discriminatory behavior, the Supreme Court held that a plaintiff could not maintain a cause of action under Title IX based upon a theory of *respondeat superior* or constructive notice. *Id.* 524 U.S. at 290-93, 118 S. Ct. at 1999-2000.

Similarly, in *Guardians Association v. Civil Service Commission of City of N.Y.,* 463 U.S. 582, 103 S. Ct. 3221, 77 L. Ed. 2d 866 (1983), the Supreme Court faced the issue of whether a plaintiff could maintain a cause of action under Title VI without showing intentional discrimination on behalf of the defendant. In *Guardians,* the Supreme Court ultimately held that intent was not an essential element of a Title VI violation, but "a plaintiff should recover only injunctive, noncompensatory relief for a defendant's unintentional violations of Title VI." *Id.* at 607, 103 S. Ct. at 3235. Each of these cases addressed the requisite showing a plaintiff must make to sustain a claim under the respective federal statute, not whether a state's Eleventh Amendment immunity could be abrogated where the state has not been put on "notice" that the specific conduct alleged to be a violation of federal law was illegal.

The Supreme Court has referred to § 2000d as an "unequivocal waiver" of the states' Eleventh Amendment immunity. *See Lane v. Pena,* 518 U.S. 187, 198, 116 S. Ct. 2092, 2099, 135 L. Ed. 2d 486 (1996). Furthermore, a number of courts have recognized that with respect to Title VI, Congress has validly abrogated the states' Eleventh Amendment immunity. *See, e.g., Fuller v. Rayburn,* 161 F.3d 516, 518 (8th Cir. 1998) ("We nevertheless agree with Mr. Fuller that by enacting section 2000d-7, 'Congress abrogated the States' Eleventh Amendment immunity under . . . Title VI.'"); *DeKalb County Sch. Dist. v. Schrenko,* 109 F.3d 680, 688 (11th Cir. 1997) ("On the other hand, the parties agree that Congress has abolished the states' immunity for causes of action grounded in Title VI."); *United States v. Yonkers Bd. of Educ.,* 893 F.2d 498, 503 (2d Cir. 1990) ("With respect to Title VI, which prohibits, inter alia, racial discrimination in federally assisted programs, Congress has expressly abrogated the states' Eleventh Amendment immunity. . . . ").

Moreover, to the extent that the Board seeks to extend the doctrine of qualified immunity to cover its actions, the Board's arguments must be rejected, as "[q]ualified immunity is not a defense available to governmental entities, but only to government employees sued in their individual capacity." *Johnson v. Outboard Marine Corp.,* 172 F.2d 531, 535 (8th Cir. 1999); *see also Rodriguez v. City of New York,* 72 F.3d 1051, 1065 (2d Cir. 1995) ("[T]he defense of qualified immunity protects only individual defendants sued in their individual capacity, not governmental entities."); *Hill v. Dekalb Reg'l Youth Det. Ctr.,* 40 F.3d 1176, 1185 (11th Cir. 1994) ("Governmental entities are not entitled to qualified immunity regarding section 1983 claims.").

By enacting § 2000d, Congress validly abrogated the states' Eleventh Amendment immunity with respect to Title VI claim. Therefore, although the Board remains free to assert that Plaintiffs have failed to set forth a proper case under Title VI, the Eleventh Amendment does not bar Plaintiffs' claims for damages. Accordingly, the Board's motion for summary judgment with respect to Plaintiffs' Title VI claim shall be denied.

Conclusion

For the reasons stated above, Plaintiffs' motion for summary judgment is granted with respect to the LSA's admissions programs in existence from 1995 through 1998, and the admissions programs for such years are declared unconstitutional. However, the University Defendants' motion for summary judgment is granted with respect to the LSA's admissions programs for 1999 and 2000. Furthermore, Plaintiffs' request for injunctive relief is denied. Defendants Duderstadt and Bollinger's motion for summary judgment on grounds of qualified immunity is granted. The Board of Regent's motion for summary judgment on grounds of Eleventh Amendment immunity, however, is denied.

An Order consistent with this Opinion shall issue.

/s/ Patrick J. Duggan
PATRICK J. DUGGAN
UNITED STATES
DISTRICT JUDGE

Date: December 13, 2000

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APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JENNIFER GRATZ and PATRICK HAMACHER, for themselves and all others similarly situated,

Plaintiffs,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Defendants,

and

EBONY PATTERSON, RUBEN MARTINEZ, LAURENT CRENSHAW, KARLA R. WILLIAMS, LARRY BROWN, TIFFANY HALL, KRISTEN M.J. HARRIS, MICHAEL SMITH, KHYLA CRAINE, NYAH CARMICHAEL, SHANNA DUBOSE, EBONY DAVIS, NICOLE BREWER, KARLA HARLIN, BRIAN HARRIS, KATRINA GIPSON, CANDICE B.N. REYNOLDS, by and through their parents or guardians, DENISE PATTERSON, MOISE MARTINEZ, LARRY CRENSHAW, HARRY J. WILLIAMS, PATRICIA SWAN-BROWN, KAREN A. MCDONALD, LINDA A. HARRIS,

CASE NO.:
97-CV-75231-DT
HON. PATRICK J. DUGGAN

ORDER

DEANNA A. SMITH, ALICE BRENNAN, IVY RENE CHARMICHAEL, SARAH L. DUBOSE, INGER DAVIS, BARBARA DAWSON, ROY D. HARLIN, WYATT G. HARRIS, GEORGE C. GIPSON, SHAWN R. REYNOLDS, AND CITIZENS FOR AFFIRMATIVE ACTION'S PRESERVATION,

Defendant-Intervenors.

/

ORDER

(Filed Jan. 30, 2001)

At a session of said Court,
held in the U.S. District Courthouse,
City of Detroit, County of Wayne,
State of Michigan on JAN 30 2001

HONORABLE PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

For the reasons set forth in an Opinion issued December 13, 2000,

IT IS ORDERED that summary judgment is **GRANTED** in favor of Plaintiffs with respect to the LSA's admissions programs in existence from 1995 through 1998, and the admissions programs for such years are hereby declared unconstitutional;

IT IS FURTHER ORDERED that summary judgment is **GRANTED** in favor of the University Defendants with respect to the LSA's admissions programs for 1999 and 2000;

IT IS FURTHER ORDERED that Plaintiffs' request for injunctive relief is **DENIED**;

IT IS FURTHER ORDERED that Defendants Duderstadt and Bollinger's motion for summary judgment on grounds of qualified immunity is **GRANTED**; and

IT IS FURTHER ORDERED that the Board of Regents' motion for summary judgment on grounds of Eleventh Amendment immunity is **DENIED**.

In the opinion of this Court, this Order involves the following controlling questions of law, as to which there is substantial ground for difference of opinion: (1) whether a public university has a compelling interest in achieving the educational benefits of a diverse student body that will justify the consideration of race as a factor in admissions; and (2) if so, whether the admissions systems employed by the University of Michigan College of Literature, Science and the Arts from 1995 until 2000 are properly designed to achieve that interest.

In the opinion of this Court, an immediate appeal from the Order would materially advance the ultimate termination of the litigation.

Dated: January 30, 2001

/s/ Patrick J. Duggan
PATRICK J. DUGGAN
UNITED STATES DISTRICT
JUDGE

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APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JENNIFER GRATZ and PATRICK HAMACHER, for themselves and all others similarly situated,

Plaintiffs,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Defendants,

and

EBONY PATTERSON, RUBEN MARTINEZ, LAURENT CRENSHAW, KARLA R. WILLIAMS, LARRY BROWN, TIFFANY HALL, KRISTEN M.J. HARRIS, MICHAEL SMITH, KHYLA CRAINE, NYAH CARMICHAEL, SHANNA DUBOSE, EBONY DAVIS, NICOLE BREWER, KARLA HARLIN, BRIAN HARRIS, KATRINA GIPSON, CANDICE B.N. REYNOLDS, by and through their parents or guardians, DENISE PATTERSON, MOISE MARTINEZ, LARRY CRENSHAW, HARRY J. WILLIAMS, PATRICIA SWAN-BROWN, KAREN A. MCDONALD, LINDA A. HARRIS,

CASE NO.:
97-CV-75231-DT
HON. PATRICK J. DUGGAN

ORDER

(Filed Feb. 9, 2001)

DEANNA A. SMITH, ALICE BRENNAN, IVY RENE CHARMICHAEL, SARAH L. DUBOSE, INGER DAVIS, BARBARA DAWSON, ROY D. HARLIN, WYATT G. HARRIS, GEORGE C. GIPSON, SHAWN R. REYNOLDS, AND CITIZENS FOR AFFIRMATIVE ACTION'S PRESERVATION,

Defendant-Intervenors.

_____/

At a session of said Court, held in the U.S. District Courthouse, City of Detroit, County of Wayne, State of Michigan, on FEB 09, 2001

PRESENT: THE HONORABLE PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

On December 13, 2000, this Court issued an Opinion granting Defendants Duderstadt and Bollinger's Motion for Summary Judgment on the grounds of qualified immunity and on January 30, 2001, this Court entered an Order granting Defendants Duderstadt and Bollinger's motion for summary judgment on grounds of qualified immunity. Now therefore,

Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, this Court hereby directs entry of final judgment on Plaintiffs' claims against the individual Defendants Duderstadt and Bollinger in their individual capacities. The clerk will enter final judgment dismissing those claims.

This Court finds that there is no just reason for delay in entering final judgment in favor of the individual Defendants. First, the parties have indicated their desire

to appeal other issues, and this Court previously has certified several issues for appeal pursuant to 28 U.S.C. § 1292(b). Second, claims under qualified immunity should be resolved as quickly as possible.

IT IS SO ORDERED.

/s/ Patrick J. Duggan
PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

Copies to:

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Deanne E. Maynard, Esq.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JENNIFER GRATZ and PATRICK HAMACHER, for themselves and all others similarly situated,

Plaintiffs,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Defendants,

and

EBONY PATTERSON, RUBEN MARTINEZ, LAURENT CRENSHAW, KARLA R. WILLIAMS, LARRY BROWN, TIFFANY HALL, KRISTEN M.J. HARRIS, MICHAEL SMITH, KHYLA CRAINE, NYAH CARMICHAEL, SHANNA DUBOSE, EBONY DAVIS, NICOLE BREWER, KARLA HARLIN, BRIAN HARRIS, KATRINA GIPSON, CANDICE B.N. REYNOLDS, by and through their parents or guardians, DENISE PATTERSON, MOISE MARTINEZ, LARRY CRENSHAW, HARRY J. WILLIAMS, PATRICIA SWAN-BROWN, KAREN A. MCDONALD, LINDA A. HARRIS,

CASE NO.: 97-CV-75231-DT
HON. PATRICK J. DUGGAN

JUDGMENT

(Filed Feb. 9, 2001)

DEANNA A. SMITH, ALICE BRENNAN, IVY RENE CHARMICHAEL, SARAH L. DUBOSE, INGER DAVIS, BARBARA DAWSON, ROY D. HARLIN, WYATT G. HARRIS, GEORGE C. GIPSON, SHAWN R. REYNOLDS, AND CITIZENS FOR AFFIRMATIVE ACTION'S PRESERVATION,

Defendant-Intervenors.

/

At a session of said Court, held in the U.S. District Courthouse, City of Detroit, County of Wayne, State of Michigan, on FEB 09 2001

PRESENT: THE HONORABLE PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

On January 30, 2001, this Court entered an Order granting Defendants Duderstadt and Bollinger's motion for summary judgment on grounds of qualified immunity. Now therefore, in accordance with such Order

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiffs' claim against individual Defendants Duderstadt and Bollinger in their individual capacities, is **DISMISSED.**

IT IS SO ORDERED.

Dated: _____

DAVID WEAVER
CLERK OF THE COURT

BY: /s/ [Illegible]
DEPUTY CLERK

APPROVED:

/s/ Patrick J. Duggan
PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

Copies to:

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APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JENNIFER GRATZ and PATRICK HAMACHER, for themselves and all others similarly situated,

Plaintiffs,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, the BOARD OF REGENTS of the UNIVERSITY OF MICHIGAN,

Defendants,

and

EBONY PATTERSON, RUBEN MARTINEZ, LAURENT CRENSHAW, KARLA R. WILLIAMS, LARRY BROWN, TIFFANY HALL, KRISTEN M.J. HARRIS, MICHAEL SMITH, KHYLA CRAINE, NYAH CARMICHAEL, SHANNA DUBOSE, EBONY DAVIS, NICOLE BREWER, KARLA HARLIN, BRIAN HARRIS, KATRINA GIPSON, CANDICE B.N. REYNOLDS, by and through their parents or guardians, DENISE PATTERSON, MOISE

CASE NO.: 97-CV-75231-DT
HON. PATRICK J. DUGGAN

MARTINEZ, LARRY CRENSHAW, HARRY J. WILLIAMS, PATRICIA SWANBROWN, KAREN A. MCDONALD, LINDA A. HARRIS, DEANNA A. SMITH, ALICE BRENNAN, IVY RENE CHARMICHAEL, SARAH L. DUBOSE, INGER DAVIS, BARBARA DAWSON, ROY D. HARLIN, WYATT G. HARRIS, GEORGE C. GIPSON, SHAWN R. REYNOLDS, AND CITIZENS FOR AFFIRMATIVE ACTION'S PRESERVATION,

Defendant-Intervenors.

OPINION

(Filed Feb. 26, 2001)

On October 14, 1997, Plaintiffs filed a class action against the University of Michigan and various University officials asserting that the University had violated Title VI of the Civil Rights Act, as well as the Equal Protection Clause of the Fourteenth Amendment, by considering race as a factor in admissions decisions at its College of Literature, Science, and the Arts ("LSA"). On December 13, 2000, this Court issued an Opinion addressing only the University Defendants' arguments that the LSA's admissions programs pass constitutional muster as a narrowly tailored means of achieving diversity, *see Gratz v. Bollinger,* 122 F.Supp.2d 811 (E.D. Mich. 2000), reserving Defendant-Intervenors' argument that the LSA's admissions programs pass constitutional muster as narrowly tailored means of remedying past and current discrimination by

the University for later consideration. This Opinion shall address the Defendant-Intervenors' arguments.

Discussion

As explained in the Court's prior Opinion in this matter, racial classifications are subject to the strictest of scrutiny, under which "such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227, 115 S. Ct. 2097, 2113, 132 L. Ed. 2d 158 (1995). In opposition to Plaintiffs' motion for summary judgment, Defendant-Intervenors contend that the LSA's admissions programs "serve[] the uncontroverted compelling interest in remedying LS & A's past and current discrimination against minorities." (Def.-Intervenors' Resp. Pls.' Renewed Mot. Summ. J. at 2-3). In particular, Defendant-Intervenors contend that the University's race-conscious admissions policies serve to "remedy the present effects of discrimination that it has caused or tolerated; remedy the negative racial climate that it has sustained or that has been caused by others on the campus; and, remedy or off-set the effects of any current discrimination in which it is engaged." (*Id.* at 5).

In a proper case, racial classifications may be justified by a State's interest in remedying the effects of past or present "identified" discrimination. *Shaw v. Hunt,* 517 U.S. 899, 909, 116 S. Ct. 1894, 1902, 135 L. Ed. 2d 207 (1996) (citing *Croson,* 488 U.S. at 498-506, 109 S. Ct. at 724-28). To rise to the level of "compelling," however, such

an interest must meet two conditions. "First, the discrimination must be 'identified discrimination.'"[1] *Id.* (citing *Croson,* 488 U.S. at 499, 500, 505, 507, 509, 109 S. Ct. at 724-25, 725, 728, 729, 730). While states and their subdivisions may take remedial action when they possess evidence of past or present discrimination, "'they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief.'" *Id.* (quoting *Croson,* 488 U.S. at 504, 109 S. Ct. at 727). "Second, the institution that makes the racial distinction must have had a 'strong basis in evidence' to conclude that remedial action was necessary, 'before it embarks on an affirmative-action program.'" *Id.* at 910, 116 S. Ct. at 1903 (quoting *Wygant v. Jackson Bd. of Educ.,* 476 U.S. 267, 277, 106 S. Ct. 1842, 1848, 90 L. Ed. 2d 260 (1986) (plurality opinion) (emphasis added)).

"A generalized assertion of past discrimination in a particular industry or region is not adequate because it 'provides no guidance for a legislative body to determine

---

[1] Defendant-Intervenors assert that "courts have been more tolerant of race-conscious action taken to remedy race-based denial of educational opportunity" and have stated that "race-conscious steps to ensure equal educational opportunity for minorities may be constitutionally permitted *even in the absence of particular identified discrimination.*" (Def.-Intervenors' Resp. Pls.' Mot. at 4-5) (emphasis added). Each of the cases cited by Defendant-Intervenors, however, involved voluntary desegregation plans designed to eliminate the vestiges of past *de jure* or *de facto* segregation in the educational context. Defendant-Intervenors have provided no evidence that the State of Michigan ever maintained a segregated higher education system, or that the admissions policies at issue were designed as voluntary plans to integrate its higher education system. Therefore, the Court is satisfied that Defendant-Intervenors must present evidence of particular identified discrimination.

the precise scope of the injury it seeks to remedy.'" *Id.* at 909, 116 S. Ct. at 1902-03 (quoting *Croson,* 488 U.S. at 498, 109 S. Ct. at 724 (O'Connor, J.)). For this reason, the Supreme Court has repeatedly stated that "an effort to alleviate the effects of societal discrimination is not a compelling interest." *Id.* at 909-10, 116 S. Ct. at 1903 (citing *Wygant,* 476 U.S. at 274-75, 276, 288, 106 S. Ct. at 1847-48, 1854).

When the race-based classifications of an affirmative action plan are challenged, "the proponents of the plan have the burden of coming forward with evidence providing a firm basis for inferring that the . . . identified discrimination in fact exists or existed and that the race-based classifications are necessary to remedy the effects of the identified discrimination." *Contractors Ass'n of E. Pa. v. Philadelphia,* 91 F.3d 586, 597 (3d Cir. 1996); *see also Concrete Works of Colo. v. Denver,* 36 F.3d 1513, 1521-23 (10th Cir. 1994). Once this burden of production has been met, "the opponents of the program must be permitted to attack the tendered evidence and offer evidence of their own tending to show that the identified discrimination did or does not exist and/or that the means chosen as a remedy do not 'fit' the identified discrimination." *Id.* Ultimately, the plaintiffs challenging the program retain the burden of persuading the court that a violation of the Equal Protection Clause has occurred by either persuading the court that the race-based preferences were not intended to serve the asserted compelling interest, or that there is no strong basis in the evidence as a whole to support the defendant's conclusion that the identified discrimination actually existed, or that the continuing effects of such discrimination necessitated the chosen remedy. *Id.*

The significance of the burden of persuasion differs depending upon which path the plaintiff chooses to pursue. If the plaintiff's theory is that the race-based preferences were adopted with an intent unrelated to remedying past discrimination, "the plaintiff has the burden of convincing the court that the identified remedial motivation is a pretext and that the real motivation was something else." *Id.* "The ultimate issue under this theory is one of fact, and the burden of persuasion on that ultimate issue can be very important." *Id.* at 597-98.

When the plaintiff proceeds under the theory that, "although the [defendant] may have been thinking of past discrimination and a remedy therefor, its conclusions with respect to the existence of discrimination and the necessity of the remedy chosen have no strong basis in evidence," the plaintiff bears the burden of persuading the court that the facts alleged as support for the defendant's conclusions are not accurate. *Id.* at 598. Under this approach, "[t]he ultimate issue as to whether a strong basis in evidence exists is an issue of law" and, therefore, "[t]he burden of persuasion in the traditional sense plays no role in the court's resolution of that ultimate issue." *Id.*

Defendant-Intervenors assert that the University's race-conscious admissions policies serve to "(1) remedy the present effects of practices of LS & A that have served to exclude African Americans and Latinos from enrollment, (2) provide a critical mass of students to remedy LS & A's hostile racial climate, and (3) remedy the discriminatory effects of LS & A's current admissions criterion." (Def.-Intervenors' Resp. Pls.' Renewed Mot. Summ. J. at 7).

1. The "Actual" Purpose Behind the LSA's Race-Conscious Admissions Programs

Plaintiffs initially assert that the Court should reject Defendant-Intervenors' arguments because it is clear from the University Defendants' extensive briefing on this issue that the "actual purpose" behind the University's race-conscious admissions policies was not to remedy past or present discrimination, but rather, to achieve "diversity." (Pls.' 8/24/00 Br. at 2-7). According to Plaintiffs, "neither the University nor the intervenors even pretend that the University was actually motivated by the interests that intervernors ask this Court to consider. The remedial justifications are just rationales that the intervenors believe the University *might have* chosen to adopt to justify their discriminatory admissions policies." (*Id.* at 5) (emphasis in original).

The Supreme Court has cautioned that when engaging in an Equal Protection analysis, the Court must look behind a defendant's "articulated" reason to determine whether there is sufficient evidence to conclude that the "articulated" reason is genuine, *i.e.*, that the articulated reason actually motivated the race-conscious program or policy. *See, e.g., Shaw,* 517 U.S. at 910, 116 S. Ct. at 1902; *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 728, 102 S. Ct. 3331, 3338, 73 L. Ed. 2d 1090 (1982). When conducting such an inquiry, the Court does not look behind the "articulated" interest to decipher for itself whether there were other justifiable reasons that may have supported the race-conscious program. "[A] racial classification cannot withstand strict scrutiny based upon what 'may have motivated the [State].'" *Shaw,* 517 U.S. at 908 n.4, 116 S. Ct. at 1902 n.4. The state actor must show that

the alleged objective was the "actual purpose" for the discriminatory classification. *Id.*

In allowing Defendant-Intervenors to join this action, the Sixth Circuit found it persuasive "that the University is unlikely to present evidence of past discrimination by the University itself or of the disparate impact of some current admissions criteria, and that these may be important and relevant factors in determining the legality of a race-conscious admissions policy." *Grutter v. Bollinger,* 188 F.3d 394, 398 (6th Cir. 1999). The Court shall interpret the Sixth Circuit's statement as an indication that although the University Defendants have never claimed that the LSA's race-conscious admissions programs were implemented to remedy past or present discrimination, Defendant-Intervenors should be given the opportunity to present evidence that remedying discrimination was the "actual" purpose behind the LSA's admissions programs.

According to Defendant-Intervenors, "[d]espite the University's sole reliance on *Bakke's* diversity rationale in this litigation, the record quite clearly shows that the University was motivated by both diversity and remedial purposes in adopting its affirmative action program." (Def.-Intervenors' 9/1/00 Sur-Reply at 5). It is not enough, however, that remedial measures "may have" motivated the LSA in adopting the challenged admissions programs. As part of their burden, Defendant-Intervenors must establish that remedial measures "actually" motived the challenged race-conscious programs. *See Shaw,* 517 U.S. at 908 n.4, 116 S. Ct. at 1902 n.4.

In this Court's opinion, Defendant-Intervenors have failed to present any evidence that the discrimination

alleged by them, or the continuing effects of such discrimination, was the real justification for the LSA's race-conscious admissions programs. Although not dispositive, the University Defendants have never claimed that the challenged programs were implemented as a means to remedy past discrimination. *See Hogan,* 458 U.S. at 727 n.16, 102 S. Ct. at 3339 n.16 (stating that even if court were to assume discrimination had occurred, challenged policy would nonetheless be invalid because the state failed to establish that the legislature "intended" the challenged policy to compensate for any perceived discrimination); *Lutheran Church-Mo. Synod v. F.C.C.,* 141 F.3d 344, 354 (D.C.Cir. 1998) (rejecting interest asserted by Department of Justice in support of F.C.C. administrative regulation because "[a]s the independent agency which promulgated the regulation in question, [the F.C.C.'s] view of the government interest it was pursuing must be accepted").

Furthermore, the terms of the admissions policies themselves indicate that they were developed to achieve diversity, not as a means to remedy discrimination. For example, the 1997 guidelines refer to "students who meet the spirit of contributing to a *diverse class.*" (Pls.' 4/9/99 Exs., Ex. AA at ¶ F.1) (emphasis added). The 1998, 1999, and 2000 admissions guidelines state that "[a]dmission is based on several factors that combine to produce a freshman class that provides *a mixture of attributes and characteristics* valued by the University," and that it is the University's "sincere belief that this *mixture* contributes to the education of our students, as well as fulfills the University's mission to prepare society's future citizens and leaders." (Pls.' 4/9/99 Exs., Ex. DD at ¶ I.B.4 & Ex. EE at 1 (1998); Kolbo Aff., Ex. A at ¶ I.B.4 & Ex. B at 1 (1999); Ex.

C at ¶ I.B.4 & Ex. D at 2 (2000) (emphasis added)). The guidelines also state that the University was "committed to an educational experience that involves students interacting with other students of different races and ethnicities than their own." (Pls.' 4/9/99 Exs., Ex. EE at 7 (1998); Kolbo Aff., Ex. A at ¶ I.B.4 & Ex. B at 1 (1999); Ex. C at ¶ I.B.4 & Ex. D at 2 (2000)).

Moreover, Defendant-Intervenors acknowledge that the admissions policies at issue were a result of the Michigan Mandate. (Def.-Intervenors' 9/1/00 Sur-Reply at 7). President Duderstadt has "described the Michigan Mandate as an attempt to better respond to the diversity of the nation and the world, by trying to change the nature of the institution itself so that all ethnic groups could be brought fully into the life and leadership of the institution," and enacted "with the goal of building a multicultural learning community which values, respects, and draws intellectual strength from the rich diversity of people of different races." (Pls.' 6/1/99 Exs., Exs. H & I). In a series of letters written in 1995, President Duderstadt explained the Michigan Mandate as the University's "commitment to make the University of Michigan a national and world academic leader in the *racial and ethnic diversity* of its faculty, students, and staff," and repeatedly referred to the University's efforts to "achieve diversity," "better reflect ethnic, racial, and socioeconomic diversity," and "to build a richly diverse community of students." (Pls.' 6/1/99 Exs., Exs. D, E, & F) (emphasis added).

The fact that none of the evidence cited by Defendant-Intervenors even discusses past or present discriminatory conduct toward Native Americans is further evidence that the University's race-conscious admissions policies were not designed with a remedial purpose in mind. *See Croson,*

488 U.S. at 506, 109 S. Ct. at 728 (stating that the "random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination . . . suggests that perhaps the city's purpose was not in fact to remedy past discrimination"). The justifications for a suspect policy or program must be "genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia,* 518 U.S. at 533, 116 S. Ct. at 2275.

"[A] tenable justification must describe actual state purposes, not rationalizations for actions differently taken." *Id.* at 535, 116 S. Ct. at 2277. Defendant-Intervenors have presented no evidence that the LSA's race-conscious admissions programs were enacted to counter the present effects of past discriminatory policies or the discriminatory impact of the other SCUGA factors. To the contrary, all of the evidence supports the conclusion that the University's race-conscious admissions programs were specifically designed for the purpose advanced by the University Defendants, *i.e.* racial and ethnic diversity. Therefore, even if the Court were to assume that the alleged discrimination or continuing effects thereof exists today, Defendant-Intervenors' argument would nonetheless fail as there is no evidence that the LSA's race-conscious admissions programs were actually put in place to remedy such discrimination. *See Hogan,* 458 U.S. at 727 n.16, 102 S. Ct. at 3339 n.16.

2. The University's History of Discrimination

Conversely, even if Defendant-Intervenors had presented evidence that the LSA's race-conscious admissions programs were actually implemented in an effort to

remedy past or current discrimination, Defendant-Intervenors' argument would nonetheless fail because Defendant-Intervenors have failed to establish a genuine issue of fact as to whether the identified discrimination in fact exists or existed, as well as whether the race-conscious admissions policies are necessary to remedy such discrimination. Defendant-Intervenors assert that the LSA's consideration of race in admissions decisions "serves compelling interests in remedying the continuing effects of long-standing discrimination at the University." (*Id.* at 6). According to Defendant-Intervenors, "Professor James Anderson's expert report and other evidence in the record establish that since its founding, the University has engaged in racially discriminatory and exclusionary practices against minorities." (*Id.* at 7). Specifically, Defendant-Intervenors contend that:

> The record shows that the University tolerated the presence of a few minorities, but that it refused to integrate them meaningfully into campus life, establishing racially segregated housing, maintaining segregated fraternities and sororities, and – when the University finally permitted African-American students to live on campus in dormitories – acquiescing to white students who refused to room with them. Through the years and to the present, minority students have struggled to maintain their presence on campus, enduring racial incidents on campus and in classrooms, from other students, faculty and staff. The University, even after receiving these complaints and corroborating student experiences, either refused to act, or did so in a woefully inadequate manner.

(*Id.* at 7).

In his expert report, Professor James Anderson, Head of the Department of Educational Policy Studies and Professor of History at the University, recounts the history of the University from 1817 to the present. According to Professor Anderson, although the University was founded in 1817, it was not until 1868 that the first African American students were enrolled, and up until 1930, African Americans were systematically excluded from University-owned housing. (Anderson Rep. at 3-10). On-campus housing remained segregated up until the 1960s.

Moreover, despite the fact the Michigan Civil Rights Congress had called for an end to discriminatory clauses in the constitutions and by-laws of all campus organizations in 1949, and in 1952 the Committee on Student Affairs accepted a proposal to eliminate discriminatory clauses in fraternity and sorority by-laws, then University President Harlan Hatcher rejected such proposals and allowed student organizations to continue to prohibit membership based on race, religion, or color. (*Id.* at 5). According to one observer, as of 1959, no fraternity had ever accepted an African American student. (*Id.* at 11). Through the late 1950's, the University refused to integrate its housing by continuing its policy of respecting students' wishes who did not wish to live with a student of another race. (*Id.* at 7).

In 1966, the Defense Department conducted an investigation of the University's compliance with Title VI of the Civil Rights Act of 1964, ultimately urging the University to increase its enrollment of African American students, faculty, and staff. (*Id.* at 9). In 1967, the University's first black professor, Professor Albert Wheeler, wrote a letter to then Vice Presidents Allan Smith and Frank Pierpont expressing his fear that the University had

developed an "unfavorable image" among the African American community. (*Id.* at 15). During her deposition, a 1971 graduate of the LSA recounts how University staff actively discouraged her from applying to the LSA, and that one admissions counselor specifically told her that "community college might be better suited for [her]." (Glenn Dep. at 10).

During the 1970s, minority students often voiced their concern regarding the University's failure to address campus racism and to increase minority enrollment. (Anderson Rep. at 17-19). According to Defendant-Intervenors, throughout the 1970s and 1980s, the University "continued to tolerate racial tensions on campus that had a devastating effect on minority enrollment, and minority participation and sense of belonging on campus." (Def.-Intervenors' Br. Resp. Pls.' Mot. Summ. J. at 13; Anderson Rep. at 32-34). Racial tension in the dorms became widely publicized in the early 1970s. (Anderson Rep. at 35). "Both University officials and students acknowledge[d] the severity of racial tensions within the dormitory system, and the inadequacy of any attempt to improve them." (*Id.*).

A 1980 study of African American students at the University revealed that eighty-five percent of the students surveyed had encountered racial discrimination while at the University, ninety percent wanted more African American students at the University, and over sixty percent stated they had little or no contact with African American faculty and staff. (*Id.* at 52). Expert Dr. Joe R. Feagin, Ph.D., a graduate research professor in sociology at the University of Florida, also reports that a 1980 survey of more than two hundred black undergraduates at the University of Michigan revealed that "most had faced verbal and other racial harassment since arrival" at

the University, mostly comprised of "total avoidance by white students and subtle actions or statements with racist overtones." (Feagin Rep. at 9). Between 1976 and 1985, the University suffered a drastic decline in minority enrollment, losing 34 percent of its African American students. Niara Sudakasa, Report on Minorities, Handicappers and Women in Michigan's Colleges and Universities at 10 (1986).

From 1986 to 1987, a number of racist events occurred at the University, including the distribution of racist fliers, vandalism in the minority lounge, and racist jokes broadcast over the University's campus radio station. (Anderson Rep. at 62; Ransby Dep. at 19-21, 33-34). An investigation resulted in a report recognizing that African American students at the University were "likely to be subjected to ridicule, abuse, and threat," as well as "instructors who make openly racist comments, inside and outside of class," and that the radio broadcasts were "only a symptom of a pervasive atmosphere on this campus." (Anderson Rep. at 63-64).

In 1995, students continued to voice concerns regarding racism on the University's campus, citing incidents in which racist messages were scrawled on walls and sent via e-mail. (Anderson Rep. at 74-75). Professor Anderson, however, also reports that "[g]eneral perceptions of racial climate on campus among students of color have become more positive," and that a 1994 study revealed that "students of color in general do not perceive tremendous tension, nor do White students feel overwhelmed by hostility from students of color." (*Id.* at 76-77). According to Professor Anderson, "perceptions of racial climate, particularly in the residence halls, are significantly more positive in the post Michigan Mandate era." (*Id.* at 77).

Dr. Feagin also reports of "several dozen complaints by black students and staff at the University" describing racist incidents from 1990 through 1999, including racist graffiti, racially derogatory remarks, white supremacist group lettering, racist slurs by whites on or near campus, racist e-mail messages, and racist literature. (Feagin Rep. at 9-10). Dr. Feagin attributes the University's racially hostile environment to white students (*Id.* at 14-18), white professors' perceived attitudes toward minority students (*Id.* at 21-23), negative experiences with campus security personnel (*Id.* at 24-26) (*see also* Def.-Intervenors' 8/11/00 Exs., Vol. IV, Ex. 7), and negative experiences with other white staff members (*Id.* at 27-28).

It is also Dr. Walter Allen's expert opinion that "African American and Latino/Hispanic students regularly experience racial incidents on the [University's] campus" and "describe a hostile racial environment." (Allen Rep. at 13). According to Dr. Allen, African American and Latino students report being the subject of racial stereotypes in the classroom and that "white faculty and white students avoid interacting with them outside of class." (*Id* . at 14). Defendant-Intervenors have also presented portions of deposition testimony from several past and present minority students, who have each recounted incidents in which they have experienced racial hostility or stereotyping by other students or faculty members. (Def.-Intervenors' 8/11/00 Exs., Vol. IV, Exs. 1-6).

3. Present Effects of the University's Prior Discrimination

As an initial matter, the Court notes that Defendant-Intervenors have presented the Court with no evidence that the University or the LSA ever facially discriminated

against minorities in admissions decisions. There is absolutely no evidence that minorities were ever outright excluded from admission to the University; nor is there any evidence that the University's past admissions programs had a discriminatory impact on minority applicants.

Furthermore, with the exception of racial hostility, which Defendant-Intervenors have presented evidence of well into the 1990s, all of the University's allegedly discriminatory conduct cited by the Defendant-Intervenors, *i.e.* segregated housing, segregated fraternities, and policies allowing non-minority students to refuse to room with minority students, occurred years before the challenged admissions policies were put in place. Where the identified discrimination has occurred in other than the immediate past, "the inquiry into the legitimacy of a race-based classification turns to the state's basis for finding continuing effects of such past discrimination." *Podberesky v. Kirwan,* 956 F.2d 52, 56 (4th Cir. 1992), *vacated on other grounds,* 38 F.3d 147 (4th Cir. 1994); *Wygant,* 476 U.S. at 280, 106 S. Ct. at 1850; *Fullilove v. Klutznick,* 448 U.S. 448, 480, 100 S. Ct. 2758, 2775, 65 L. Ed. 2d 902 (1980) ("We recognize the need for careful judicial evaluation to assure that any . . . program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal."). According to Defendant-Intervenors, "[t]he continuing effects of the discrimination against minority students is evident in the fact that students of color, understandably concerned with the school's reputation for discrimination and racial insensitivity, *may* be deterred from applying." (Def.-Intervenors' Br. Resp. Pls.' Renewed Mot. Summ. J. at 17) (emphasis added).

As evidence that the University's prior discriminatory policies have continually deterred African Americans from attending the University, Defendant-Intervenors cite the fact that as the percentage of African Americans graduating high school in Michigan rose from 8.9% in 1976 to 10.97% in 1983, the percentage of African Americans enrolled at the LSA decreased from 7.2% to 5.14%. (*Id.* at 18).

As the Supreme Court has recognized, reliance on statistical disparities to establish a *prima facie* pattern or practice of discriminatory conduct is not appropriate where special qualifications are required. *See Croson,* 488 U.S. at 501, 109 S. Ct. at 726 ("But it is equally clear that when special qualifications are required to fill a particular job, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.") (internal quotation omitted). "[W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task." *Id.* at 501-02, 109 S. Ct. at 726. Defendant-Intervenors have presented no evidence regarding the number of African Americans graduating high school in 1976 or 1983 that were qualified to attend the University, nor, more importantly, the number of high school graduates even interested in attending college.

Furthermore, the Court finds Defendant-Intervenors' statistical data from 1976 and 1983 to be of little probative value with respect to whether such policies served to deter African American and other minority students from applying to the University in 1995 when the first of the challenged admissions programs was implemented. As

Defendant-Intervenors themselves acknowledge, "[t]he years after the passage of the Civil Rights Act of 1964 saw a marked increase in the number of African American students attending the University." (*Id.* at 10). Although there were only approximately thirty-five African Americans enrolled at the University in 1935, in 1966, African American students constituted 1.2 percent of the University's 32,000 student population, 3.5 percent in 1970, 6.8 percent in 1972, and 7.1 percent in 1990. The fact that the percentage of minority students attending the University has steadily increased tends, in this Court's opinion, to indicate that any deterrent effect the University's prior discriminatory policies and practices may have had has dwindled in recent times.

Defendant-Intervenors also assert that "[t]he parents of the children who present themselves for admissions to Michigan today, did not have the economic and social advantage gained from attending an institution such as Michigan, and thus cannot pass on the full range [of] advantages to their children that many white parents, who are more likely to have attended Michigan, can." (Def.-Intervenors' Br. Resp. Pls.' Renewed Mot. Summ. J. at 18). Defendant-Intervenors, however, have provided no link between any particular identified discrimination on behalf of the University and the social or economic disadvantage of such parents. As previously discussed, generalized assertions of past discrimination in a particular spectrum, such as college admissions, or of societal discrimination, do not provide a strong basis for engaging in remedial action. *See Shaw,* 517 U.S. at 909-10, 116 S. Ct. at 1902-03.

Although Defendant-Intervenors frame their argument in terms of remedying the continuing effects of the

University's prior discrimination, it is clear from the evidence cited by Defendant-Intervenors that the alleged deterrence stems from the past and current racial hostility on campus and/or the University's alleged acquiescence in such hostility, not from any "identified" discrimination by the University itself. Accordingly, the Court rejects Defendant-Intervenors' contention that the University has a compelling interest in remedying any present effects of its own past discrimination.

4. The University's Past and Current Hostile Racial Climate

Defendant-Intervenors have presented ample evidence that minority students at the University have been, and continue to be subjected to, racial hostility, stereotyping, and isolation. According to Defendant-Intervenors, "[t]his hostile environment is perpetuated by various aspects of the University community, including other students, University staff, and professors." (Def.-Intervenors' Br. Resp. Pls.' Renewed Mot. Summ. J. at 19). As Defendant-Intervenors explain, "[b]y increasing the numbers of African-Americans and Latinos, race-conscious admissions provides the critical mass of minority students required to remedy this negative social climate and the detrimental isolation that they experience." (*Id.*).

According to Defendant-Intervenors' experts, studies show that race-conscious admissions programs serve to remedy this negative racial climate by creating a "critical mass" of African American and Latino students on campus such that African American and Latino students are "able to form the necessary community and social support networks associated with success." (*Id.* at 23-24; Allen Rep. at 7). Defendant-Intervenors further assert that

"[t]his increase in numbers serves to reduce the racial isolation that is so harmful to the educational experiences of minority students, increase intergroup interaction, and thus help diminish negative racial stereotypes and racial hostility." (*Id.* at 24).

As Defendant-Intervenors correctly acknowledge, although the University itself is not the cause of the alleged racial hostility, it may take affirmative steps to dismantle a system of racial exclusion in which it has become a passive participant. *Croson,* 488 U.S. at 492, 109 S. Ct. at 720. Defendant-Intervenors, however, have provided no evidence that the University has been a "passive participant" in the more recent racial episodes outlined above. As the Supreme Court has acknowledged, there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for African Americans. This observation, however, by itself, is not sufficient to justify race-conscious measures. *Id.* at 499, 109 S. Ct. at 724.

5. Discriminatory Effect of the University's Current Admissions Policies

Next, Defendant-Intervenors assert that the University's race-conscious admissions policies are necessary to counteract other factors in its admissions policies that have an adverse impact on minority applicants. (Def.-Intervenors' Br. Resp. Pls.' Renewed Mot. Summ. J. at 26-32). Defendant-Intervenors have presented the expert reports of William T. Trent, and Drs. Jacob Silver and James Rudolph, in support of their assertion that other factors considered in the University's admissions policies have an adverse impact on minority applicants, specifically African Americans and Latino Americans.

According to Defendant-Intervenors, the SCUGA factors "are used to enhance the GPAs or selection index point totals of white applicants to a significantly greater degree than for African-American and Latino applicants, rendering the latter less competitive in the admissions process." (*Id.* at 30; Trent Rep. at 7; Silver & Rudolph Rep. at 14-15). For example, African American and Latino applicants are less likely to attend high schools that receive a high "S" (school) factor, or offer advanced courses contributing to an applicant's "C" (curriculum) factor. (*Id.* at 27-28; Trent Rep. at 4-7). Similarly, due to the University's past history of discrimination, it is less likely that a minority student will receive any alumnus "A" (alumni) points. (*Id.* at 29; Trent Rep. at 7; Silver & Rudolph Rep. at 16-17). Furthermore, minority students are less likely to reside in the forty-five northern Michigan counties that the University identifies as under-represented under its "G" (geography) factor.[2] (*Id.* at 30; Trent Rep. at 7; Silver & Rudolph Rep. at 16).

In this Court's opinion, Defendant-Intervenors' reliance upon the discriminatory impact of the other SCUGA factors is misplaced as the SCUGA factors are but one component of the overall race-conscious admissions programs that Plaintiffs seek to invalidate. Because both the allegedly discriminatory SCUGA factors and the racial preferences are part of the same program, there is no overall discriminatory impact.

---

[2] The "U" (unusual) factor includes under-represented minority status.

Moreover, if the current selection criteria have a discriminatory impact on minority applicants, it seems to this Court that the narrowly tailored remedy would be to remove or redistribute such criteria to accommodate for socially and economically disadvantaged applicants of all races and ethnicities, not to add another suspect criteria to the list. Accordingly, the Court finds Defendant-Intervenors' contention to be unpersuasive.

Conclusion

Defendant-Intervenors have failed to cite any evidence that the LSA's race-conscious admissions criteria were actually motivated by a desire to remedy any past or present discrimination by the University. Furthermore, the Court is satisfied that the LSA's race-conscious admissions programs cannot be justified as measures to remedy either the current effects of past discrimination, or the discriminatory impact of the LSA's other admissions criteria. Because Defendant-Intervenors have failed to present sufficient evidence to create a genuine issue of material fact in support of their claim that the LSA's admissions programs in existence from 1995 through 1998 were a narrowly tailored means of achieving the compelling governmental interest of remedying the present effects of past discrimination, Plaintiffs are entitled to summary judgment on this issue.[3]

[3] The Court notes that its decision today has no practical effect on its prior decision regarding the LSA's admissions programs in existence for 1999 and 2000, as such policies were previously found to be constitutional as a narrowly tailored means of achieving a compelling

(Continued on following page)

To survive summary judgment, the nonmoving party "is required to do more than simply show that there is some 'metaphysical doubt as to the material facts.'" *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 800 (6th Cir. 1994) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986)). "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Anderson v. Liberty Lobby,* 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202 (1986). The Court is satisfied that Defendant-Intervenors have failed to sustain this burden. Therefore, Plaintiffs' motion for summary judgment with respect to Defendant-Intervenors' claim that the University was justified in using race as a factor in admissions to remedy the present effects of past discrimination shall be granted, and Defendant-Intervenors' claims that the University was justified in using race as a factor in admissions to remedy the present effects of past discrimination shall be dismissed.

An Order consistent with this Opinion shall issue forthwith.

/s/ Patrick J. Duggan
PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

Date: Feb. 26, 2001

governmental interest, *i.e.* diversity. *See Gratz,* 122 F.Supp.2d at 827-31.

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APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JENNIFER GRATZ and PATRICK HAMACHER, for themselves and all others similarly situated,

Plaintiffs,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, the BOARD OF REGENTS of the UNIVERSITY OF MICHIGAN,

Defendants,

and

EBONY PATTERSON, RUBEN MARTINEZ, LAURENT CRENSHAW, KARLA R. WILLIAMS, LARRY BROWN, TIFFANY HALL, KRISTEN M.J. HARRIS, MICHAEL SMITH, KHYLA CRAINE, NYAH CARMICHAEL, SHANNA DUBOSE, EBONY DAVIS, NICOLE BREWER, KARLA HARLIN, BRIAN HARRIS KATRINA GIPSON, CANDICE B.N. REYNOLDS, by and through their parents or guardians, DENISE PATTERSON, MOISE MARTINEZ, LARRY CRENSHAW, HARRY J.

CASE NO.: 97-CV-75231-DT
HON. PATRICK J. DUGGAN

WILLIAMS, PATRICIA SWAN-BROWN, KAREN A. MCDONALD LINDA A. HARRIS DEANNA A. SMITH, ALICE BRENNAN, IVY RENE CHARMICHAEL, SARAH L. DUBOSE, INGER DAVIS, BARBARA DAWSON, ROY D. HARLIN, WYATT G. HARRIS, GEORGE C. GIPSON, SHAWN R. REYNOLDS, AND CITIZENS FOR AFFIRMATIVE ACTION'S PRESERVATION,

Defendant-Intervenors.

_____/

ORDER

(Filed Feb. 26, 2001)

At a session of said Court, held in the U.S. District Courthouse, City of Detroit, County of Wayne, State of Michigan, on FEB 26 2001.

PRESENT: THE HONORABLE PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

On October 14, 1997, Plaintiffs filed a class action against the University of Michigan and various University officials asserting that the University had violated Title VI of the Civil Rights Act, as well as the Equal Protection Clause of the Fourteenth Amendment, by considering race as a factor in admissions decisions at its College of Literature, Science, and the Arts ("LSA"). On December 13, 2000, this Court issued an Opinion addressing only the University Defendants' arguments that the LSA's admissions programs pass constitutional muster as a narrowly

tailored means of achieving diversity, *see Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000), reserving Defendant-Intervenors' argument that the LSA's admissions programs pass constitutional muster as narrowly tailored means of remedying past and current discrimination by the University for later consideration. For the reasons stated in an Opinion issued this date,

IT IS ORDERED that Plaintiffs' motion for summary judgment with respect to Defendant-Intervenors' claim that the University was justified in using race as a factor in admissions to remedy the present effects of past discrimination is **GRANTED**; and

IT IS FURTHER ORDERED that Defendant-Intervenors' claims that the University was justified in using race as a factor in admissions to remedy the present effects of past discrimination are **DISMISSED**.

/s/ Patrick J. Duggan
PATRICK J. DUGGAN
UNITED STATES
DISTRICT JUDGE

Date: FEB 26 2001
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APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JENNIFER GRATZ and PATRICK HAMACHER, for themselves and all others similarly situated, Plaintiffs, v. LEE BOLLINGER, JAMES J. DUDERSTADT, the BOARD OF REGENTS of the UNIVERSITY OF MICHIGAN, Defendants, and EBONY PATTERSON, RUBEN MARTINEZ, LAURENT CRENSHAW, KARLA R. WILLIAMS, LARRY BROWN, TIFFANY HALL, KRISTEN M.J. HARRIS, MICHAEL SMITH, KHYLA CRAINE, NYAH CARMICHAEL, SHANNA DUBOSE, EBONY DAVIS, NICOLE BREWER, KARLA HARLIN, BRIAN HARRIS KATRINA GIPSON, CANDICE B.N. REYNOLDS, by and through their parents or guardians, DENISE PATTERSON, MOISE MARTINEZ, LARRY CRENSHAW, HARRY J.	CASE NO.: 97-CV-75231-DT HON. PATRICK J. DUGGAN **ORDER**

WILLIAMS, PATRICIA SWAN-BROWN, KAREN A. MCDONALD, LINDA A. HARRIS, DEANNA A. SMITH, ALICE BRENNAN, IVY RENE CHARMICHAEL, SARAH L. DUBOSE, INGER DAVIS, BARBARA DAWSON, ROY D. HARLIN, WYATT G. HARRIS, GEORGE C. GIPSON, SHAWN R. REYNOLDS, AND CITIZENS FOR AFFIRMATIVE ACTION'S PRESERVATION,

Defendant-Intervenors.

ORDER

(Filed Mar. 21, 2001)

At a session of said Court, held in the
U.S. District Courthouse, City of Detroit,
County of Wayne, State of Michigan,
on _____.

PRESENT: THE HONORABLE PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

On October 14, 1997, Plaintiffs filed a class action against the University of Michigan and various University officials asserting that the University had violated Title VI of the Civil Rights Act, as well as the Equal Protection Clause of the Fourteenth Amendment, by considering race as a factor in admissions decisions at its College of Literature, Science, and the Arts ("LSA"). On December 13, 2000, this Court issued an Opinion addressing the University Defendants' arguments that the LSA's admissions policies constituted a narrowly tailored means of achieving the educational benefits of a diverse student body,

concluding, *inter alia,* that the LSA's admissions programs in existence from 1995 through 1998 were unconstitutional, but that the LSA's admission programs for 1999 and 2000 were constitutional. *See Gratz v. Bollinger,* 122 F. Supp. 2d 811 (E. D. Mich. 2000).

On January 30, 2001, the Court issued an Order reflecting the findings in its December 13, 2000 Opinion. In the same Order, the Court certified that the issues addressed in its December 13, 2000 Opinion and January 30, 2001 Order involved controlling questions of law, as to which substantial ground for difference of opinion existed, and that an immediate appeal from such Order would materially advance the termination of this litigation.

On February 26, 2001, this Court issued an Opinion and Order granting Plaintiffs' motion for summary judgment with respect to Defendant-Intervenors' claim that the University was justified issuing race as a factor in admissions to remedy the present effects of past discrimination. This matter is currently before the Court on Defendant-Intervenors' "Motion for Entry of Final Judgment Pursuant to 54(b), and in the alternative, 59(e) Motion to Add a Certification for Interlocutory Appeal."

Rule 54(b) of the Federal Rules of Civil Procedure provides that when multiple parties are involved, "the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." The Court is satisfied that there is no just reason for delay with respect to the Defendant-Intervenors' claims. The Court has fully adjudicated Defendant-Intervenors' claims. Furthermore, the Court

has already certified that an immediate appeal with respect to the University Defendants' claims regarding diversity would materially advance this litigation. In fact, both Plaintiffs and the University Defendants have already instituted appellate proceedings with respect to the Court's January 30, 2001 Order. In this Court's opinion, entering final judgment with respect to Defendant-Intervenors' claims would avoid the possibility of piecemeal appeals and provide for a more efficient utilization of judicial resources. Therefore, the Court finds that there is no just reason for delay and accordingly,

IT IS HEREBY ORDERED that final judgment is entered with respect to Defendant-Intervenors' claims.

/s/ Patrick J. Duggan
PATRICK J. DUGGAN
UNITED STATES
DISTRICT JUDGE

Date: MAR 21 2001

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APPENDIX H

Nos. 01-1333/1416/1418/1438/1447/1516

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JENNIFER GRATZ AND PATRICK HAMACHER FOR THEMSELVES AND ALL OTHER SIMILARLY SITUATED,

Plaintiffs-Appellants (01-1333 and 01-1418), Plaintiffs-Appellees (01-1416)

v.

LEE BOLLINGER, ET AL.,

Defendants-Appellees (01-1333 and 01-1418) Defendants-Appellants (01-1416),

EBONY PATTERSON, ET AL.,

Defendants-Appellees (01-1333) Intervening Defendants (01-1416) Intervening Defendants-Appellees (01-1418) Intervening Defendants-Appellants (01-1438)

BARBARA GRUTTER,

Plaintiff-Appellee (01-1447 and 01-1516),

ORDER

(Filed Oct. 19, 2001)

v.

LEE BOLLINGER, ET AL.,

Defendants-Appellants (01-1447),

and

KIMBERLY JAMES, ET AL.,

Intervening Defendants-Appellants (01-1516).

BEFORE: MARTIN, Chief Circuit Judge; BOGGS, SILER, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, and GILMAN, Circuit Judges

The plaintiffs in these consolidated appeals filed a petition seeking initial *en banc* review of the decisions of the two district courts before whom the cases were heard. The petition was referred to the three-judge panel to which the appeals had been assigned for oral argument on October 23, 2001.

The panel requested that all of the active judges of the court be polled to determine whether or not the petition should be granted and the appeals be presented in the first instance to the *en banc* court for argument and decision. A majority of the active judges voted to grant the petition; therefore

IT IS ORDERED that the petition for initial hearing *en banc* be, and it hereby is, GRANTED. It is FURTHER ORDERED the oral argument scheduled for October 23, 2001 is cancelled; oral argument to the *en banc* court

will be on Thursday, December 6, 2001, at 1:30 P.M., EST, in Cincinnati, Ohio.

ENTERED BY ORDER OF
THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX I

Nos. 01-1333/1416/1418/1438/1447/1516

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JENNIFER GRATZ and PATRICK HAMACHER, for themselves and all others similarly situated,

Plaintiffs-Appellants
(Nos. 01-1333 and 01-1418)
Plaintiffs-Appellees
(No. 01-1416)

v.

LEE BOLLINGER, et al.,

Defendants-Appellees
(Nos. 01-1333 and 01-1418)
Defendants-Appellants
(No. 01-1416)

EBONY PATTERSON, et al.

Defendant-Appellees
(No. 01-1333)
Intervening Defendants
(No. 01-1416)
Intervening Defendants-Appellees
(No. 01-1418)
Intervening Defendants-Appellants
(No. 01-1438)

BARBARA GRUTTER,
Plaintiff-Appellee
(Nos. 01-1447 and 01-1516)

LEE BOLLINGER, et al.
Defendants-Appellants
(No. 01-1447)

ORDER

(Filed Nov. 16, 2001)

KIMBERLY JAMES, et al.,)
Intervening Defendants-Appellants)
(No. 01-1516))

BEFORE: MARTIN, Chief Circuit Judge; BOGGS, SILER, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, and GILMAN, Circuit Judges

These consolidated matters now come before the court upon the motion of Plaintiff-Appellee Grutter (Nos. 01-1447/1516) for an order terminating this court's previously entered stay of the injunction issued by the district court, and upon the joint motion of the University defendants to expand the time allotted for oral argument. By order of October 19, 2001 the court had directed that these appeals to be [sic] heard by the court sitting *en banc*.

On April 5, 2001 a panel of the court considered a motion of the University defendants in No. 01-1447 requesting a stay of the order of the district court. Having found that motion well taken, the court ordered the injunction stayed during the pendency of the appeal. The court has now considered the instant motion to terminate that stay and the response filed in opposition to the motion. A majority of the judges in regular active service having voted against the motion,

IT IS ORDERED that the motion to terminate the stay be, and it hereby is, DENIED.

Upon consideration of the defendants' motion to enlarge the time for oral argument and having considered as well the response to the motion, a majority of the judges in regular active service have voted that oral argument proceed as follows:

In Nos. 01-1333/1416/1418, *Gratz, et al. v. Bollinger, et al.*

Plaintiffs will have 20 minutes for argument

University defendants will have 15 minutes for argument

Intervening minority students will have 5 minutes for argument

In No. 01-1438, *Gratz, et al. v. Bollinger, et al.*

Intervening minority students will have 15 minutes for argument (including any argument time ceded to the University defendants)

Gratz appellees will have 15 minutes for argument

In Nos. 01-1447/1516, *Grutter v. Bollinger, et al.*

University defendants will have 20 minutes for argument (including any argument time ceded to intervening minority students)

Plaintiff will have 20 minutes for argument

Oral argument will be held in Cincinnati, Ohio on Thursday, December 6, 2001, beginning at 1:30 P.M. The argument will be held in Room 403, Potter Stewart United States Courthouse. The cases will be called as shown above.

ENTERED BY ORDER OF
THE COURT

/s/ Leonard Green
Leonard Green Clerk

APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JENNIFER GRATZ and PATRICK HAMACHER, for themselves and all others similarly situated,

Plaintiffs,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Defendants.

and

EBONY PATTERSON, RUBEN MARTINEZ, LAURENT CRENSHAW, KARLA R. WILLIAMS, LARRY BROWN, TIFFANY HALL, KRISTEN M.J. HARRIS, MICHAEL SMITH, KHYLA CRAINE, NYAH CARMICHAEL, SHANNA DUBOSE, EBONY DAVIS, NICOLE BREWER, KARLA HARLIN, BRIAN HARRIS, KATHRINA GIPSON, CANDICE B.N. REYNOLDS, by and through their parents or guardians, DENISE PATTERSON, MOISE MARTINEZ, LARRY CRENSHAW, HARRY J.

CASE NO.:
97-CV-75231-DT
HON. PATRICK J. DUGGAN

JOINT SUMMARY OF UNDISPUTED FACTS REGARDING ADMISSIONS PROCESS

(Filed Dec. 13, 2000)

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Defendant-Intervenors.

_____/

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December 6, 2000

Hon. Patrick J. Duggan
United States District Court for
the Eastern District of Michigan
231 West Lafayette Boulevard
Detroit, Michigan 48234

Re: *Gratz, et al. v. Bollinger, et al.*, No. 97-75231

Dear Judge Duggan:

On behalf of the Defendants and the Plaintiffs, we hereby submit this Joint Proposed Summary of Undisputed Facts Regarding Admissions Process.

Sincerely,
/s/ John Payton/bb
John Payton

cc: Kirk Kolbo, Esq.
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JOINT PROPOSED SUMMARY OF UNDISPUTED FACTS REGARDING ADMISSIONS PROCESS

1. The Parties

Defendant, the University of Michigan ("University") is a public institution of higher education located in Ann Arbor, Michigan. According to Defendants, "[a]dmission to the University is selective, meaning that many more students apply each year than can be admitted," and the University rejects many qualified applicants. (Defs.' 5/3/99 Br. at 4). For example, the University received some 13,500 applications for admission to the fall 1997 entering freshman class of its College of Literature, Science and the Arts ("LSA"), from which it elected to enroll 3,958 freshmen. (*Id.*) Among its stated admissions objectives, the University strives to compose a class of students from diverse racial, ethnic, cultural, geographic, and socioeconomic backgrounds and diverse talents. The University views diversity as essential to its educational mission. According to the University, diversity "increase[s] the intellectual vitality of [its] education, scholarship, service, and communal life." (Defs.' 5/3/99 Br. at 5). To facilitate diversity, it is undisputed that the University considers

race as one factor, among others, in making admissions decisions.

Plaintiffs Jennifer Gratz and Patrick Hamacher are Caucasian residents of the State of Michigan, who applied for admission into the 1995 and 1997 freshman classes of LSA, respectively. On January 19, 1995, Plaintiff Gratz was notified that a final decision regarding her admission had been delayed until early to mid April 1995, as she was considered by the University to be "well qualified, but less competitive than the students who ha[d] been admitted on first review." (Pls.' 4/9/99 Br. at 3). On April 24, 1995, Plaintiff Gratz was notified that the University was unable to offer her admission. In this letter, the University invited her to "place [her] name on [the] extended waiting list by completing and returning the enclosed form before May 10" because "[t]here may be a possibility that space will be available for a few students." (*Id.*). In the same letter, the University informed Plaintiff Gratz that it "expect[ed] to take very few students" from the extended waiting list and "recommend[ed] students make alternative plans to attend another institution." (*Id.*). The University did not receive an extended waiting list form from Plaintiff Gratz. She enrolled in the University of Michigan at Dearborn, from which she graduated in the spring of 1999.

Plaintiff Hamacher was notified on November 19, 1996, that a decision regarding his admission was "postponed" until mid-April of 1997. According to the University's letter, a decision regarding Plaintiff Hamacher had been postponed because, "[a]lthough [his] academic credentials [were] in the qualified range, they [were] not at the level needed for first review admission." (*Id.* at 3). On April 8, 1997, Plaintiff Hamacher's admissions application

was rejected, and he was informed, in substantially similar form as Plaintiff Gratz, about the extended waiting list. Plaintiff Hamacher did not accept the University's invitation to place his name on the extended waiting list by returning a completed form. Thereafter, Plaintiff Hamacher enrolled at Michigan State University.

The Defendant-Intervenors are seventeen African-American and Latino students who have applied for, or intend to apply for, admission to the University, joined by the Citizens for Affirmative Action's Preservation, a nonprofit organization whose stated mission is to preserve opportunities in higher education for African American and Latino students in Michigan. According to Defendant-Intervenors, the resolution of this case directly threatens African American and Latino students' access to higher education.

2. The Admissions Policies

The Office of Undergraduate Admissions ("OUA") oversees and implements the LSA admissions process and evaluates all applications to LSA. In order to promote consistency in the review of a large number of applications, OUA uses written guidelines in effect for each academic year. OUA generally expects admissions counselors to make admissions decisions in accordance with the guidelines, and counselors generally conform admissions decisions to the guidelines. There is some discretion to depart from the guidelines, and counselors are expected to discuss any departures from the guidelines with a supervisor. According to the University, because "admissions is more art than science," application review "is ultimately a matter of human judgment." (Defs.' 7/17/00 Br., Ex. H).

OUA considers many factors in making admissions decisions, including high school grades, standardized test scores, high school quality, curriculum strength, geography, alumni relationships, under-represented minority status, personal achievement, and leadership. The University considers African-Americans, Hispanic-Americans, and Native Americans to be under-represented minorities. The role that race plays in the outcome of admissions decisions varies. There are cases in which race is dispositive in the outcome, and there are cases in which it is not dispositive. According to the University, all of the students admitted to the University are qualified to attend the University, and for the purpose of these motions, Plaintiffs assume this proposition to be true. It is undisputed that the University's consideration of race in the admissions process has the effect of admitting virtually every qualified under-represented minority applicant. The actual mechanics of the admissions policies at issue in this case are undisputed.

Academic Years 1995 and 1996

Upon receipt of an application, OUA clerks first recalculated an applicant's high school grade point average, based upon the applicant's academic courses from tenth and eleventh grades ("GPA 1"). The applications were then referred to admissions counselors, each of whom was assigned a specific geographic territory and reviewed all applications from that territory. The admissions counselors then evaluated a student's application according to the "SCUGA" factors, including the quality of an applicant's high school ("S"), the strength of an applicant's high school curriculum ("C"), an applicant's unusual circumstances ("U"), an applicant's geographical residence

("G"), and an applicant's alumni relationships ("A"). For some, but not all, of these factors, such as school quality and curriculum strength, counselors could add points to an applicant's GPA 1 score, ultimately culminating in what was referred to as an applicant's GPA 2 score. GPA 2 did not include all of the factors considered in the admissions process. It did not include any point value based on an applicant's Michigan residency or membership in an under-represented minority group.

In making admissions decisions, counselors referred to a set of "Guidelines" tables, with GPA 2 ranges represented on the vertical axis, and ACT/SAT scores represented on the horizontal axis. Each of these tables was divided into cells that included one or more possible courses of action, designated as admit, reject, delay for additional information, or postpone for reconsideration during final review. Counselors used the tables to guide their admissions decisions by comparing a particular applicant's GPA 2 score and ACT/SAT score with the appropriate cell of the table.

In 1995, the Guidelines consisted of four different tables, one for applicants from each of the following groups: (1) in-state, non-minority applicants; (2) out-of-state, non-minority applicants; (3) in-state, minority applicants; and (4) out-of-state, minority applicants. In 1996, only two tables were used, one for in-state applicants and one for out-of-state applicants. Each individual cell on the 1996 tables, however, contained guideline courses of action for minority applicants and guideline courses of action for non-minority applicants.

The tables sometimes contained different guideline courses of action for minority applicants and non-minority

applicants in the same cell, so that in certain situations, applicants with the same GPA 2 score and ACT/SAT score were subject to different admissions decisions based upon their racial or ethnic status. For example, under the 1995 Guideline tables, Plaintiff Gratz, who had a GPA 2 score of 3.8 and an ACT score of 25, and was an in-state, non-minority applicant, fell within a cell calling for postponement of an admissions decision regarding her application, while an in-state or out-of-state minority student with the same GPA 2 score and ACT score would have fallen within a cell calling for admission.

From 1995 through 1998, the admissions guidelines also provided that qualified applicants from under-represented minority groups be admitted as soon as possible. Specifically, the guideline stated: "All qualified American Indians, Black/African American, and Hispanic/Latino American applicants will be admitted as soon as high probability of success can be predicted." (Pls.' Exs. Y & Z). As part of its efforts to recruit as many under-represented minorities as possible from what it considers to be a disproportionately small pool of qualified minority applicants, the University "tend[ed] not to postpone decisions on their applications," under the belief that minority applicants were more likely to enroll if promptly notified of their admission. (Defs.' 5/3/99 Br. at 17-18).

The University used a "rolling" admissions system for LSA, under which OUA reviewed and acted on applications throughout the admissions season, in contrast to a "precipice" system in which all admissions decisions are made on the same day, after all applications have been received and reviewed. A committee called the Enrollment Working Group ("EWG") was responsible for ensuring that the University met its target enrollment. It accomplished

this task by monitoring admissions against a myriad of objectives, including the achievement of a desired distribution of students among academic units, the appropriate balance between in-state and out-of-state enrollment, and the enrollment of a class with the attributes the University desires.

According to the University, the primary benefit of a rolling admissions system is that it permits early notification of admission, which is a powerful recruiting tool. The University states that it also carefully managed its rolling admissions system to afford consideration to those applications historically submitted later in the academic year, and that for the academic years 1995 through 1998, it used a technique that it called "protected seats" to accomplish this purpose. Certain groups – including athletes, foreign students, ROTC candidates, and under-represented minorities – were referred to as "protected categories." EWG projected how many applications from these protected categories the University was likely to receive after a given date by reference to how many were received from applicants in these groups after that same date in the prior year. Based on these projections, OUA then paced admissions decisions to permit full consideration of expected applications from these protected categories without over-enrolling the class. As explained by the University:

> This space is "protected" to enable OUA to achieve the enrollment targets of the University and of the individual units while using a rolling admissions system. If this space is not filled by qualified candidates from the designated groups toward the end of the season, it is used to admit qualified candidates remaining in the applicant pool, including applicants from the postponed pool or extended waiting list, applicants to other units, etc.

(Pls.' Ex. H at 13).

Academic Year 1997

For the 1997 academic year, the University used essentially the same procedure as in 1996, with one relevant modification. OUA gave consideration to race (and a few other factors listed below) in part through the tables and in part through GPA 2. Accordingly, GPA 2 was restructured to include additional point values (as shown in the SCUGA guidelines) for the "U" factor so that applicants could receive points for under-represented minority status, socioeconomic disadvantage, attendance at a high school with a predominantly under-represented minority population, or under-representation in the unit to which the student was applying (*e.g.*, men in nursing). OUA retained the two tables it used in 1996 for in-state and out-of-state residents, which contained guideline courses of action for applicants who benefited from the expanded "U" factor and applicants who did not. However, OUA modified the actual guideline courses of action for each cell in recognition of the fact that race was now included in GPA 2.

Under the 1997 procedures, Plaintiff Hamacher received a GPA 2 score of 3.0 and an ACT score of 28, placing him in a cell on the in-state applicant table, which generally called for postponement of the admissions decision. The guideline course of action for a minority applicant in the same cell on the table generally called for admission.

Academic Year 1998

Beginning with the 1998 academic year, OUA dispensed with the Guideline tables and cells and the SCUGA decimal point system, in favor of a selection index system, on which a potential applicant could score a maximum of 150 points based on a uniform set of criteria. The selection index scale was then divided linearly into ranges generally calling for admissions disposition as follows: 100-150 (admit); 95-99 (admit or postpone); 90-94 (postpone or admit); 75-89 (delay or postpone); 74 and below (delay or reject). As was true with the tables, counselors were generally expected to and generally did conform admissions decisions to the selection index scale and retained some discretion to make departures from the scale after consulting with a supervisor.

An applicant received selection index points based upon the counselor's review of the application for a variety of factors, including high school academic GPA, standardized test scores, academic quality of an applicant's high school, strength or weakness of high school curriculum, in-state residency, alumni relationship, personal essay, and personal achievement or leadership. Most important for purposes of this action, under a "miscellaneous" category, an applicant was entitled to twenty points based upon his or her membership in an under-represented racial or ethnic minority group. According to the University, "[t]he development of the selection index for admissions in 1998 changed only the mechanics, not the substance, of how race and ethnicity [were] considered in admissions." (Defs.' 5/3/99 Br. at 57). "The difference between the selection index and the grids, therefore, has no legal significance." (*Id.*).

Academic Years 1999 and 2000

For the 1999 and 2000 academic years, OUA continued to use the selection index system, under which every applicant who is a member of an under-represented racial or ethnic minority group receives twenty points. (7/17/00 Kolbo Aff., Ex. D). However, starting with the academic year of 1999, the University created an Admissions Review Committee ("ARC"), comprised of members of OUA and the Office of the Provost, to provide an additional level of consideration beyond the initial counselor review for some cases as identified by the counselors. Counselors may, in their discretion, "flag" an application for ARC review after determining that the applicant (1) is academically prepared to succeed at the University, (2) has achieved a minimum selection index score, and (3) possesses a quality or characteristic important to the University's composition of its freshman class, such as high class rank, unique life experiences, challenges, circumstances, interests or talents, socioeconomic disadvantage, and under-represented race, ethnicity, or geography. (Defs.' 7/17/00 Br. at 22; Ex. AA).

The ARC reviews only a portion of all of the applications. The bulk of admissions decisions are executed based on selection index score parameters set by the EWG. The parameters determine what admissions action – admit, defer, or deny – will be executed with respect to all applications that counselors have reviewed and entered into the OUA database at a given time. The ARC then meets periodically and reviews the files of applicants who were "flagged" by counselors, but who were not admitted based on the EWG parameters. After discussing these applications, the ARC decides whether to admit, defer, or deny the applicant.

In addition, starting with the academic year 1999, the University abandoned its prior approach of immediately admitting all qualified under-represented minorities, and now defers or postpones some of these applications. Similarly, the University has discontinued its use of "protected seats."

No. 02-516

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JENNIFER GRATZ AND PATRICK HAMACHER,
PETITIONERS,

V.

LEE BOLLINGER, JAMES J. DUDERSTADT, AND
THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN CONDITIONAL OPPOSITION TO CERTIORARI BEFORE JUDGMENT

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QUESTIONS PRESENTED

1. Whether the district court correctly applied settled principles of *stare decisis* in determining that the University of Michigan's College of Literature, Science, and the Arts' admissions program is constitutional under this Court's decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

2. If this Court declines to give *stare decisis* effect to its decision in *Bakke*, whether the educational benefits that flow from a diverse student body to an institution of higher education, its students, and the public it serves, are sufficiently compelling to permit the school to consider race and/or ethnicity as one of the many factors in making admissions decisions through a "properly devised" admissions program.

3. Whether the current admissions processes of the University of Michigan's College of Literature, Science, and the Arts represent such a "properly devised" admissions program.

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Robert L. Stern et al., *Supreme Court Practice* (8th ed. 2002) 14, 15

16 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3924.1 18

This case presents a challenge to the University of Michigan's College of Literature, Science, and the Arts' admissions program, which takes race and ethnicity into account as one of many factors in making admissions decisions. Respondents, the Board of Regents of the University of Michigan, Lee Bollinger, and James J. Duderstadt, hereby conditionally oppose the petition for a writ of certiorari before judgment.

Petitioners' challenge presents the same legal issues—in a factually distinct setting—as the petition for a writ of certiorari in *Grutter v. Bollinger*, No. 02-241. That petition presents the question whether the University of Michigan Law School's admissions policy is consistent with the requirements of the Fourteenth Amendment's Equal Protection Clause and Title VI of the Civil Rights Act of 1964. The *Grutter* and *Gratz* lawsuits progressed on parallel tracks before different district court judges.

Appeals in both cases proceeded simultaneously, and were heard on the same day by the *en banc* Sixth Circuit. The court of appeals' opinion in the *Grutter* case, issued on May 14, 2002, states that an opinion in *Gratz* would be "forthcoming." *See Grutter* Pet. App. 4a n.2. That opinion has not yet issued.

Although this case—like *Grutter*—presents an issue of national importance, certiorari is not warranted in *Gratz* for the same reasons it is not warranted in *Grutter*. The identified division of lower court authority on the primary legal question presented—whether achieving the educational benefits of diversity is a compelling interest that justifies the consideration of race as a factor in admissions—is shallow, limited and undeveloped.

This case also faces the additional obstacle that it seeks certiorari before judgment in the court of appeals, which this Court's Rule 11 provides shall be granted only on a showing that the "case is of such imperative public importance as to justify the deviation from normal appellate practice and to

require immediate settlement in this Court." Petitioners hardly contend that this case satisfies that standard as a stand-alone petition. Rather, Petitioners point to a line of cases holding that certiorari before judgment may be appropriate once this Court has otherwise agreed to hear another related case presenting the same fundamental legal question.

On that point, Respondents agree that this Court should grant review in this case if (and only if) it also grants the petition in *Grutter*. In that event, the Court should limit its review to certain of the cases pending in the court of appeals, and in any event, limit its review to the first question presented, which involves the important legal question of the permissibility of the consideration of race as a factor in higher education admissions. The questions involving qualified immunity, the consideration of the defunct prior admissions systems, and the district court's exercise of its equitable authority to grant or deny injunctive relief, should remain in the court of appeals, for that court's consideration in the first instance.

To accomplish this, as described more fully below, if this Court grants certiorari in *Grutter*, it should also grant certiorari before judgment in *Gratz* either on the limited question of the constitutionality of the current admissions program of the College of Literature, Science, and the Arts, or in certain (but not all) of the *Gratz* appeals now pending in the court of appeals from the various decisions of the United States District Court for the Eastern District of Michigan (Duggan, J.).

STATEMENT OF THE CASE

Factual Background

1. Admission to LS&A. As a preeminent public institution of higher education, the University of Michigan has made an educational judgment that a student body that is broadly diverse, including with respect to race and ethnicity, is "an integral component of [the University's] mission"

because it "increase[s] the intellectual vitality of [its] education, scholarship, service, and communal life." Pet. App. 4a (internal quotations and citation omitted). Thus, to "facilitate the University's goal" of obtaining the educational benefits of diversity, the College of Literature, Science, and the Arts ("LS&A") considers race and ethnicity as one of many factors as it "strives to compose a class of students" that is broadly diverse. *Id.*

LS&A shares this commitment to obtaining the educational benefits of diversity with the University of Michigan Law School, but it implements its commitment through a differently-crafted admissions program, as it receives many thousands more applications per year than the Law School. At the time this litigation commenced, the Office of Undergraduate Admissions ("OUA") received and reviewed approximately 13,500 applications to LS&A—a figure that has since risen to over 17,000 applications per year. To promote consistency in the review of applications, while preserving admissions counselors' ability to exercise subjective judgment, OUA uses written guidelines, which are reviewed annually and altered periodically. These guidelines identify a range of factors, academic and otherwise, that help reveal a student's potential to contribute—individually, and in conjunction with classmates—to the educational environment at LS&A. Admission to LS&A is selective because thousands more students apply each year than can be admitted.

2. Current Admissions System. LS&A put its current admissions system into place in 1999. The district court describes that system as being in place through 2000, the most recent admissions season as of the time of the district court's decision. It remains in place today. Under this present system, one of OUA's approximately 20 professional admissions counselors individually reviews each application. Pet. App. 38a. Each counselor reviews all applications from an assigned geographic territory. *Id.* "There is no separate

review or assignment of under-represented minority applicants . . . ." *Id.* The counselors evaluate all applications based on the same set of factors identified in the guidelines. JA 1147.[1] LS&A does not employ quotas, numerical targets or goals for admission or enrollment of minority students. Pet. App. 34a-35a.

Counselors initially evaluate applications aided by a "selection index" worksheet listing factors the University believes important in composing a class. Counselors select a numerical value for each listed factor, up to a possible total of 150 points. JA 1118, 1147. Academic factors account for up to 110 points. Eighty points are available for academic GPA from tenth and eleventh grades, and 12 points are available for standardized test scores. *Id.* Every applicant from the same secondary school receives the same number of points—up to ten—to account for the academic strength of that school. *Id.* at 1118, 1148-49. In addition, counselors subtract up to four points for an applicant who chose a weaker curriculum when a stronger one was available, and add up to eight points for an applicant who selected more challenging courses. *Id.* at 1118, 1149-50.

Applicants receive up to 40 points for other factors that indicate an applicant's potential contribution to LS&A. *Id.* at 1118, 1150. They may receive 20 points for *one* of the following: membership in an underrepresented minority group,[2] socioeconomic disadvantage, attendance at a predominantly minority high school, athletics, or at the

[1] Citations to "JA" refer to the Joint Appendix filed in the court of appeals.

[2] LS&A considers African-Americans, Hispanics, and Native Americans to be underrepresented minorities for purposes of considering race or ethnicity in admissions. JA 1471. Because LS&A receives sufficient numbers of applications from students of other racial and ethnic groups, it can enroll meaningful numbers of such students without conscious consideration of race or ethnicity in the admissions process. *See id.* at 1445.

Provost's discretion. *Id.* at 1118, 1153-54. Reflecting the University's commitment both to state residents and to broader geographic diversity, counselors assign ten points for Michigan residency, six additional points for residency in underrepresented Michigan counties, and two points for residency in underrepresented states. *Id.* at 1118, 1150-51. Applicants receive one or four points for alumni relationships. *Id.* at 1118, 1151. The personal essay can earn up to three points. *Id.* at 1152. Based on an applicant's activities, work experience, and awards, counselors may assign up to five points for leadership and service, and five more points for personal achievement. *Id.* at 1118, 1152-53.

The counselor totals the points to calculate the selection index score, which is entered into OUA's database. That score sometimes, but not always, serves as the basis for the ultimate admissions decision. *Id.* at 1162.

The University recognizes that a selection index score may not always reflect an applicant's potential contribution to LS&A. Therefore, as part of counselors' complete review of application files, OUA asks counselors to identify applications that would benefit from review by the Admissions Review Committee ("ARC"), which evaluates more complex cases through an informal discussion format. *Id.* at 1161-62. A counselor may, in his or her discretion, "flag" an application for ARC discussion if the counselor determines that the applicant: (1) is academically prepared to do the work at LS&A; (2) has a selection index score above a certain level; and (3) possesses at least one of a variety of qualities or characteristics important to the University's composition of its freshman class, such as underrepresented race, ethnicity, or geography; high class rank; socioeconomic disadvantage; unique life experiences, challenges, circumstances, interests or talents; connections to the University community; or athletics. Pet. App. 39a-40a.

LS&A makes admissions decisions throughout the admissions season. Those decisions are generally executed

in one of two ways. *First*, the Enrollment Working Group ("EWG"), which monitors enrollment during the admissions season, sets selection index score parameters that are used in determining the admissions action—admit, defer, or deny—for all reviewed applications then pending in OUA's database. Decisions are made periodically, and EWG adjusts the parameters, when necessary, to pace admissions appropriately. *See* JA 1162. *Second*, flagged applications not admitted based on the EWG parameters are forwarded to the ARC, which decides whether to admit, defer, or deny, after the committee considers the applicant's entire file. *Id.*

3. Discontinued Admissions Programs: 1995-1998. The admissions programs used before 1999 differed from the current system in three ways that, taken together, the district court concluded were unlawful. The University has undisputedly eliminated all three practices. *Id.* at 1160, 1163.

First, before the selection index, counselors used "grids" to assist in making admissions decisions. Each grid's horizontal axis listed standardized test score ranges, and its vertical axis listed ranges of "GPA2"—an index incorporating multiple factors, including academic GPA, school strength, curriculum rigor, and exceptional leadership or extracurricular activities. Each grid cell listed admission action options. *Id.* at 436-39.

Between 1995 and 1997, OUA accounted in different ways for other factors—including Michigan residency, alumni status, and race—that the University considered important in the admissions process but that the grid structure did not already incorporate: by creating multiple grids, by listing different "action codes" within the same grid, and/or by including that factor in the GPA2 index. In 1995, OUA used four grids: (1) in-state non-minority applicants, (2) out-of-state non-minority applicants, (3) in-state minority applicants, and (4) out-of-state minority applicants. Pet. App. 33a. In 1996, OUA used only two grids (one for in-state and legacy students and one for out-of-state students), and the cells listed two rows of "action codes"—one for underrepresented minorities and another for non-minorities. *Id.* In 1997, OUA again used two grids, but considered race in two ways: partly by factoring it into GPA2, and partly by accounting for it in the distribution of action codes. *Id.*

Second, in 1999, OUA eliminated the portion of the guidelines that permitted clerks to have rejection letters sent to some applicants with very low grades and scores without counselor review, while requiring counselor review for all applicants from certain groups, including athletes, private school students, and underrepresented minorities. JA 440-41, 1163. Despite the guidelines' language, however, the clerks generally forwarded all applications to counselors because they felt uncomfortable rejecting applicants without counselor input. *Id.* at 1457-58.

Third, in 1999, LS&A discontinued its use of so-called "protected seats" as an enrollment management technique for its rolling admissions process. *Id.* at 1163. The practice had been used because students from certain groups—such as minorities, ROTC candidates, recruited athletes, and foreign students—tended to apply later in the admissions season. *Id.* at 1478-79. Towards the end of each admissions cycle, EWG projected the number of applications expected from these groups, based on the number received the prior year, so OUA could pace admissions decisions to permit consideration of these anticipated applications before the class was filled. *Id.* at 1461-65. The groups for which EWG made projections were called "protected categories," and the projections were called "protected seats." Students from "protected categories" who applied late in the admissions cycle were not by any means guaranteed admission. To the contrary, OUA evaluated them in the same way, against the same criteria, as all other applicants, regardless of race. *Id.* at 1474-75.

4. Challenges to Enrolling Meaningful Numbers of Minority Students. LS&A vigorously recruits qualified minority applicants. Pet. App. 42a. It does so because in order to provide the educational benefits of racial and ethnic diversity to all students, learning environments must include meaningful numbers of minority students. JA 1834.

LS&A's year-round minority recruiting efforts include attending recruiting fairs in areas with substantial minority populations; hosting workshops for high school counselors; coordinating campus visits for minority high school juniors; corresponding with individual minority candidates; and hosting a Spring Welcome Day for admitted minority students. *Id.* at 1487-88. OUA also maintains an office in Detroit to recruit local high school students, most of whom are African-American. *Id.* at 1480-81.

Despite LS&A's efforts, recruiting alone is insufficient to enroll a student body with meaningful numbers of underrepresented minority students because the pool of qualified underrepresented minority applicants is significantly smaller than the pool of qualified non-minority applicants. Pet. App. 42a; JA 1441, 1492. In addition, intense competition with peer institutions for these highly sought-after students compounds the pool size problem by depressing the "yield"—the proportion of admitted students who choose to enroll. JA 1492, 3991-92. As a result of the small pool size, OUA ends up admitting virtually all qualified underrepresented minority applicants.[3] *Id.* at 1472-73, 1491-92.

[3] Plaintiffs' suggestion that the University has a current policy of admitting all qualified minority applicants is simply wrong. In their petition, plaintiffs quote from a memo created in 1995 (Pet. 5), well before the current admissions systems were implemented. Moreover, to the extent that prior admissions guidelines included language discussing the admission of all qualified minority students, it is undisputed that no such language appears in the 1999 or 2000 admissions guidelines. Pet. App. 113a; *see also id.* at 118a.

Indeed, even with these efforts, LS&A is only able to provide *some* of the educational benefits of diversity because meaningful numbers of minority students are not present in all significant learning contexts. *Id.* at 1836, 1917.

Without considering race and ethnicity in admissions, the proportion of admitted and enrolled underrepresented minority students would drop precipitously,[4] leaving most of LS&A's learning contexts with very few minority students, or none at all. *Id.* at 1876, 1916. Under those circumstances, the University could not obtain the educational benefits of diversity. *Id.* at 1836.

Procedural History

Plaintiffs Jennifer Gratz and Patrick Hamacher, both of whom are white, were unsuccessful applicants for admission to LS&A for the classes that enrolled in 1995 and 1997, respectively. On October 14, 1997, Plaintiffs brought this action on behalf of a class of similarly-situated applicants. The complaint asserted that the admissions policy of LS&A violates the Fourteenth Amendment's Equal Protection Clause, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. §§ 1981, 1983. The plaintiffs sought declaratory and injunctive relief, and compensatory and punitive damages against the Board of Regents of the University of Michigan, as well as Lee Bollinger and James J. Duderstadt, both of whom are former presidents of the University of Michigan.

On February 5, 1998, a group of seventeen African-American and Latino students who applied, or intended to apply, for admission to the University of Michigan, along with Citizens for Affirmative Action's Preservation, a nonprofit organization that seeks to preserve opportunities in higher education for African-American and Latino students, moved to intervene as defendants in the case. The district

[4] Despite the expected dramatic drop in underrepresented minorities, only a slightly higher proportion of non-minority students would be admitted. *See id.* at 1876.

court denied the motion to intervene. The court of appeals reversed that denial on an interlocutory appeal (heard along with an appeal from the denial of intervention in *Grutter*). *See Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999).

By an order dated December 23, 1998, the district court certified a class, pursuant to Fed. R. Civ. P. 23(b)(2), of those applicants who applied for and were denied admission to LS&A and who "are members of those racial and ethnic groups, including Caucasian, that defendants treat less favorably on the basis of race in considering their application for admission." Pet. App. 3a & n.2. The district court also bifurcated the case into separate liability and damages phases. On September 26, 2000, the Sixth Circuit denied the University's petition for interlocutory review of the district court's certification order, pursuant to Fed. R. Civ. P. 23(f).

Following extensive discovery, on December 13, 2000, the district court issued an opinion granting, in part, cross motions for summary judgment. The district court concluded, following Justice Powell's opinion in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978), that the University of Michigan has a compelling interest in seeking to obtain the educational benefits that flow from a student body that is diverse in many ways, including with respect to racial and ethnic diversity. Pet. App. 27a-28a. In reaching that conclusion, the district court also determined that, through the unrebutted reports of nationally-renowned experts in history, sociology, psychology, and education, the University had presented "solid evidence" of the educational benefits of diversity. *Id.* at 22a-25a.

The district court noted, however, that "Justice Powell's opinion in *Bakke* fails to set forth any bright line regarding what constitutes a permissible consideration of race in admissions decisions," and that it "is often a thin line that divides the permissible from the impermissible." *Id.* at 34a. The district court concluded that the admissions programs in operation in 1999 and 2000 satisfied the requirements set

forth in *Bakke* and were therefore constitutional, whereas the systems in place from 1995 through 1998, taken together, "cross that thin line from the permissible to the impermissible." *Id.* (footnote omitted). The district court also granted the individual defendants' motions for summary judgment on qualified immunity grounds, holding that a reasonable official in the position of the individual defendants might not have known that the admissions systems in place from 1995 to 1998 would be found unconstitutional.

On January 10, 2001, the plaintiffs and defendants jointly requested that the district court, in connection with the entry of an order reflecting the conclusions set forth in its December 13, 2000 opinion, certify interlocutory cross-appeals pursuant to 28 U.S.C. § 1292(b). The district court, by order dated January 30, 2001, did so. On February 9, 2001, the district court also entered final judgment, pursuant to Fed. R. Civ. P. 54(b), in favor of the individual defendants who had prevailed on their qualified immunity defenses.

Following the district court's § 1292(b) certification of questions arising from its January 30, 2001 order, the plaintiffs and defendants each petitioned the court of appeals to permit the interlocutory appeals to proceed. By order dated March 26, 2001, the court of appeals granted the petition and cross-petition. Those appeals are pending in the court of appeals as Nos. 01-1416 and 01-1418. The plaintiffs also filed a notice of appeal, No. 01-1333, pursuant to 28 U.S.C. § 1292(a), with respect to the final order dismissing the claims against the individual defendants and denying the requested injunctive relief. Those three appeals were subject to consolidated briefing and argument in the court of appeals.

In a separate opinion, dated February 26, 2001, the district court rejected the arguments advanced by the intervening defendants that LS&A's consideration of race as a factor in admissions could be justified as a means to remedy the present effects of past discrimination. By order

dated March 21, 2001, the district court also separately entered final judgment under Fed. R. Civ. P. 54(b) with respect to the claims of the intervening defendants, thereby permitting those defendants to bring an interlocutory appeal from its summary judgment rulings. The intervening defendants filed a notice of appeal as to the district court's order rejecting their defenses. That appeal, No. 01-1438, was briefed separately from the other three appeals in *Gratz*, but argued along with those appeals.

All four appeals were argued before the *en banc* court of appeals on December 6, 2001—the same date that the court heard argument in *Grutter*. The court of appeals issued its decision in *Grutter* on May 14, 2002. In that opinion, the court of appeals noted that it would "address the challenge to the University of Michigan's admissions policy, *Gratz v. Bollinger*, Nos. 01-1333, 01-1416, 01-1418, 01-1438, in a forthcoming opinion." *Grutter* Pet. App. 4a n.2. The court of appeals has not yet decided the *Gratz* case.

REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED FOR THE SAME REASONS SET FORTH IN OPPOSITION TO CERTIORARI IN *GRUTTER*.

The Brief in Opposition in *Grutter*, submitted by Respondents the Board of Regents of the University of Michigan and its present and former officials, sets forth in detail the reasons this Court should not, at this time, grant certiorari to address the question whether institutions of higher education may consider race and ethnicity in admissions to obtain the educational benefits of diversity. Respondents in this case will not repeat the reasons set forth therein, but incorporate them by reference. Because the division of authority among the courts of appeals is shallow and undeveloped, it is unnecessary for this Court to intervene at this time.

II. IF THIS COURT DENIES THE PETITION IN *GRUTTER*, THE HIGH STANDARD APPLICABLE TO PETITIONS FOR CERTIORARI BEFORE JUDGMENT IS NOT MET.

If this Court denies the petition in *Grutter*, it follows *a fortiori* that this Court should deny this petition for certiorari before judgment. The standard for granting certiorari before judgment is very demanding. "A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." S. Ct. Rule 11.

Petitioners argue that, if this Court otherwise grants certiorari in *Grutter*, it should also grant this petition for certiorari before judgment because it is a related case presenting essentially the same legal issues. Assuming this Court denies the petition for certiorari in *Grutter*, however, nothing else even remotely suggests that Petitioners have met the rigorous standard set forth in Rule 11 and this Court's cases regarding certiorari before judgment.

Petitioners contend that because this is a class action lawsuit presenting issues of national importance, the Court should grant certiorari before judgment. Those reasons do not, however, distinguish this case from many other cases in which this Court appropriately awaits resolution in the courts of appeals before exercising its certiorari jurisdiction. Petitioners cannot and do not suggest that *Gratz* presents a *better* vehicle than *Grutter* for this Court to resolve the issues presented in the petition—either now or after judgment in the court of appeals. Thus, if this Court denies the petition for certiorari in *Grutter*, it should deny this petition as well.

III. IF THIS COURT DOES GRANT CERTIORARI IN *GRUTTER*, IT WOULD BE APPROPRIATE TO GRANT CERTIORARI HERE, LIMITED TO THE FIRST QUESTION PRESENTED IN THE PETITION.

If (and only if) this Court were to grant the petition in *Grutter*, Respondents agree that it would be appropriate to grant certiorari before judgment to determine whether the current LS&A admissions program is constitutional. This outcome can be achieved in either of two ways. The Court could restrict its grant of certiorari before judgment to the appeal that presents this question (No. 01-1418). Alternatively, if this Court grants certiorari before judgment with respect to all four of the appeals pending in the court of appeals, it would be appropriate for this Court to issue an order limiting its grant of certiorari to the question of whether the current LS&A admissions system is constitutional.

Review of the other questions presented before judgment in the court of appeals is unwarranted, and would add unnecessary complexity to the briefs, argument, and decision of these cases. The application of the legal principles this Court may announce to the prior admissions systems—as well as the other questions presented in the petition that are by no means independently certworthy—are more properly left for consideration in the first instance by the court of appeals.

Respondents thus respectfully submit that if this Court grants certiorari in *Grutter*, it should grant the petition for certiorari before judgment to hear some, but not all, of the cases now pending in the court of appeals. Because "what the Supreme Court is asked to do by way of granting certiorari before judgment is to render the kind of judgment on the merits of the appeal that the court of appeals could have rendered," Robert L. Stern et al., *Supreme Court Practice* 76 (8th ed. 2002), and because the instant petition for certiorari before judgment relates to four separate cases

that are pending in the court of appeals, each of the four pending appeals is addressed separately. *See Hohn v. United States*, 524 U.S. 236, 241-44 (1998) (noting that a "case" is "in" the court of appeals when a notice of appeal is filed and a docket entry created).

No. 01-1418. This is the plaintiffs' interlocutory appeal, for which leave was granted under 28 U.S.C. § 1292(b), challenging the district court's conclusion that the current operation of the LS&A admissions process (beginning in 1999) complies with applicable constitutional standards.

In the event this Court grants certiorari in *Grutter*, Respondents agree that certiorari before judgment would be appropriate in this appeal. As Petitioners note, once this Court has granted certiorari in a particular case, it sometimes grants certiorari before judgment to hear other cases then pending in the lower courts presenting the same or related questions of law arising on different facts. *See* Pet. 15 (citing cases); *see also* Stern, *supra*, at 262 & n.65 (citing thirteen such cases); *cf. Clinton v. New York*, 524 U.S. 417, 455 (1998) (Scalia, J., joined by O'Connor, J., dissenting) (arguing that the Court had appellate jurisdiction over one appeal under statute providing for expedited appeal to Supreme Court as of right, but not in a second related case, and suggesting that "[i]n light of the public importance of the issues involved, and the little sense it would make for the Government to pursue its appeal against one appellee in this Court and against the others in the Court of Appeals, the entire case, in my view, qualifies for certiorari review before judgment").

As Petitioners note (Pet. 15), if this Court were to grant the petition in *Grutter*, hearing both cases would provide the Court an opportunity to resolve these important legal questions in the context of a broader range of factual circumstances faced by colleges and universities than would be possible if the Court granted certiorari in only one case.

The two cases are certainly related. They have proceeded on parallel tracks in district court and in the court of appeals. The Board of Regents of the University of Michigan is the principal defendant in both cases. These two separate but related cases involve two factually distinct admissions systems, one involving a small and extremely selective graduate program (similar in structure to those put in place, after *Bakke*, by many small and selective colleges and graduate programs), and another involving admissions to a large, selective public university that is required to consider tens of thousands of applications each year. Hearing them together would allow this Court an opportunity to provide more helpful guidance to lower courts and to colleges and universities charged with complying with this Court's decisions than would be possible if only one admissions system were before the Court.

No. 01-1416. This is the defendants' interlocutory appeal, for which leave was granted under 28 U.S.C. § 1292(b), challenging the district court's determination that the LS&A admissions systems, in place from 1995 to 1998, taken together, were constitutionally impermissible.

Because the University of Michigan undisputedly no longer employs the admissions systems at issue in this appeal, Respondents do not believe this Court should sit as a court of review, in the first instance, to hear an appeal from the district court's determination. If this Court were inclined to grant certiorari at this point to decide whether and how colleges and universities may consider race in admissions to achieve the benefits of diversity, the *Grutter* case and the appeal in No. 01-1418 would provide ample opportunity for this Court to resolve the question in the context of admissions systems that are currently in force. There is no reason why this Court should exercise its rare certiorari before judgment authority to apply the rule of law that would emerge from these cases to admissions processes that the University discontinued four years ago. *See, e.g., Texas v.*

Hopwood, 518 U.S. 1033, 1034 (1996) (mem.) (statement of Ginsburg, J., joined by Souter, J., with respect to the denial of certiorari) (observing, in connection with the denial of certiorari, that "the 1992 admissions program [at the University of Texas Law School] has long since been discontinued and will not be reinstated.") (internal quotations and citation omitted).[5]

If this Court does otherwise grant certiorari in these cases, the appeal presenting the question involving discontinued admissions systems should properly remain in the court of appeals, left for that court's resolution following this Court's disposition of these cases.

No. 01-1333. Prior to the court of appeals' decision to accept the district court's § 1292(b) certification, plaintiffs filed an appeal as of right with respect to (a) the district court's final order, pursuant to Fed. R. Civ. P. 54(b), granting judgment on qualified immunity grounds in favor of the individual defendants who had been sued for damages in their individual capacities, and (b) the district court's summary judgment ruling denying plaintiffs' request for an injunction.

Plaintiffs' challenge to the district court's qualified immunity ruling is wholly fact-bound and unworthy of this Court's review—least of all before judgment in the court of appeals. The petition does not identify any disagreement among the lower courts on any question of law relating to qualified immunity standards. Under these circumstances, it would certainly be inappropriate to leapfrog the court of appeals in order to resolve the application of settled qualified

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[5] While the petition relies heavily on a stipulation that Petitioners assert equates the prior and current admissions systems (Pet. 9), in fact the stipulation addressed the change only from the "grids" to the "selection index," and did not relate to the use of "protected seats" or other aspects of the prior admissions systems that the district court found constitutionally problematic. Indeed, the district court did not adopt Petitioners' interpretation of the stipulation. Pet. App. 34a & n.16.

immunity principles to the facts of this case. Certiorari before judgment should therefore be denied, with the question of the correctness of the district court's qualified immunity ruling left for consideration in the first instance in the court of appeals, following any decision by this Court on the merits.

In addition, certiorari before judgment with respect to this appeal would also be improper because the jurisdiction of the court of appeals was not properly invoked. Plaintiffs did not seek preliminary injunctive relief in the district court. For that reason, § 1292(a)(1)'s exception to the final judgment rule does not apply. *See Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, 385 U.S. 23 (1966) (district court's order denying plaintiff's motion for summary judgment based on the existence of triable facts was not appealable under § 1292(a)(1)); 16 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3924.1, at 156 (1996) (suggesting that § 1292(a)(1) should be confined "to appeals from orders dealing with explicit requests for preliminary relief"). No other basis for appellate jurisdiction over the district court's order denying plaintiffs' request for injunctive relief is presented.

Even if the court of appeals has appellate jurisdiction over this aspect of plaintiffs' appeal, there is no reason this Court should hear that appeal in the first instance. Plaintiffs ask this Court to resolve the question whether the district court, having concluded that the LS&A's current admissions system was lawful while its prior admissions systems were not, erred in declining to enjoin defendants from reinstituting its prior admissions systems. This unexceptional exercise of the district court's traditional authority to grant or withhold equitable relief in view of all of the facts and circumstances presents no question of general applicability warranting this Court's review.

Thus, because the qualified immunity question is wholly fact-bound, and because the challenge to the district court's

denial of injunctive relief is not certworthy and rests on a questionable jurisdictional foundation, certiorari before judgment should be denied in appeal No. 01-1333.

No. 01-1438. This appeal was filed by the intervening defendants from the district court's order rejecting the argument that the LS&A admissions system could be justified as a remedy for the present effects of alleged past discrimination. The intervening defendants, who are also Respondents herein, have separately filed a petition for a writ of certiorari before judgment, No. 02-571, in which certiorari is sought on the same remedial question.[6] If (and only if) certiorari is granted in *Grutter*, Respondents the Board of Regents of the University of Michigan, Lee Bollinger, and James J. Duderstadt do not oppose the request (either as advanced by the Petitioners herein, or by the intervening defendants as Petitioners in this Court in case No. 02-571), for certiorari before judgment seeking review in this Court of that remedial question.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari before judgment should be denied.

If this Court grants certiorari in the related case of *Grutter v. Bollinger*, No. 02-241, however, the petition for a writ of certiorari before judgment in this case should be granted, limited to the plaintiffs' § 1292(b) appeal (No. 01-1418). The petition for certiorari before judgment should be denied as to the plaintiffs' § 1292(a)(1) appeal (No. 01-1333) and the defendants' § 1292(b) appeal (No. 01-1416). If this Court grants certiorari before judgment with respect to any of these appeals, Respondents do not oppose the petition seeking certiorari before judgment to hear the questions

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[6] The petition in *Patterson*, No. 02-571, also purports to present the question whether the University's consideration of race may be justified as serving the compelling interest of achieving the educational benefits of diversity. Because that question is fully before the Court in connection with this petition, it need not be independently considered in *Patterson*.

presented in the intervening defendants' appeal (No. 01-1438).

Alternatively, if certiorari is granted in *Grutter*, and if this Court does not act separately on the petition with respect to each of the separate cases now pending in the court of appeals, it should issue an order limiting its review to the question of whether the current LS&A admissions program is constitutional.

Finally, if certiorari before judgment in this case is granted, Respondents respectfully suggest that this Court enter its order granting certiorari in this case and in *Grutter* on the same date, and provide that the cases each be set for one hour of argument on the same day.

Respectfully submitted,

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In The
Supreme Court of the United States

JENNIFER GRATZ AND PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Respondents.

On Petition For Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Sixth Circuit

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Supreme Court Rule 11 1

MISCELLANEOUS

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I. INTRODUCTION

The "conditional" opposition of respondents Lee Bollinger, James Duderstadt, and the Board of Regents of the University of Michigan (collectively "University" or "University respondents") to the Rule 11 petition of Jennifer Gratz and Patrick Hamacher actually indicates substantial agreement between the parties on some important points. Thus, although opposing a grant of certiorari for the same reasons given by respondents in *Grutter v. Bollinger* (No. 02-241), the University agrees with petitioner that if one of the cases is accepted for review, there are compelling reasons for granting review in the other, and that, in particular, these reasons are sufficiently compelling to warrant issuance of a writ before judgment under Rule 11 in *Gratz*, if the petition in *Grutter* is granted.

Respondents' opening argument – that the petition should be denied for the same reasons given by respondents in opposing the petition in *Grutter v. Bollinger* – suffers from all the same weaknesses and fallacies identified in petitioner Grutter's reply to the opposition brief in that case. Just as respondents have not repeated all of their arguments in their conditional opposition, petitioners will not here burden the Court with a repetition of the reasons why the respondents are quite demonstrably wrong in arguing that the "division of lower court authority on the primary legal question presented . . . is shallow, limited and undeveloped." Brief in Conditional Opposition at 1. Instead, petitioner refers the Court to the arguments and authorities contained in their reply to the opposition brief in *Grutter*.

Most of the remainder of the oppositional portion of the University's brief is taken up with arguments regarding the appropriate scope of the Court's review in the event it grants the petition. Specifically, the University seeks to shield from review the lawfulness of the admissions policies in effect from 1995 to 1998, which includes years in which the two named plaintiffs applied, and were rejected for admission, by the University; whether the district court should have denied plaintiffs' claim seeking to enjoin the use of those policies; and whether the individual defendants are entitled to summary judgment on qualified immunity grounds. The University's arguments are based on erroneous factual and legal premises and are unpersuasive for other reasons as well. For the reasons discussed below, petitioner submits that it would be appropriate for the Court to issue a writ to answer all the questions presented in the petition.

II. ARGUMENT

A. The Questions Presented Arise From One Case in the Court of Appeals, Not Four.

The University premises much of its argument in opposition on a strange and novel theory that there are four separate "cases" pending in the court of appeals and that the issues presented in the petition arise from some, but not all, of these "cases." *See* Brief in Conditional Opposition at 14-15. It gives no authority for the first part of this proposition except for citing to the uncontroversial point that a "case" is "in" the court of appeals when a notice of appeal is filed and a docket entry created. *See id.* at 15. The question of *when* a case is "in" the court of appeals, an important one because of the jurisdictional requirements of 28 U.S.C. § 1254(1), is, however, quite

different from the question of whether multiple consolidated appeals from the same district court case make for multiple "cases" in the court of appeals. For reasons discussed in the next section below, the answer to the second question is a purely academic (and hence unnecessary) one in the consideration of this petition because all the questions presented in it arise independently from both the appeals filed by petitioner and docketed in the court of appeals, whether they constitute one or more "cases."

Not only have respondents failed to cite appropriate authority for their *ipse dixit* proposition that the petition arises from multiple cases, the rule they suggest is quite counter-intuitive. A case commences, of course, with the filing of a complaint. Although many district court rulings might follow from the filing of that complaint, it would be eccentric to consider that each ruling means that another "case" has been thereby created and decided. To be sure, rulings in the course of various stages of the proceedings may lead to multiple appeals at different times during the pendency of the case, each one creating a new basis for review on certiorari. But those are not the circumstances in which the University is characterizing the petition here as arising from multiple "cases." These proceedings do not even present the more complex scenario of counterclaims filed in response to a complaint, or multiple complaints consolidated for consideration by the district court. Instead, the orders and judgment in the district court from which various appeals were taken all derived indisputably from *one* case commenced by Gratz and Hamacher. It follows that the one case did not become multiple cases

merely because more than one party filed a notice of appeal in the same court of appeals.[1]

B. There Is Appellate Jurisdiction For Review of the District Court's Order Denying an Injunction.

The University's erroneous argument about multiple "cases" in the court of appeals leads to its next two arguments: (1) that plaintiffs' appeal of the district court's order denying an injunction did not properly invoke the jurisdiction of the court of appeals; and (2) that there is "[n]o other basis for appellate jurisdiction over the district court's order denying plaintiffs' request" for an injunction. Brief in Conditional Opposition at 18. The University is wrong on both counts.

The second of these two assertions is especially disingenuous. The district court denied plaintiffs' request for an injunction in the January 30, 2001, Order. Petitioners appealed that order pursuant to *both* 1292(a)(1) and 1292(b); thus, even if defendants were correct about the propriety of using 1292(a)(1), the propriety of the district court's denial of an injunction was nonetheless in the court of appeals. The certification of an order under Section 1292(b) brings the entire order before the court of appeals.

[1] It is instructive to note that in *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), the Sixth Circuit issued one decision, although there were two appeals filed and docketed: by the Law School respondents and the intervenors in that case. It would be quite illogical to suggest that the Sixth Circuit in *Grutter* decided two "cases," and it is just as nonsensical to suggest the same thing with respect to the district court's rulings in *Gratz*.

28 U.S.C. § 1292(b) (authorizing district court to certify *orders* for appeal, and giving courts of appeals authority to permit appeals from *orders*); *see also, e.g.*, *Yamaha Motor Group v. Calhoun*, 516 U.S. 199, 205 (1996) ("appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court{dots4}[T]he appellate court may address any issue fairly included within the certified order because 'it is the *order* that is appealable, and not the controlling question identified by the district court.'"); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1300 (9th Cir. 1997) (jurisdiction pursuant to Section 1292(b) not limited to certified question, but rather entire order).

Indeed, in the Sixth Circuit, defendants made precisely the same argument about the propriety of review of the denial of injunctive relief under Section 1291(a)(1), but nonetheless conceded that granting the cross-petitions for permission to appeal under § 1292(b) would "avoid and *render moot* [that] jurisdictional question." Defendants' Statement Respecting Interlocutory Appellate Jurisdiction (served March 14, 2001), p. 9 (emphasis added). The Sixth Circuit *did* grant the cross-petitions, and, accordingly, by defendants' own words, any question about whether the appeal of the district court's denial of injunctive relief is moot.

The foregoing also renders moot, then, the University's first argument – that plaintiffs' appeal of the denial of injunctive relief (No. 01-1333) did not invoke appellate jurisdiction. In any event, the argument is erroneous. The University's reliance on *Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, 385 U.S. 23 (1966), for the proposition that an interlocutory appeal may not be taken from a

permanent injunction is thoroughly misplaced. The Court in that case explained that appellate jurisdiction was lacking because the order appealed from was a pretrial order having nothing to do with the merits of the case. *Id.* at 25 ("We take the . . . view [that the order may not be appealed] not because 'interlocutory' or preliminary may not at times embrace *permanent injunctions*, but because the denial of a motion for summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim.") (emphasis added).

Moreover, the Court has recognized that an interlocutory appeal from an injunction is appropriate where the denial of the plaintiffs' request for injunctive relief has "serious, perhaps irreparable consequences." *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981). Plaintiffs' claims and request for injunctive relief easily satisfy this test because they arise from deprivations of constitutional rights. *See Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (First Amendment rights). *See also* 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948.1, at 161 ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.").

C. There Are Compelling Reasons to Review All the Questions Presented in the Petition.

Because there is appellate jurisdiction to review the district court's order denying injunctive relief, all that remain of the University's conditional opposition are its arguments that the Court should in its discretion decline to review the lawfulness of the 1995-1998 admission

systems and the judgment in favor of the individual defendants on qualified immunity grounds. There are compelling reasons, however, for encompassing these issues in a writ of certiorari. First, the University's description of the 1995-1998 admissions systems as "defunct" does not address whether the district court should have dismissed on summary judgment a claim for an injunction with respect to them. As argued in the petition, a party's voluntary cessation of illegal conduct, especially when produced by litigation, is not a basis for denying injunctive relief. *See* Petition at 29. The University still vigorously defends the mechanical racial preferences for years 1995-1998, with its use of protected seats for select racial minorities and explicit double standards contained in separate "grids" for making admissions decisions.

Moreover, the parties have stipulated as a factual matter that the current admissions system (the one in effect for the 1999-2000 admissions cycles) is substantively the same with respect to the consideration of race as the 1995-1998 admissions systems. The University points out that the district court found a material distinction between the 1995-1998 and 1999-2000 admissions systems, but the district court's *legal* conclusion distinguishing between the systems (which is one of the reasons justifying issuance of a writ in the first place) does not change the *undisputed fact* that the "substance" of how race and ethnicity are considered in admissions did not change.[2] *See*

[2] The University contends that it no longer has a policy of admitting all "qualified" minorities. *See* Conditional Opposition at 8 & n.3. This contradicts undisputed evidence in the record from a senior admissions official who testified that the 1999-2000 systems did not depart from this policy. *See* JA-85-87 (deposition testimony of Marilyn

(Continued on following page)

Joint Summary of Undisputed Facts Regarding Admissions Process, JA-4099. Moreover, the undisputed evidence was that the University calculated the numerical-based "selection index" to replicate the results obtained with the 1995-1998 admissions systems. *See* JA-333, 365-66, 375, 700-03, 931. Hence, the systems are two sides of the same coin, and a consideration of the policies in the latter period is assisted by reference to the systems it was derived from and vice versa.

Finally, the Court should also review the district court's judgment in favor of the individual defendants on qualified immunity grounds. It is quite incomprehensible how admissions systems that the district court found to be a "clear" instance of a "functional equivalent of a quota system," App. at 45a, did not violate "clearly" established rights of plaintiffs, *id.* at 48a-50a. Review hardly presents a "fact-bound" question, Brief in Conditional Opposition at 18. If it were fact-bound, the district court presumably would have denied the individual defendants' motion for summary judgment. Rather, qualified immunity here

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McKinney). Moreover, since the later system (using the selection index) was statistically designed to replicate the admissions outcomes produced in 1995-1998, it was hardly necessary for the selection-index guidelines to state explicitly what the system accomplished by design. Finally, for these reasons it is a disingenuous quibble for the University to distinguish between the "effect" that its policies have of admitting all "qualified" minorities it deems "underrepresented," and an explicit policy to achieve this end. The University does not argue that the results produced by its current policies – admission of "virtually all qualified underrepresented minority students," Brief in Conditional Opposition at 8 – are a matter of chance or coincidence. Rather, the results are, of course, the product of policies intentionally designed to achieve racial and ethnic "diversity."

presents an important question of what legal conclusions should have followed from the undisputed facts.

III. CONCLUSION

For all the foregoing reasons, petitioner respectfully submits that a writ should issue.

Respectfully submitted,

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In The
Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, ET AL.,

Respondents.

JENNIFER GRATZ AND PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE CENTER FOR NEW BLACK LEADERSHIP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Bolick, *The Affirmative Action Fraud* (1996) 11

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Bowen and Bock, *The Shape of the River* (1998) 16

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Brest, Paul, "Diversity Gives Depth to the Law," *Los Angeles Times* (Jan. 3, 2003) 11

Carcieri, Martin D., "The Sixth Circuit and *Grutter v. Bollinger*: Diversity and Distortion," *7 Tex. Rev. of Law & Politics* 127 (2002) 5

Cohen, Adam, "When the Field is Level," *Time* (July 5, 1999) 12

"Governor's One Florida Plan Works," *Fort Myers (FL) News-Press* (June 21, 2002) 13

Green and Winters, *Public School Graduation Rates in the United States* (2002) 11

Greene, *An Evaluation of the Florida A-Plus Accountability and School Choice Program* (Feb. 2001) 16

Howell and Peterson, *The Education Gap: Vouchers and Urban Schools* (2002) 16

McCarthy, Rebecca, "UGA Revises Entry Rules," *Atlanta Journal-Constitution* (Aug. 1, 2002) 15

Moore, Michael Scott, "Affirmative Reaction," *SF Weekly* (Nov. 12, 1997) 14

National Center for Education Statistics, *The Nation's Report Card: Fourth-Grade Reading 2000* 9

Peterson, Paul E., "School Choice: A Report Card," in Peterson and Hasses, eds., *Learning From School Choice* (1998) 16

Rees, Nina Shokraii, "Public School Benefits of Private School Choice," *Pol'y Rev.* (Jan.-Feb. 1999) 16

TABLE OF AUTHORITIES – Continued

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Sacchetti, Maria and Susan Tully Tapia, "UCI Leads System in Key Ethnic Increases," *Orange County Register* (Apr. 4, 2001) 13

Schuster, Karla, "Education Initiative is Praised," *Ft. Lauderdale (FL) Sun-Sentinel* (March 6, 2002) 15

Seattle Post-Intelligencer (May 8, 1999) 15

Schubert, Ruth, "UW Sees Decline in Minority Freshmen," *Seattle Post-Intelligencer* (May 8, 1999) 15

Taylor Jr., Stuart, "Do African-Americans Really Want Racial Preferences?" *National Journal* (Dec. 20, 2002) 7

Traub, James, "The Class of Prop. 209," *New York Times* (May 2, 1999) 10

Thernstrom and Thernstrom, *America in Black and White* (1997) 9

Thernstrom, Stephan and Abigail Thernstrom, "Reflections on *The Shape of the River*," 46 UCLA L. Rev. 1583 (1999) 17

Yardley, Jim, "Desperately Seeking Diversity," *New York Times* (Apr. 14, 2002) 13

INTEREST OF *AMICUS CURIAE*[1]

The Center for New Black Leadership (CNBL) is a non-partisan, not-for-profit, public policy research and advocacy organization devoted to developing and promoting a market-oriented, community-based vision of public leadership for black communities in America and abroad.

SUMMARY OF ARGUMENT

"Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Regents of Univ. of Ca. v. Bakke*, 438 U.S. 265, 291 (1978) (Opinion of Powell, J.). Respondents are only the latest among legions who have tried to persuade this Court to abandon that bedrock principle of equal protection, this time in service of the amorphous concept of "diversity." To accept racial diversity as a compelling governmental interest would create an exception that would swallow the constitutional rule of nondiscrimination.

In reality, the massive racial preferences employed by respondents are a superficial and self-defeating response to a serious national problem that lurks just beneath the surface of this litigation: a chronic and debilitating academic gap, which manifests itself in severe racial disparities in

[1] The parties have consented to the filing of this brief. In conformity with Supreme Court Rule 37.6, *amicus* states that counsel for a party did not author this brief in whole or in part and that no persons or entities other than *amicus*, its members, and its counsel made a monetary contribution to the preparation and submission of the brief.

admissions at elite institutions of higher learning. Racial preferences do nothing to close that academic gap. To the extent that respondents' policies are directed toward any legitimate purpose, race-neutral methods exist to try to accomplish it. To close the academic gap requires efforts far more systemic than those presently employed by respondents or most other governmental entities. Not until this nation and this Court eschew the illusory quick-fix of racial preferences, once and for all, will America make true progress toward the ideal of racial equality and equal educational opportunities.

ARGUMENT

All parties appear to agree that the constitutional standard applicable to all racial classifications created by government[2] is strict scrutiny, requiring the state to demonstrate a compelling governmental interest served by the most narrowly tailored means. See, e.g., *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). The challenged racial preferences do not satisfy either requirement.

I. RACIAL DIVERSITY IS NOT A COMPELLING GOVERNMENT INTEREST.

As Justice Robert Jackson warned presciently in *Korematsu v. United States*, 323 U.S. 214, 246 (1944)

[2] Because this case is governed by the 14th Amendment, which limits state action only, *amicus* expresses no view on the proper legal standards applicable to private entities.

(Jackson, J., dissenting), once the Court has "validated the principle of racial discrimination," the "principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." Many have done so, from the apologists for segregation to the advocates of racial preferences, the latter employing soothing terms such as "affirmative action," "role models," and "benign discrimination." Respondents here employ the latest euphemism – diversity – and the Court should reject it along with other forms of discriminatory subterfuge.

"Diversity" is a clever and slippery term. Respondents insist that what they really mean is "viewpoint diversity." See *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 849 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (6th Cir. 2002). Of course, a university properly may seek to ensure diversity of viewpoints in its student body.[3] However, such an effort must be undertaken on an individualized basis. The fact that such individual determinations may present administrative inconvenience provides no justification for racial preferences. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989). Respondents here have undertaken no such individualized determinations, opting instead for racial stereotyping.

This Court repeatedly and categorically has rejected the use of racial stereotypes as a proxy for viewpoint

[3] Another problem with viewpoint diversity as a justification here is that it would seem equally valid for a university to assign a high value to viewpoint homogeneity. Racial preferences presumably would yield very different results in the two contexts; but if one is a compelling justification for racial preferences, so too would be the other.

diversity. As the Court declared in the context of political reapportionment in *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (citations omitted), such actions bear

> an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group – regardless of their age, education, economic status, or the community in which they live – think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.

Moreover, the diversity concept is simply too amorphous a basis upon which to hitch the use of racial classifications, which, if ever appropriate must be used with surgical precision. Justice Powell, whose wisdom was not limited to the *Bakke* case, spoke to the context of "role models," an equally amorphous rationalization for racial preferences rejected by this Court in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (plurality). He observed that such a rationale has "no logical stopping point," *id.* at 275, and that its adoption would allow a court to "uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." *Id.* at 276. Diversity likewise is inherently subjective and elastic. Who is to say what constitutes diversity? Or when it is achieved?[4] Accepting diversity as a compelling governmental objective

[4] Indeed, respondents could not specify with particularity any point at which a "critical mass" of diversity was achieved. *Grutter*, 137 F. Supp. 2d at 850.

necessarily would amount to an open-ended license for racial preferences.

But in any case, the stated goal of viewpoint diversity here plainly is pretextual. Respondents have singled out specific racial and ethnic groups for preference, in an effort to achieve a "critical mass" of such groups. *Grutter*, 137 F. Supp. 2d at 832. Hence respondents' true goal is racial balance, which this Court again repeatedly and categorically has rejected as a legitimate governmental objective, much less a compelling one. "Racial balance is not to be achieved for its own sake." *Freeman v. Pitts*, 503 U.S. 467, 494 (1992). See also *Croson*, 488 U.S. at 507; *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 24 (1971) ("If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse"). See also Martin D. Carcieri, "The Sixth Circuit and *Grutter v. Bollinger*: Diversity and Distortion," 7 *Tex. Rev. of Law & Politics* 127 (2002).

Respondents assert that the preferences invoke race as merely "a factor" rather than as a rigid quota. No majority opinion of this Court ever has turned upon such an empty semantical distinction. Contrasting a quota with "critical mass" – amounting to between 11 and 17 percent of specified minority groups, *Grutter*, 137 F. Supp. 2d at 850 – is a distinction without a difference. And the preferences needed to achieve those numbers are massive. *Grutter*, 137 F. Supp. 2d at 837 and n.20; *Grutter*, 288 F.3d at 776 (Boggs, J., dissenting) ("staggering magnitude"). At the University of Michigan, applicants automatically are awarded 20 points out of a possible 150 if they belong to specified racial or ethnic groups. *Gratz v. Bollinger*, 122

F. Supp. 2d 811, 827 (E.D. Mich. 2000). The difference between the racial preferences employed by respondents and the quota rejected in *Bakke* is one of the slightest degree. The effect is exactly the same. See *Grutter*, 137 F. Supp. 2d at 851 ("the law school has made the current admissions policy practically indistinguishable from a quota system").

Nor would the result differ if the preference were more slight. Restricting race to *a* factor in the admissions process creates no real or principled limitation. Race presumably never would be the sole factor in an admissions decision, but considering the competitiveness of the admissions process, it likely often will be determinative, see *Grutter*, 137 F. Supp. 2d at 834, given the tragically small number of black and Hispanic students who meet the requisite standards for admission to elite postsecondary institutions. But in any case, weak or strong preferences are not the issue. Both involve double standards based on racial classifications. In any situation where opportunities are finite, allowing race to be a plus-factor for one person necessarily means that it is a minus-factor for someone else.[5] We urge the Court to reject the siren call of seemingly modest departures from the principle of

[5] Racial preferences invariably pit minority racial groups against one another. In the university context, black and Hispanic students are targeted for preferences, while Asian students suffer disproportionate disadvantage. Moreover, in our increasingly multi-ethnic society, bi-racial individuals often are forced to choose which group they belong to in order to determine their rights and opportunities.

equality, lest the discriminatory exception become the rule.[6]

II. RACIAL DISPARITIES IN HIGHER EDUCATION ARE THE RESULT OF A SEVERE AND PERSISTENT ACADEMIC GAP THAT RACIAL PREFERENCES CANNOT CURE.

No matter how slight, when governmental classifications "touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Bakke*, 438 U.S. at 299 (Opinion of Powell, J.). The narrow tailoring inquiry encompasses whether less-restrictive means could have been used and whether the classification at issue "fits" with greater precision than any alternative means. *Wygant*, 476 U.S. at 279 n.6; *Croson*, 488 U.S. at 507.

[6] The Court's disdain for racial classifications, even as a remedy for past discrimination, is echoed by a strong popular consensus. A spring 2001 survey by the *Washington Post*, Kaiser Foundation, and Harvard University found that when asked whether race or ethnicity should be a factor in hiring, promotion, or college admission, or whether merit and qualifications should be the sole criterion, only five percent of respondents said race or ethnicity should be a factor, while 92 percent favored merit alone. Among African-Americans, 12 percent opined that race or ethnicity should be a factor, while 86 percent favored merit and qualifications. Those findings are supported by numerous other highly credible surveys in recent years. One, for instance, found that 90 percent of black respondents opposed even favoring black students whose SAT scores are 25 points below white applicants (when, in fact, minority SAT scores typically average 150-200 points less than non-minority scores). See Stuart Taylor Jr., "Do African-Americans Really Want Racial Preferences?" *National Journal* (Dec. 20, 2002).

Assuming respondents are addressing any legitimate goal, racial preferences are a crude and overly burdensome means to satisfy it in light of racially neutral alternatives. Moreover, such racial sorting glosses over the real cause of racial disparities in postsecondary education: a severe racial gap in academic achievement in the K-12 years, owing significantly to the concentration of economically disadvantaged black and Hispanic students in defective inner-city public schools. Racial preferences do nothing to close that gap.

The racial gap is so severe that in order for elite institutions of higher learning to obtain anything approaching a racially proportionate (i.e., "diverse") student body, they must do one of the following: (1) engage in massive racial preferences, as here; (2) abandon objective admissions criteria in an effort to racially gerrymander their student bodies; or (3) help to address systemically the underlying problems in our nation's K-12 educational system. The easiest approach, exemplified in this case, is the first, and it appears widespread among elite postsecondary institutions. Once public universities are prevented from employing overt racial preferences, they move to the second approach. The third approach, of course, is the hardest, but it is the only real solution to the academic gap. Not until the tool of racial preferences is removed from the policy arsenal can we make real progress toward closing the educational divide.

A. All of respondents' rationalizations for the use of racial preferences avoid the real and glaring issue: an educational crisis among disadvantaged members of certain racial and ethnic groups, including blacks and Hispanics. However disguised, respondents' efforts are a superficial and cosmetic response to this crisis that leaves intact and unaddressed the underlying problems in our K-12

educational system that lead to severe racial disparities in postsecondary education.

Following this Court's decision in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), and the adoption of our nation's civil rights laws, blacks and other minorities made substantial economic and educational progress. See generally Thernstrom and Thernstrom, *America in Black and White* (1997). Unfortunately, a substantial academic gap has persisted, and since the late 1980s actually has widened. The academic gap starts in the early years and continues to grow. The 2000 National Assessment of Educational Progress (NAEP) revealed, for instance, that 63 percent of black and 56 percent of Hispanic fourth-graders are below the most basic levels of proficiency in reading. National Center for Education Statistics, *The Nation's Report Card: Fourth-Grade Reading 2000* at 31 and 33. By the time students turn 17, the racial gap is severe. In reading, the average black 17-year-old is roughly four academic years behind the average white student in reading.[7] The racial gap in mathematics is 3.4 years; in writing it is 3.3 years; in science it is 5.4 years. Thernstrom and Thernstrom at 355. When it comes time for those youngsters to apply for college, black students are at a severe disadvantage.

The achievement gap reflects as well in Scholastic Achievement Test results. In 1995, the average white score on the verbal component of the SATs was 448, compared to

[7] In other words, if the average white student is reading at 12th grade proficiency, the average black student is reading at only an eighth grade level.

356 for blacks. The average mathematics score for whites was 498, while for blacks it was 388. Thernstrom and Thernstrom at 398. The gap was especially pronounced at the upper end of SAT scores, which is most relevant, of course, to elite institutions of higher education. In 1995, among students scoring between 700 to 800 on the verbal component of the SAT, 8,978 were whites, 1,476 were Asians, and only 184 nationwide were black. Among students scoring 750 or above on the mathematics component, 9,519 were white, 3,827 were Asian, and only 107 were black. In other words, the ratio of whites to blacks in the elite verbal category was 49:1; in mathematics it was 89:1. By another measure, among the 734 superstar students named in 1995 by the College Board as Advanced Placement Scholars, which reflects top grades on eight AP tests, 29.7 percent were Asians, 63.1 percent were non-Hispanic whites, and only two of 734 were African-Americans. *Id.* at 398-400. Measuring by grade-point averages yields similar results: in 1995, only 12 percent of black college-bound seniors were in the top ten percent of their class, compared to 23 percent of whites and 28 percent of Asians. *Id.* at 402.

The academic gap translates into a huge competitive disadvantage in college admissions, particularly at elite institutions. In terms of required academic credentials for admission to the University of California, in 1996 30 percent of the state's Asian-American students and 12.7 percent of whites qualified, compared to only 3.8 percent of black and 2.8 percent of Latino students. James Traub, "The Class of Prop. 209," *New York Times* (May 2, 1999), sec. 6 at 44.

Not only do most black and Hispanic students operate at a huge academic disadvantage when they apply to college, but a disproportionate number of them drop out before they do so. The national graduation rate for the public school class of 2000 was 69 percent; for black students it was 55 percent, and for Hispanic students only 53 percent. Green and Winters, *Public School Graduation Rates in the United States* (2002) at 3.

This enormous academic gap manifests itself, of course, in large racial disparities in postsecondary institutions, especially elite schools, which have resorted to racial preferences in order to alter the demographic composition of the student bodies that would result from objective admissions criteria. See, e.g., Paul Brest, "Diversity Gives Depth to the Law," *Los Angeles Times* (Jan. 3, 2003) (former Stanford Law School dean reports that "[f]or well over a quarter of a century, law schools have been taking race into account in their admission of students in order to promote diversity"). However, since the late 1980s, *the racial academic gap has actually widened*. Thernstrom and Thernstrom at 357 and 397. Racial preferences do not purport to do anything to close the racial academic gap. Indeed, they exacerbate the problem by creating the cosmetic illusion of progress, when in reality the underlying problems are festering unaddressed. See Bolick, *The Affirmative Action Fraud* (1996). The use of racial preferences by respondents and other elite institutions of higher learning not only is not narrowly tailored to the goal of increasing the number of qualified minority students, it operates at cross-purposes with that goal.

B. In the aftermath of voter initiatives curbing racial preferences in public university admissions in California and Washington State and by court decision in Texas,[8] the number of black and Hispanic students at the most elite public universities declined substantially.[9] Faced with declining minority enrollment in their elite institutions of higher learning, those states all adopted racially neutral programs designed to boost minority enrollment. Even if this Court were to recognize racial diversity as a compelling governmental interest, *the existence of such facially neutral programs establishes, as a matter of law, that less-burdensome alternatives exist to the use of racial preferences*,

[8] By executive order of the governor, Florida also ceased the overt use of racial preferences in public university admissions.

[9] The number of students in the public university systems as a whole, however, did not significantly decline. That is because of a phenomenon called "cascading": instead of being leap-frogged by racial preferences into elite institutions, minority candidates with lesser credentials are admitted to universities commensurate with their objective qualifications. For instance, while the number of blacks and Hispanics enrolled at the University of California's Berkeley and Los Angeles campuses declined from 1997 to 1999 after the eradication of racial preferences, they increased by half or more at the Riverside and Irvine campuses. See Adam Cohen, "When the Field is Level," *Time* (July 5, 1999) at 30; Traub at 44. Cascading may ultimately result in higher minority graduation rates from college. Although minority graduation rates from the most elite institutions of higher learning are high, even proponents of racial preferences, such as Derek Bok, former president of Harvard, acknowledge that black and Hispanic students at elite institutions rank academically on average in the bottom one-quarter to one-third of their classes. Traub at 44. In post-secondary education generally, dropout rates for minority students are substantially higher than for nonminority students, suggesting that the academic mis-match created by massive racial preferences may be detrimental to many of the intended beneficiaries. Thernstrom and Thernstrom at 405-09.

necessarily rendering respondents' programs unconstitutional.

Each of the programs guarantees admission to state universities to a specified percentage of top graduates from the state's high schools. In California, the top four percent of high school graduates who can produce evidence of disadvantage are guaranteed admission, which has resulted in minority enrollment in the system as a whole approaching the same level as before the eradication of preferences. See Maria Sacchetti and Susan Tully Tapia, "UCI Leads System in Key Ethnic Increases," *Orange County Register* (Apr. 4, 2001). Texas provides guaranteed admission to the top ten percent. See Jim Yardley, "Desperately Seeking Diversity," *New York Times* (Apr. 14, 2002), sec. 4A at 28. In Florida, where minority enrollment has remained constant since the elimination of racial preferences, admission is guaranteed for the top 20 percent. "Governor's One Florida Plan Works," *Fort Myers (FL) News-Press* (June 21, 2002) at 8B.

These so-called "percent" programs were designed primarily to maintain minority enrollment within university systems, and to that extent they have succeeded. However, given the racial academic gap, it is plain that these programs are gerrymandered to achieve, without overt preferences, a particular racial and ethnic result. As a result, they are constitutionally suspect. See, e.g., *Village of Arlington Heights v. Metro. Hous. Devel. Corp.*, 429 U.S. 252 (1977). Moreover, such programs also do little if anything to redress the academic gap that fuels racial disparities in higher education.

C. Fortunately, the elimination of racial preferences has had the salutary effect of encouraging activists and

policymakers to look at, and begin addressing, the systemic causes of racial disparities. As *Time* Magazine observes, "The low number of minorities at top-tier campuses should be a wake-up call about the need to improve K-12 education for all children." Cohen at 30. Specifically, as the *New York Times* has found, "ending affirmative action has had one unpublicized and profoundly desirable consequence: it has forced the universit[ies] to try to expand the pool of eligible minority students." Traub at 44.

To that end, university admissions offices themselves may be able to do little to boost minority enrollment. This Court properly has recognized that isolated agencies of government are ill-equipped to solve broad social problems, underscoring why it is especially dangerous to give such entities "license to create a patchwork of racial preferences." *Croson*, 488 U.S. at 499. Certainly an admissions office may shift to individualized admissions procedures, to take into account individual talents or hardships, or eliminate alumni preferences or other non-merit-based barriers to admission. *Id.* at 508; *Grutter*, 137 F. Supp. 2d. at 871. Schools including Berkeley are doing exactly that. Traub at 44.

Beyond their admissions offices, universities can, and are beginning to, assist in redressing underlying educational disparities. Forced to abandon the easy fix of racial preferences, the University of California adopted the "Berkeley Pledge," which encompasses efforts to help educationally disadvantaged students to build their skills and credentials for college admission. College students and professors are enlisted for both mentoring and tutoring of students well before they apply for college admission. Michael Scott Moore, "Affirmative Reaction," *SF Weekly* (Nov. 12, 1997). As the *New York Times* reports,

"U.C. campuses are now reaching down into the high schools, the junior highs and even the elementary schools to help minority students achieve the kind of academic record that will make them eligible for admission, thus raising the possibility that diversity without preferences will someday prove to be more than a fond hope." Traub at 44.

Likewise, Florida Lieutenant Governor Frank Brogan comments, "There are things we can do to get our minority numbers up quickly and we're working hard on that, but what we're really interested in is the long haul." Among other efforts, the state has partnered with the College Board to increase the number of students taking advanced placement exams and the PSAT, offering all public school tenth-graders the chance to take the PSAT for free. The University of Florida also is working with inner-city high schools to boost academic achievement. Karla Schuster, "Education Initiative is Praised," *Ft. Lauderdale (FL) Sun-Sentinel* (March 6, 2002) at 5B. Similarly, the University of Washington is engaged in academic and mentoring programs in inner-city schools in an effort to better prepare middle and high school students to be more competitive in college admissions. Ruth Schubert, "UW Sees Decline in Minority Freshmen," *Seattle Post-Intelligencer* (May 8, 1999) at A1. The programs seem to hold promise. In Washington State, for instance, middle school students participating in an Early Scholars Outreach Program have produced a 3.2 grade-point average, compared with 2.5 for non-participating students. Rebecca McCarthy, "UGA Revises Entry Rules," *Atlanta Journal-Constitution* (Aug. 1, 2002).

Going even more to the heart of the problem, school choice programs such as charter schools and vouchers offer

real hope for narrowing the racial academic gap. See Howell and Peterson, *The Education Gap: Vouchers and Urban Schools* (2002); Bolick, *Transformation* (1998) at 34-67. In Milwaukee, after four years with a school voucher program, the academic gap was reduced by between one-third and one-half. Paul E. Peterson, "School Choice: A Report Card," in Peterson and Hassel, eds., *Learning from School Choice* (1998) at 23. Studies indicate that public school performance improves when competition is introduced. See, e.g., Nina Shokraii Rees, "Public School Benefits of Private School Choice," *Pol'y Rev.* (Jan.-Feb. 1999). After the first year of the Florida Opportunity Scholarship Program, every public school listed by the state as failing (and thereby qualifying its students for vouchers) had improved its academic performance, with gains most pronounced among the poorest-performing youngsters. Greene, *An Evaluation of the Florida A-Plus Accountability and School Choice Program* (2001). Of course, the Court approved such programs only last year in *Zelman v. Simmons-Harris*, 122 S.Ct. 2460 (2002).

A wide variety of truly race-neutral efforts are available to policymakers to expand educational opportunities and lift academic performance among disadvantaged children. See *Grutter*, 288 F.3d at 807-08 (Boggs, J., dissenting). Such efforts will be pursued and real progress will resume in earnest only when the superficial and divisive approach of racial preferences is removed, fully and without equivocation, from the policy arsenal.

Defenders of racial preferences in postsecondary education contend that race-neutral admissions are "unworthy of our country's ideals." Bowen and Bok, *The Shape of the River* (1998) at 286. Surely they are wrong about that; but they are right that the practice of sorting

Americans by race is deeply embedded in our history. The time has long come to stop it. Surely, the "civil rights warriors of the 1950s and 1960s did not put their lives on the line to perpetuate such terrible habits of mind." Stephan Thernstrom and Abigail Thernstrom, "Reflections on *The Shape of the River*," 46 UCLA L. Rev. 1583, 1628 (1999).

The invisible victims of racial preferences are those who are left behind, their plight swept under the carpet by the cosmetic illusion of racial proportionality. Civil rights do not trickle down. We respectfully urge this honorable Court to reaffirm the principle of equality and thereby to help this nation continue along the path of racial healing and make good at last on the promise of opportunity.

CONCLUSION

Amicus urges this honorable Court to reverse the decisions below.

Respectfully submitted,

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January 15, 2003

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No. 02-516

In The Supreme Court of the United States

JAN 16 2003

JENNIFER GRATZ AND PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Respondents,

and

EBONY PATTERSON, *et al.*,

Respondents.

On Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Sixth Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

U.S. Court of Appeals for the Sixth Circuit

No. 01-102

2/12/01	Permission for Leave to Appeal Docketed. Request filed by Petitioner Lee Bollinger. 1292 petition for permission to appeal. ☐ (blc) [01-102]
2/20/01	Respondent RESPONSE and cross-petition in support of 1292(b) petition. Response from David F. Herr for Respondent Patrick Hamacher, Respondent Jennifer Gratz. Certificate of service date 2/16/01 [01-102] (blc)

* * *

3/26/01	ORDER filed: The petition and cross-petition for permission to appeal are GRANTED [01-102, 01-104]. Boyce F. Martin, Jr., Chief Judge, Martha C. Daughtrey, Karen N. Moore, Circuit Judges. (blc) [01-102 01-104]

* * *

U.S. Court of Appeals for the Sixth Circuit

No. 01-104

2/23/01 Permission for Leave to Appeal Docketed. Request filed by Petitioner Jennifer Gratz, Petitioner Patrick Hamacher. Petition first received on 2/20/01 as part of response to 1292 petition filed in 01-102. ☐ (blc) [01-104]

* * *

3/26/01 ORDER filed: The petition and cross-petition for permission to appeal are GRANTED [01-102, 01-104]. Boyce F. Martin, Jr., Chief Judge, Martha C. Daughtrey, Karen N. Moore, Circuit Judges. (blc) [01-102 01-104]

* * *

U.S. Court of Appeals for the Sixth Circuit

No. 01-1333

3/12/01 Civil Case Docketed, Notice filed by Appellant Jennifer Gratz, Appellant Patrick Hamacher. Transcript needed: y (blc) [01-1333]

3/15/01 Appellee LETTER filed regarding jurisdiction; requests "cross-petitions" be granted. Letter from John H. Pickering for Appellee Univ MI Bd of Regent, Appellee James J. Duderstadt, Appellee Lee Bollinger. Certificate of service date 3/14/01 [01-1333] (blc) [01-1333]

* * *

5/8/01 FIRST PROOF BRIEF filed by Kirk O. Kolbo for Appellant Patrick Hamacher, Appellant Jennifer Gratz in 01-1333, Kirk O. Kolbo for Appellee Patrick Hamacher, Appellee Jennifer Gratz in 01-1416, Kirk O. Kolbo for Appellant Patrick Hamacher, Appellant Jennifer Gratz in 01-1418 Certificate of Service date 5/7/01. Number of Pages: 64 (13864). [01-1333, 01-1416, 01-1418] (rgf) [01-1333 01-1416 01-1418]

* * *

5/14/01 PETITION for en banc hearing filed by Kirk O. Kolbo for Appellants Patrick Hamacher, Jennifer Gratz. Certificate of service date 5/11/01. [01-1333, 01-1416, 01-1418] (blh) [01-1333 01-1416 01-1418]

* * *

6/4/01 ORDER filed placing the petition for hearing en banc in abeyance. [2367428-1] [01-1333,

01-1416 01-1418]. Entered by order of the court. (blh) [01-1333 01-1416 01-1418]

* * *

6/7/01 PROOF BRIEF filed by John Payton for Appellee Univ MI Bd of Regent, Appellee James J. Duderstadt, Appellee Lee Bollinger in 01-1333, 01-1416, 01-1418 Copies: 01. Certificate of Service date 6/6/01. Number of Pages: 60 (13929). [01-1333, 01-1416, 01-1418] (rgf) [01-1333 01-1416 01-1418]

* * *

6/8/01 PROOF BRIEF field by E. Vincent Warren for Appellee Ebony Patterson in 01-1333, E. Vincent Warren for Appellee Ebony Patterson in 01-1418 Copies: 01. Certificate of Service date 6/6/01. Number of Pages: 33 (8811). [01-1333, 01-1418] (rgf) [01-1333 01-1418]

* * *

6/29/01 PROOF BRIEF filed by Kirk O. Kolbo for Appellant Patrick Hamacher, Appellant Jennifer Gratz in 01-1333, Kirk O. Kolbo for Appellee Patrick Hamacher, Appellee Jennifer Gratz in 01-1416, Kirk O. Kolbo for Appellant Patrick Hamacher, Appellant Jennifer Gratz in 01-1418. Certificate of service date 6/27/01. Number of Pages: 57 (12949). [01-1333, 01-1416, 01-1418] (rgf) 01-1333 01-1416 01-1418]

* * *

7/10/01 CERTIFIED RECORD filed. Volumes include 3 Tr; 18 Pl. [01-1333, 01-1416, 01-1418] (jc) [01-1333 01-1416 01-1418]

7/12/01 PROOF BRIEF filed by John Payton for Appellee Univ MI Bd of Regent, Appellee James J. Duderstadt, Appellee Lee Bollinger in 01-1333, 01-1416, 01-1418. Certificate of service date 7/11/01. Number of Pages: 29 (6988). [01-1333, 01-1416, 01-1418] Final fourth brief due 7/30/01 in 01-1333, in 01-1416, in 01-1418. [01-1333, 01-1416, 01-1418] (rgf) [01-1333 01-1416 01-1418]

7/19/01 APPENDIX filed by Kirk O. Kolbo for Appellant Patrick Hamacher, Appellant Jennifer Gratz in 01-1333, Kirk O. Kolbo for Appellee Patrick Hamacher, Appellee Jennifer Gratz in 01-1416, Kirk O. Kolbo for Appellant Patrick Hamacher, Appellant Jennifer Gratz in 01-1418. Copies: 5 +10 (9 vols.) for en banc hearing. Extra copies received on 10/29/01. Certificate of service date 7/18/01 [01-1333, 01-1416, 01-1418] (ert) [01-1333 01-1416 01-1418]

7/31/01 FINAL BRIEF filed by Theodore M. Shaw for Appellee Citizens Affir, et al. 01-1333, 01-1416, 01-1418. Copies: 07 Certificate of service date 7/30/01. Number of Pages: 34 (8835). [01-1333, 01-1416, 01-1418] (rgf) [01-1333 01-1416 01-1418]

7/31/01 FINAL BRIEF filed by John Payton for Appellee Univ MI Bd of Regent, Appellee James J. Duderstadt, Appellee Lee Bollinger in 01-1333, 01-1416, 01-1418. Copies: 07 Certificate of service date 7/30/01. Number of Pages: 60 (13922). [01-1333, 01-1416, 01-1418] (rgf) [01-1333 01-1416 01-1418]

* * *

7/31/01 FINAL BRIEF filed by John Payton for Appellee Univ Mi Bd of Regent, Appellee James J. Duderstadt, Appellee Lee Bollinger in 01-1333, 01-1416, 01-1418. Copies: 07. Certificate of service date 7/30/01. Number of Pages: 29 (6975). [01-1333, 01-1416, 01-1418] (rgf) [01-1333 01-1416 01-1418]

7/31/01 FINAL BRIEF filed by Kirk O. Kolbo for Appellant Patrick Hamacher, Appellant Jennifer Gratz in 01-1333, Kirk O. Kolbo for Appellee Patrick Hamacher, Appellee Jennifer Gratz in 01-1416, Kirk O. Kolbo for Appellant Patrick Hamacher, Appellant Jennifer Gratz in 01-1418 Copies: 07. Certificate of Service date 7/30/01. Number of Pages: 67 (13981). [01-1333, 01-1416, 01-1418] (rgf) [01-1333 01-1416 0-1418]

* * *

7/31/01 FINAL BRIEF filed by Kirk O. Kolbo for Appellant Patrick Hamacher, Appellant Jennifer Gratz in 01-1333, Kirk O. Kolbo for Appellee Patrick Hamacher, Appellee Jennifer Gratz in 01-1416, Kirk O. Kolbo for Appellant Patrick Hamacher, Appellant Jennifer Gratz in 01-1418 Copies: 07. Certificate of Service date 7/30/01. Number of Pages: 57 (12934). [01-1333, 01-1416, 01-1418] (rgf) [01-1333 01-1416 0-1418]

8/27/01 Oral argument date set for October 23, 2001 in court room 607. Notice of argument sent to counsel. [01-1333, 01-1416, 01-1418] (rld) [01-1333 01-1416 01-1418]

* * *

10/19/01 ORDER filed granting petition for en banc hearing [2356046-1], [2356062-1], and [2356074-1] filed by Kirk O. Kolbo. Boyce F. Martin, Chief Judge; Danny J. Boggs, Eugene E. Siler, Alice M. Batchelder, Martha C. Daughtrey, Karen N. Moore, R. G. Cole, Eric L. Clay, Ronald L. Gilman, Circuit Judges. (blh) [01-1333 01-1416 01-1418 01-1438 01-1447 01-1516]

* * *

12/6/01 CAUSE ARGUED on 12/6/01 by David F. Herr for Appellant Patrick Hamacher, Appellant Jennifer Gratz in 01-1333, John Payton for Appellee Univ MI Bd of Regent, Appellee James J. Duderstadt, Appellee Lee Bollinger in 01-1333, John Payton for Appellant MI Bd Regents, Appellant James J. Duderstadt, Appellant Lee Bollinger in 01-1416, David F. Herr for Appellee Patrick Hamacher, Appellee Jennifer Gratz in 01-1416, David F. Herr for Appellant Patrick Hamacher, Appellant Jennifer Gratz in 01-1418, John Payton for Appellee MI Bd Regents, Appellee James J. Duderstadt, Appellee Lee Bollinger in 01-1418 before Judges Martin, Boggs, Siler, Batchelder, Daughtrey, Moore, Cole, Clay, Gilman. [01-1333, 01-1416, 01-1418] (me) [01-1333 01-1416 01-1418]

10/23/02 U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant Jennifer Gratz in 01-1333, Appellant Patrick Hamacher in 01-1333, Appellee Jennifer Gratz in 01-1416, Appellee Patrick Hamacher in 01-1416. Appellant Jennifer Gratz in 01-1418, Appellant Patrick Hamacher in 01-1418. Filed

in the Supreme Court on 10-01-02, Supreme Ct. case number: 02-516. [01-1333, 01-1416, 01-1418] (swh) [01-1333 01-1416 01-1418]

10/23/02 U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellee Ebony Patterson in 01-1333, Defendant Ebony Patterson in 01-1416, Appellee Ebony Patterson in 01-1418. Filed in the Supreme Court on 10-16-02, Supreme Ct. case number: 02-571. [01-1333, 01-1416, 01-1418] (swh) [01-1333 01-1416 01-1418]

12/5/02 U.S. Supreme Court letter filed granting petition for writ of certiorari limited to Question 1 presented by the petition [2635739-1] filed by Patrick Hamacher, Jennifer Gratz, Patrick Hamacher, Jennifer Gratz, Patrick Hamacher, Jennifer Gratz [01-1333, 01-1416, 01-1418] in 01-1333, 01-1416, 01-1333. Filed in the Supreme Court on 12-02-02. (swh) [01-1333 01-1416 01-1418]

12/6/02 U.S. Supreme Court letter filed denying petition for writ of certiorari [2635796] filed by Ebony Patterson, et al. [01-1333, 01-1416, 01-1418, 01-1438] in 01-1333, 01-1416, 01-1418. Filed in the Supreme Court on 12-02-02. (swh) [01-1333 01-1416 01-1418]

U.S. Court of Appeals for the Sixth Circuit

No. 01-1438

3/30/01 Civil Case Docketed. Notice filed by Appellant Ebony Patterson, Appellant Ruben Martinez, Appellant Laurent Crenshaw, Appellant Karla R. Williams, Appellant Larry Brown, Appellant Tiffany Hall, Appellant Kristen M.J. Harris, Appellant Michael Smith, Appellant Khyla Craine, Appellant Nyah Carmichael, Appellant Shanna Dubose, Appellant Ebony Davis, Appellant Nicole Brewer, Appellant Karla Harlin, Appellant Brian Harris, Appellant Katrina Gipson, Appellant Candice B.N. Reynolds, Appellant Denise Patterson, Appellant Moises Martinez, Appellant Larry Crenshaw, Appellant Harry J. Williams, Appellant Patricia Swan-Brown, Appellant Karen A. McDonald, Appellant Linda A. Harris, Appellant Deanna A. Smith, Appellant Alice Brennan, Appellant Ivy Rene Carmichael, Appellant Sarah L. Dubose, Appellant Inger Davis, Appellant Barbara Dawson, Appellant Roy D. Harlin, Appellant Wyatt G. Harris, Appellant George C. Gipson, Appellant Shawn R. Reynolds, Appellant Citizens Affir, James J. Duderstadt, MI Bd Regents. Transcript needed: y ☐ (blc)

* * *

5/14/01 PETITION for en banc hearing filed by Kirk O. Kolbo for Appellees Patrick Hamacher, Jennifer Gratz. Certificate of service date 5/11/01. [01-1438] (blh)

* * *

6/4/01 ORDER filed placing the petition for hearing en banc in abeyance. [2367450-1] [01-1438] Entered by order of the court. (blh)

* * *

7/10/01 CERTIFIED RECORD filed. Volumes include 3 Tr; 18 Pl. [01-1438] Applied from 01-1333, 01-1416 & 01-1418. (jc)

* * *

10/19/01 ORDER filed granting petition for en banc hearing [2356046-1], [2356062-1], and [2356074-1] filed by Kirk O. Kolbo. Boyce F. Martin, Chief Judge; Danny J. Boggs, Eugene E. Siler, Alice M. Batchelder, Martha C. Daughtrey, Karen N. Moore, R.G. Cole, Eric L. Clay, Ronald L. Gilman, Circuit Judges. (blh)

10/19/01 Date previously set for oral argument is cancelled. [01-1438] (me)

* * *

11/16/01 ORDER filed denying motion to terminate the stay of the district court's injunction filed by Kirk O. Kolbo in 01-1447; oral argument set for 12/6/01 as follows: 01-1333/1416/1418-20 min. appt; 15 min. appe; 5 min. itv; 01-1438 15 min per side; 01-1447/1516 20 min. per side in 01-1333/1416/01-1418, 01-1438/01-1447, 01-1516. Boyce F. Martin Jr., Chief Judge, Danny J. Boggs, Eugene E. Siler, Alice M. Martha C. Daughtrey, Karen N. Moore, R. G. Cole, Eric L. Clay, Ronald L. Gilman, Circuit Judges. (ert)

* * *

12/6/01 CAUSE ARGUED on 12/6/01 by Theodore M. Shaw for Appellant Citizens Affir, Appellant

Shawn R. Reynolds, Appellant George C. Gipson, Appellant Wyatt G. Harris, Appellant Roy D. Harlin, Appellant Barbara Dawson, Appellant Inger Davis, Appellant Sarah L. Dubose, Appellant Ivy Rene Carmichael, Appellant Alice Brennan, Appellant Deanna A. Smith, Appellant Linda A. Harris, Appellant Karen A. McDonald, Appellant Patricia Swan-Brown, Appellant Harry J. Williams, Appellant Larry Crenshaw, Appellant Moises Martinez, Appellant Denise Patterson, Appellant Candice B.N. Reynolds, Appellant Katrina Gipson, Appellant Brian Harris, Appellant Karla Harlin, Appellant Nicole Brewer, Appellant Ebony Davis, Appellant Shanna Dubose, Appellant Nyah Carmichael, Appellant Khyla Craine, Appellant Michael Smith, Appellant Kristen M.J. Harris, Appellant Tiffany Hall, Appellant Larry Brown, Appellant Karla R. Williams, Appellant Laurent Crenshaw, Appellant Ruben Martinez, Appellant Ebony Patterson, David F. Herr for Appellee Patrick Hamacher, Appellee Jennifer Gratz before Judges Martin, Boggs, Siler, Batchelder, Daughtrey, Moore, Cole, Clay, Gilman. [01-1438] (me)

10/23/02 U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellee Jennifer Gratz, Appellee Patrick Hamacher. Filed in the Supreme Court on 10-01-02, Supreme Ct. case number: 02-516. [01-1438] (swh)

10/23/02 U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant Ebony Patterson. Filed in the Supreme Court on 10-16-02, Supreme Ct. case number 02-571. [01-1438] (swh)

12/5/02 U.S. Supreme Court letter filed granting petition for writ of certiorari limited to Question 1 presented by the petition [2635747-1] filed by Patrick Hamacher, Jennifer Gratz [01-1438]. Filed in the Supreme Court on 12-02-02. (swh)

U.S. District Court

for the Eastern District of Michigan (Detroit)

10/14/97 1 COMPLAINT – Receipt # 351144 – Date Fee Received: 10/14/97 (nh) [Entry date 10/16/97]

10/21/97 4 SUMMONS returned executed by process server on 10/14/97 answer due 11/3/97 for Lee Bollinger, for James T. Duderstadt, for Univ MI College Lit, for Univ MI (LS) [Entry date 10/23/97]

* * *

12/3/97 6 ANSWER by defendants Lee Bollinger, James T. Duderstadt and Univ MI to complaint [1-1] with proof of mailing (RH) [Entry date 12/05/97] [Edit date 05/27/99]

12/3/97 6 AFFIRMATIVE defenses by defendants Lee Bollinger, James T. Duderstadt and Univ MI (RH) [Entry date 12/05/97] [Edit date 05/27/99]

* * *

12/22/97 8 DEMAND by plaintiffs for jury trial (dp) [Entry date 01/05/98]

* * *

2/5/98 11 MOTION by Ebony Patterson, Ruben Martinez, Laurent Crenshaw, Karla Williams, Larry Brown, Tiffany Hall, Kristen J. J. Harris, Michael Smith, Khyla Craine, Nyah Carmichael, Shanna Dubose, Nichole Brewer, Ebony Davis, Karlin Harlin, Brian Harris, Katrina Gipson, Candice Reynolds and Citizens for Affirmative Action's Preservation to intervene,

with brief and proposed answer of intervening defendants (RH) [Entry date 02/06/98] [Edit date 01/26/99]

2/5/98 – SCHEDULE by Judge Patrick J. Duggan: status conference set for 2:00 3/31/98 (mo) [Entry date 02/09/98] [Edit date 05/27/99]

2/11/98 12 MOTION (first amended) by Ebony Patterson, Laurent Crenshaw, Karla R. Williams, Tiffany Hall, Kristen M. J. Harris, Michael Smith, Khyla Craine, Nyah Carmichael, Shanna Dubose, Ebony Davis, Nicole Brewer, Karla Harlin, Brian Harris, Katrina Gipson, Candice B. N. Reynolds, Citizens Actions, Ruben Martinez and Larry Brown to intervene with proof of mailing (cv) [Entry date 02/12/98] [Edit date 05/27/99]

* * *

2/24/98 14 RESPONSE by plaintiffs Jennifer Gratz and Patrick Humacher to motion to intervene [12-1] (RH) [Entry date 02/26/98] [Edit date 05/27/99]

2/24/98 15 RESPONSE by defendants to motion to intervene [12-1] with proof of mailing (RH) [Entry date 08/11/98]

3/4/98 16 REPLY by intervening defendants to response to motion to intervene [12-1] with proof of mailing (pd) [Entry date 05/27/99]

* * *

7/7/98 24 MEMORANDUM opinion and order by Judge Patrick J. Duggan denying motion to

intervene by intervening defen [12-1] (dp) [Entry date 07/08/98]

* * *

7/21/98 29 MOTION by intervening defendants for reconsideration of order [24-1] with brief, attachment and proof of mailing (kg) [Entry date 07/22/98]

7/24/98 30 NOTICE by the Court of hearing on motion for reconsideration of order [24-1] by intervening defen [29-1] (RH) [Entry date 08/04/98]

* * *

8/14/98 34 SUPPLEMENTAL memorandum by intervening defendants in support of motion for reconsideration of order [24-1] by intervening defen [29-1] with attachments A-D and proof of mailing (dp) [Entry date 08/17/98]

9/14/98 36 MOTION by Univ MI, James T. Duderstadt, Lee Bollinger for order denying class certification with brief, exhibits and proof of mailing (LS) [Entry date 09/15/98]

* * *

10/13/98 45 MOTION by plaintiffs for class certification, and for bifurcation of liability and damages trials with attachments A-F (LS) [Entry date 10/14/98]

* * *

10/27/98 48 OPINION and order by Judge Patrick J. Duggan denying motion for reconsideration of order [24-1] by intervening defen [29-1] with proof of mailing. (cf) [Entry date 10/30/98]

11/2/98 49 APPEAL by intervening defendants of order [48-1] to USCA – FEE: PAID – Receipt: #370580 (do) [Entry date 11/04/98] [Edit date 05/27/99]

11/2/98 52 REPLY by defendants to response to motion for order denying class certification [36-1] with exhibits A-E and proof of mailing (dh) [Entry date 11/05/98] [Edit date 05/27/99]

11/2/98 52 RESPONSE by defendants to motion for class certification [45-1] and for bifurcation of liability and damages trials [45-2] with exhibits A-E and proof of mailing (dh) [Entry date 11/05/98] [Edit date 05/27/99]

* * *

11/18/98 56 REPLY by plaintiffs Patrick Humacher and Jennifer Gratz to response to motion for class certification [45-1], motion for bifurcation of liability and damages trials by Jennifer Gratz, Patrick Humacher [45-2] with attachments (kg) [Entry date 11/19/98]

11/20/98 57 ACKNOWLEDGEMENT from USCA of receipt of appeal & docket [51-1] – appeal case # 98-2248 (LS) [Entry date 11/24/98]

* * *

12/10/98 – MOTION hearing held on motion for class certification [45-1] and for bifurcation of liability and damages trials [45-2] and motion for order denying class certification [36-1] – disposition: taken under advisement – Judge Patrick J. Duggan – Court Reporter: Marie Metcalf (mo) [Entry date 12/10/98] [Edit date 05/27/99]

* * *

12/23/98 62 ORDER by Judge Patrick J. Duggan granting motion for class certification [45-1] and for bifurcation of liability and damages trials [45-2] and denying motion for order denying class certification [36-1] (lg) [Entry date 12/28/98] [Edit date 05/27/99]

12/23/98 63 MEMORANDUM opinion and order by Judge Patrick J. Duggan, regarding plaintiffs' motion for class certification and bifurcation of liability and damaged trials and defendants' motion for order denying class certification (lg) [Entry date 12/30/98]

* * *

4/1/99 76 ORDER by Judge Patrick J. Duggan, with consent motion, providing that the proper defendants be named and with proof of mailing. (Note: "Board of Regents" added as party text to defendant University of Michigan and terminating defendant, The University of Michigan College of Literature, Arts and Science.) (cf) [Entry date 04/05/99] [Edit date 04/05/99]

4/9/99 77 MOTION by plaintiffs Patrick Humacher and Jennifer Gratz for partial summary judgment on liability with brief (dp) [Entry date 04/12/99]

4/9/99 78 AFFIDAVIT and exhibits filed by plaintiffs Patrick Humacher and Jennifer Gratz in support of motion for partial summary judgment on liability (document 77); volume I (dp) [Entry date 04/12/99] [Edit date 04/12/99]

4/9/99 79 AFFIDAVIT and exhibits filed by plaintiffs Patrick Humacher and Jennifer Gratz in support of motion for partial summary judgment (document 77); volume II (dp) [Entry date 04/12/99]

5/3/99 80 MOTION by defendant's for summary judgment (cm) [Entry date 05/04/99]

5/3/99 81 RESPONSE by defendants to motion for partial summary judgment on liability [77-1] with cross-motion for summary judgment, brief and proof of mailing (cm) [Entry date 05/04/99] [Edit date 05/27/99]

5/3/99 82 APPENDIX by defendants in support of opposition to plaintiffs' motion for partial summary judgment, and memorandum in support of motion for summary judgment by Lee Bollinger, James T. Duderstadt, Univ MI, Univ MI College Lit [80-1] Volume 1: Documents and Materials (cm) [Entry date 05/04/99]

5/3/99 83 APPENDIX by defendants in support of opposition to plaintiffs' motion for partial summary judgment, and memorandum in support of defendants' cross-motion for summary judgment by Lee Bollinger, James T. Duderstadt, Univ MI, Univ MI College Lit [80-1] Volume 2: Deposition Excerpts (CM) [Entry date 05/04/99]

5/3/99 84 APPENDIX by defendants in support of opposition to plaintiffs' motion for partial summary judgment, and motion for summary judgment by Lee Bollinger, James T. Duderstadt, Univ MI, Univ MI College Lit

[80-1] Volume 3: Expert Witness Reports (cm) [Entry date 05/04/99]

* * *

6/1/99 97 MEMORANDUM by plaintiffs in opposition to motion for summary judgment by Lee Bollinger, James T. Duderstadt, Univ MI, Univ MI College Lit [80-1] (dh) [Entry date 06/02/99]

6/1/99 98 NON-CERTIFIED copy of order from USCA granting – appeal case # 98-2248 (dh) [Entry date 06/02/99]

6/1/99 99 AFFIDAVIT of Kirk O. Kolbo and exhibits regarding memorandum in opposition by Jennifer Gratz, Patrick Humacher [97-1] (dh) [Entry date 06/02/99]

* * *

6/7/99 101 NON-CERTIFIED copy of order from USCA granting appellants' motion to stay district court proceedings – appeal case # 98-2248 (dp) [Entry date 06/08/99]

8/13/99 102 SLIP opinion from USCA reversing and remanding the case for further proceedings, etc. – appeal case # 98-2009/2248. (cf) [Entry date 08/17/99]

8/13/99 103 NON-CERTIFIED copy of judgment from USCA reversing and remanding the case for further proceedings, etc. – appeal case # 98-2009/2248. (cf) [Entry date 08/17/99]

* * *

9/8/99 107 NON-CERTIFIED copy of order from USCA granting case – appeal case # 98-2248 (dh) [Entry date 09/09/99]

* * *

9/15/99 109 MANDATE from USCA reversing, remanding and vacating-appeal case # 98-2248 (LS) [Entry date 09/17/99]

* * *

10/12/99 110 ANSWER by intervening defendants Citizens Aff Actions, Candice B. N. Reynolds, Katrina Gipson, Brian Harris, Ebony Davis, Shanna Dubose, Nyah Carmichael, Khyla Craine, Michael Smith, Kristen M. J. Harris, Tiffany Hall, Ruben Martinez, Karla R. Williams, Laurent Crenshaw, Larry Brown, Ebony Patterson, Nicole Brewer and Karla Harlin to complaint [1-1] with proof of mailing proof of mailing (dp) [Entry date 10/14/99]

* * *

2/7/00 119 MOTION by defendants for relief from order regarding class certification and bifurcation in light of subsequent authority with brief and proof of mailing (cm) [Entry date 02/09/00]

* * *

3/9/00 130 REPLY brief by defendants to response to, and in support of, motion for relief from order regarding class certification and bifurcation in light of subsequent authority by James T. Duderstadt, Lee Bollinger and Univ MI [119-1] with proof of mailing (dp) [Entry date 03/13/00]

* * *

5/2/00 144 OPINION and order by Judge Patrick J. Dugan denying motion for relief from order regarding class certification and bifurcation in light of subsequent authority by James T. Duderstadt, Lee Bollinger, Univ MI [119-1] with proof of mailing. [EOD Date: 5/2/00] (cf) [Entry date 05/02/00]

* * *

7/17/00 156 MOTION (renewed) by plaintiffs' Patrick Humacher and Jennifer Gratz renewed motion for partial summary judgment on liability with supplemental memorandum in support of motion, affidavit of Kirk O. Kolbo and exhibits in support of motion. (cf) [Entry date 07/18/00]

* * *

7/17/00 158 MOTION (renewed by defendants Univ MI, James T. Duderstadt, Lee Bollinger renewed motion for summary judgment as to plaintiffs' claims for injunctive and declaratory relief with brief and certificate of service via courier. (cf) [Entry date 07/18/00]

7/17/00 159 MOTION (renewed) by defendants Univ MI, James T. Duderstadt, and Lee Bollinger renewed motion for summary judgment on grounds of qualified immunity with brief and certificate of service via courier. (cf) [Entry date 07/18/00]

7/17/00 160 APPENDIX (Volume 1 – documents and materials) by defendants Univ MI, James T. Duderstadt, and Lee Bollinger to motion renewed motion for summary judgment on grounds of qualified immunity by Lee

Bollinger, James T. Duderstadt, Univ Mi [159-1], and motion renewed motion for summary judgment as to plaintiffs' claims for injunctive and declaratory relief by Lee Bollinger, James T. Duderstadt, Univ MI [158-1] (cf) [Entry date 07/18/00] [Edit date 07/18/00]

7/17/00 161 APPENDIX (Volume 2 – deposition excerpts) by defendants Univ MI, James T. Duderstadt, and Lee Bollinger to motion renewed motion for summary judgment on grounds of qualified immunity by Lee Bollinger, James T. Duderstadt, Univ MI [159-1], and motion renewed motion for summary judgment as to plaintiffs' claims for injunctive and declaratory relief by Lee Bollinger, James T. Duderstadt, Univ MI [158-1]. (cf) [Entry date 07/18/00] [Edit date 07/18/00]

7/17/00 162 APPENDIX (Volume 3 – expert witness reports) by defendants Univ MI, James T. Duderstadt, and Lee Bollinger to motion renewed motion for summary judgment on grounds of qualified immunity by Lee Bollinger, James T. Duderstadt, Univ MI [159-1], and motion renewed motion for summary judgment as to plaintiffs' claims for injunctive and declaratory relief by Lee Bollinger, James T. Duderstadt, Univ MI [158-1]. (cf) [Entry date 07/18/00]

7/17/00 163 APPENDIX (Volume 4 – court orders and briefs and amici curiae) by defendants Univ MI, James T. Duderstadt, and Lee Bollinger to motion renewed motion for summary judgment on grounds of qualified immunity by Lee Bollinger, James T. Duderstadt,

Univ MI [159-1], and motion renewed motion for summary judgment as to plaintiffs' claims for injunctive and declaratory relief by Lee Bollinger, James T. Duderstadt, Univ MI [158-1]. (cf) [Entry date 07/18/00]

* * *

7/17/00 165 MOTION by defendants James T. Duderstadt and Lee Bollinger for summary judgment on grounds of qualified immunity with proof of mailing (dp) [Entry date 07/20/00]

* * *

8/11/00 172 RESPONSE by Patrick Humacher, Jennifer Gratz to renewed motion for summary judgment on grounds of qualified immunity by Lee Bollinger, James T. Duderstadt, Univ MI [159-1], and renewed motion for summary judgment as to plaintiffs' claims for injunctive and declaratory relief by Lee Bollinger, James T. Duderstadt, Univ MI [158-1] with proof of mailing (LS) [Entry date 08/14/00]

8/11/00 172 REPLY by Patrick Humacher, Jennifer Gratz to response and in support of renewed motion for partial summary judgment on liability by Jennifer Gratz, Patrick Humacher [156-1] with proof of mailing (LS) [Entry date 08/14/00]

8/11/00 173 AFFIDAVIT of Kirk O. Kolbo and exhibits submitted in support of plaintiffs memorandum in opposition to defendants two renewed motions for summary judgment and reply memorandum in support of

plaintiffs motion for partial summary judgment with attachments A-F (LS) [Entry date 08/14/00]

* * *

8/11/00 175 RESPONSE in opposition by intervening defendants to renewed motion for partial summary judgment on liability by Jennifer Gratz and Patrick Humacher [156-1] with proof of mailing (approved for filing) (LS) [Entry date 08/14/00]

8/11/00 176 RESPONSE by intervening defendants to renewed motion for summary judgment as to plaintiffs' claims for declaratory relief by Lee Bollinger, James T. Duderstadt, Univ MI [158-1] with attachment and proof of mailing (LS) [Entry date 08/14/00]

8/11/00 177 APPENDIX by intervening defendants in support of defendant – intervenors opposition ot plaintiffs renewed motion for summary judgment (Volume 1: Expert Witness Reports) (LS) [Entry date 08/14/00]

8/11/00 178 APPENDIX by intervening defendants in support of defendant – intervenors opposition to plaintiffs renewed motion for summary judgment (volume II: Expert Witness Reports) (LS) [Entry date 08/14/00]

8/11/00 179 APPENDIX by intervening defendants in support of defendant – intervenors opposition to plaintiffs renewed motion for summary judgment (volume II-B: Expert Witness Reports) (LS) [Entry date 08/14/00]

8/11/00 180 APPENDIX by intervening defendants in support of defendant-intervenors opposition to plaintiffs renewed motion for summary

judgment (volume III: Expert Witness Report) (LS) [Entry date 08/14/00]

8/11/00 181 APPENDIX by intervening defendants in support of defendant – intervenors opposition to plaintiffs renewed motion for summary judgment (volume IV: Materials and Deposition Excerpts) (LS) [Entry date 08/14/00]

8/11/00 182 MEMORANDUM by defendants in opposition to motion renewed motion for summary judgment on grounds of qualified immunity by Lee Bollinger, James T. Duderstadt, Univ MI [159-1] with proof of mailing and attachments (1g) [Entry date 08/15/00]

* * *

8/24/00 188 REPLY by plaintiff's to response in opposition to motion renewed motion for partial summary judgment on liability by Jennifer Gratz, Patrick Humacher [156-1] (nh) [Entry date 08/29/00]

* * *

9/1/00 193 SUR-REPLY memorandum by defendant/ intervenor's in opposition to motion renewed motion for partial summary judgment on liability by Gratz, Patrick Humacher [156-1] with proof of mailing (nh) [Entry date 10/05/00]

9/7/00 191 NOTICE by defendant Univ MI of adjourning hearing on motion renewed motion for summary judgment on grounds of qualified immunity by Lee Bollinger, James T. Duderstadt, Univ MI [159-1]; renewed motion for judgment as to plaintiffs' claims

for injunctive and declaratory relief by Lee Bollinger, James T. Duderstadt, Univ MI [158-1]; motion to strike any testimony or expert opinions (including of William Bowen) based on consideration of the college and beyond database by Jennifer Gratz, Patrick Humacher [157-1]; motion renewed motion for partial summary on liability by Jennifer Gratz, Patrick Humacher [156-1]; motion for summary judgment on grounds of qualified immunity by Lee Bollinger, James T. Duderstadt [165-1] for 9:30 11/21/00 and adjouning the final pretrial conference (cm) [Entry date 09/08/00]

10/3/00 192 CERTIFIED copy of order from USCA denying petitions for permission to appeal or alternatively for relief in mandamus – appeal case # 00-0107/0109 (also see 97-75928) (dp) [Entry date 10/04/00]

* * *

11/16/00 – MOTION hearing held on motion renewed motion for summary judgment as to plaintiffs' claims for injunctive and declaratory relief by Bollinger, James T. Duderstadt, Univ Mi [158-1], motion renewed motion for partial summary judgment on liability by Jennifer Gratz, Patrick Humacher [156-1] – disposition: taken under advisement – Judge Patrick J. Duggan – Court Reporter: Marie Metcalf (mo) [Entry date 11/16/00]

11/27/00 204 TRANSCRIPT taken on 11/16/00 of motion for partial summary judgment on liability and motion to strike, defendants' renewed motion for summary judgment re injunctive (lg) [Entry date 12/01/00]

* * *

12/13/00 205 JOINT summary of undisputed facts regarding admissions process. (cf) [Entry date 12/20/00]

12/13/00 206 OPINION by Judge Patrick J. Duggan denying renewed motion for summary judgment on grounds of eleventh amendment immunity by Lee Bollinger, James T. Duderstadt, Univ MI [159-1], granting renewed motion for summary judgment with respect to the LSA's admissions programs for 1999 and 2000 by Lee Bollinger, James T. Duderstadt, Univ MI [158-1], granting renewed motion for summary judgment with respect to the LSA's admissions programs in existence from 1995 through 1998, and the admissions programs for such years shall be declared unconstitutional and denying request for injunctive relief by Jennifer Gratz, Patrick Humacher [156-1], and granting motion for summary judgment on grounds of qualified immunity by Lee Bollinger, James T. Duderstadt [165-1] with proof of mailing. [EOD Date: 12/20/00] (cf) [Entry date 12/20/00] [Edit date 12/20/00]

1/30/01 207 ORDER by Judge Patrick J. Duggan granting renewed motion for partial summary judgment on liability by Patrick Humacher, Jennifer Gratz [156-1] in favor of plaintiffs with respect to the LSA's admissions programs in existence from 1995 thrugh 1998 and the admissions programs for such years are hereby declared unconstitutional; and in favor of University defendants with respect to the

LSA's admission programs for 1999 and 2000; denying plaintiffs requests injunctive relief [158-1], denying motion for summary judgment on grounds of qualified immunity by James T. Duderstadt, Lee Bollinger [165-1], granting renewed motion for summary judgment on grounds of qualified by Univ MI, James T. Duderstadt, Lee Bollinger [159-1] and the Board of Regents motion for summary judgment on grounds of Eleventh Amendment immunity is denied (see order for details) with proof of mailing [Date 2/2/01] (LS) [Entry date 02/02/01]

2/9/01 208 ORDER by Judge Patrick J. Duggan, stating that the claims under qualified immunity should be resolved as quickly as possible [EOD Date 2/12/01] (lg) [Entry date 02/12/01]

2/9/01 209 JUDGMENT (ORDER) by Judge Patrick J. Duggan, to dismiss defendants Lee Bollinger and James T. Duderstadt [EOD Date 2/13/01] (lg) [Entry date 02/13/01]

2/26/01 210 OPINION by Judge Patrick J. Duggan regarding defendant-intervenors' argument that the College of Literature, Science and the Arts admissions programs pass constitutional muster as narrowly tailored means of remedying past and current discrimination by the university for later consideration with proof of mailing. An order consistent with this opinion shall issue forthwith. [EOD Date: 2/28/01 (cf) [Entry date 02/28/01]

2/26/01 211 ORDER by Judge Patrick J. Duggan granting motion for summary judgment with respect to defendant-intervenors' claim that the university was justified in using race as a factor in admissions to remedy the present effects of past discrimination by Patrick Humacher, Jennifer Gratz [156-1] and that defendant-intervenors' claim that the university was justified in using race as a factor in admissions to remedy the present effects of past discrimination are dismissed with proof of mailing. [EOD Date 2/28/01] (cf) [Entry date 02/28/01]

2/26/01 212 APPEAL by plaintiffs Patrick Humacher and Jennifer Gratz of orders [209-2] and [207-1] to USCA with affidavit of service – FEE: PAID – Receipt #: 413914 (do) [Entry date 03/02/01]

3/2/01 213 PROOF of mailing of notice of appeal to USCA, all of record and Marie Metcalf (do) [Entry date 03/02/01]

3/2/01 214 CERTIFIED copy of appeal notice by Jennifer Gratz, Humacher [212-1] and docket transmitted to USCA (do) [Entry date 03/02/01]

3/12/01 215 MOTION by intervening defendants for entry of a final judgment pursuant to 54(B) and, in the alternative, to add certification for interlocutory appeal pursuant to 59(E) with brief (dp) [Entry date 03/13/01]

3/13/01 216 PROOF of mailing by intervening defendants of motion for entry of a final judgment pursuant to 54(b) and, in the alternative, 59(e) motion to add a certification for

interlocutory appeal (dp) [Entry date 03/13/01]

3/15/01 217 ACKNOWLEDGEMENT from USCA of receipt of appeal notice by Jennifer Gratz and Patrick Humacher [212-1] – appeal case # 01-1333 (dp) [Entry date 03/16/01]

3/21/01 218 ORDER by Judge Patrick J. Duggan that final judgment is entered with respect to Defendant-Intervenors' claims [EOD Date 3/22/01] (cm) [Entry date 03/22/01]

3/22/01 219 RESPONSE by plaintiffs Patrick Humacher and Jennifer Gratz to motion for entry of a final judgment pursuant to 54(B) [215-1], motion to add certification for interlocutory appeal pursuant to 59(E) [215-2] with proof of mailing (kg) [Entry date 03/23/01]

3/23/01 220 APPEAL by intervening defendants of orders [211-1] and [210-1] to USCA with proof of service – FEE; not paid (do) [Entry date 03/26/01]

3/23/01 – STAYED pending appeal by Judge Patrick J. Duggan (pd) [Entry date 03/27/01]

3/26/01 221 PROOF of mailing of notice of appeal to USCA and counsel of record (do) [Entry date 03/26/01]

3/26/01 222 CERTIFIED copy of appeal notice by intervening defendants [220-1] and docket transmitted to USCA (do) [Entry date 03/26/01]

3/27/01 223 TRANSCRIPT order form by appellants regarding request for transcript(s) appeal case #01-1333 (nh) [Entry date 03/28/01]

4/4/01 224 ORDER from USCA granting the petition and cross-petition for permission to appeal – USCA #01-0102/0104. [EOD Date 4/5/01] (cf) [Entry date 04/05/01]

4/4/01 225 ACKNOWLEDGEMENT from USCA of receipt of appeal notice intervening defen by appellant [220-1] – appeal case # 01-1438. (cf) [Entry date 04/05/01] [Edit date 04/05/01]

4/4/01 226 APPEAL filing fee received from plaintiff Patrick Humacher for appeal notice of appeal & docket [214-1] in the amount of $ 105.00 – Receipt #415896 – appeal case 01-1418 (nh) (Entry date 04/11/01]

4/4/01 227 APPEAL filing fee received from plaintiff Jennifer Gratz for appeal notice of appeal & docket [214-1] in the amount of $ 105.00 – Receipt # 415897 – Appeal case 01-1416 (nh) [Entry date 04/11/01]

* * *

4/12/01 229 APPEAL filing fee received from Natl Assn Adv for appeal notice [220-1] in the amount of $ 105.00 – Receipt # 416306 – appeal case # 01-1438 (jg) [Entry date 04/17/01]

* * *

6/22/01 231 NOTICE by plaintiff Jennifer Gratz of designation of record for appeal (dp) [Entry date 06/26/01]

6/26/01 232 RECORD consisting of: 18 volumes of pleadings and 3 transcripts transmitted to USCA – appeal case # 01-1333 & # 01-1438. (UPS 1Z 467 088 03 1209 636 6, UPS 1Z 467 088 03 1209 637 5, and UPS 1Z 467

088 03 1209 638 4) (cf) [Entry date 06/26/01]

8/2/01 233 ACKNOWLEDGEMENT from USCA of receipt of record – appeal case # 01-1333, 01-1416, 01-1418. (cf) [Entry date 08/03/01]

8/2/01 234 ACKNOWLEDGEMENT from USCA of receipt of record – appeal case # 01-1438. (cf) [Entry date 08/03/01]

10/31/02 235 NOTICE from the US Supreme Court that a petition for writ of certiorari was filed and placed on the docket (kg) [Entry date 10/31/02]

10/31/02 236 NOTICE from the US Supreme Court that a petition for writ of certiorari was filed and placed on the docket (kg) [Entry date 10/31/02]

12/11/02 237 ORDER from the U.S. Supreme Court denying writ of certiorari regarding – appeal case # 01-1333/01-1416/01-1414/01-1438 [EOD Date: 12/16/02] (cm) [Entry date 12/16/02]

12/11/02 238 ORDER from the U.S. Supreme Court of limited grant of writ of certiorari regarding question 1 – appeal case # 01-1333/01-1416/01-1418/01-1438 [EOD Date 12/16/02] (cm) [Entry date 12/16/02

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

JENNIFER GRATZ and PATRICK HAMACHER, for themselves and all others similarly situated, Plaintiffs, v. LEE BOLLINGER, JAMES J. DUDERSTADT, THE UNIVERSITY OF MICHIGAN, and THE UNIVERSITY OF MICHIGAN COLLEGE OF LITERATURE, ARTS AND SCIENCE, Defendants.	Civil Action #97-75231 PATRICK DUGGAN COMPLAINT CLASS ACTION

Nature of the Action

1. This is a class action brought for violations and threatened violations of the rights of the plaintiffs and the class they represent to equal protection of the laws under the Fourteenth Amendment to the United States Constitution, and for racial discrimination in violation of 42 U.S.C. §§ 1981, 1983 and 2000d *et seq*. Plaintiffs seek declaratory and injunctive relief and compensatory and punitive damages in an amount to be proven at trial.

Jurisdiction and Venue

2. This Court has jurisdiction of the action under 28 U.S.C. §§ 1331 and 1343. This action arises under the Fourteenth Amendment to the United States Constitution,

and under federal laws, 42 U.S.C. §§ 1981, 1983, and 2000d *et seq.*

3. Venue in this court is proper under 28 U.S.C. § 1391 and this Court has personal jurisdiction over the defendants in this matter because the events giving rise to this claim occurred, and will occur, in this district.

Plaintiffs

4. Jennifer Gratz is, and at all times relevant to this litigation was, a resident of the State of Michigan. Gratz applied in 1994 for admission to the University of Michigan College of Literature, Science & Arts (the "LSA College") in Ann Arbor as an undergraduate beginning in the academic year 1995-96. In January 1995, the LSA College placed her on a "wait list" for admission. In April 1995, she was apprised that her application had been rejected. She has attended University of Michigan at Dearborn instead.

5. Patrick Hamacher is, and at all times relevant to this litigation was, a resident of the State of Michigan. Hamacher applied for admission to the LSA College as an undergraduate in 1996. By letter dated November 19, 1996, the LSA College informed him that he had been placed on a "wait list" for admission. Sometime in the spring of 1997, he was apprised that his application had been rejected. He has attended Michigan State University instead, but would transfer to the LSA College if offered an opportunity. He intends to apply to transfer if the discriminatory admissions system described herein is eliminated.

Defendants

6. The University of Michigan is a public educational institution in the State of Michigan. The LSA College is a school under the supervisory authority of the University of Michigan.

7. James Duderstadt was the President of the University of Michigan during the time that Gratz's application was under consideration. He was, at that time, the individual ultimately responsible for the admissions policies described below. He is being sued in his individual capacity.

8. On or around February 1, 1997, Lee Bollinger became the President of the University of Michigan, and was President at the time that Hamacher's application was rejected. He was, at that time, the individual ultimately responsible for the admissions policies described below. He is being sued in both his individual and official capacities. Unless enjoined, he will continue to approve of, and implement, an admissions system substantially the same as the system described below.

Class Action Allegations

9. Gratz and Hamacher bring this class action pursuant to Rules 23(a), 23(b), and 23(c)(4)(A) of the Federal Rules of Civil Procedure on behalf of a class consisting of all students who:

- applied for and were not granted admission to the LSA College for all academic years since 1995-96 through the entry of a judgment in this action; and

- were members of those racial or ethnic groups, including Caucasian, that defendants treated less favorably in considering their applications for admission to the LSA College.

10. Plaintiffs seek to maintain this class, pursuant to Rules 23(b) and 23(c)(4), on the issues of whether defendants engaged in unlawful discrimination and whether defendants should be enjoined from continuing their discriminatory policies.

11. The Class is so numerous that joinder of all its members is impracticable. Defendants receive thousands of applications for admission each year for the LSA College. Plaintiffs do not know addresses or the precise number of rejected applicants, but can ascertain this information from the defendants' records.

12. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among the questions of law and fact common to the Class are whether defendants violated the Fourteenth Amendment to the United States Constitution, and federal laws, 42 U.S.C. §§ 1981, 1983, and 2000d *et seq.*, by discriminating and by conspiring to discriminate against certain applicants on the basis of race, and whether they will continue to do so.

13. Plaintiffs' claims are typical of the claims of the members of the Class, and they are adequate representatives of the Class. Plaintiffs and members of the Class have sustained damages because of defendants' unlawful activities alleged herein. Plaintiffs have retained counsel

competent and experienced in race discrimination litigation and intend to prosecute this action vigorously. Plaintiffs will fairly and adequately protect the interests of the Class.

14. A class action is superior to other available means for the fair and efficient adjudication of the controversy.

Facts

15. The University of Michigan is a State-run university which also receives federal funds. The LSA College is an educational unit part of, operated by, and responsible to, the University of Michigan. It also receives federal funds.

16. The LSA Admissions Form asks each applicant to disclose his or her race.

17. Each of the plaintiffs identified his or her race by checking the box next to "white."

18. Defendants used the race information provided by plaintiffs and other applicants to determine who would be admitted to the LSA College.

19. Defendants used different admissions standards based on each student's self-identified race. As a result, students from favored racial groups had a significantly greater chance of admission than students with similar credentials from disfavored racial groups.

20. Applicants from disfavored racial groups were not compared directly to applicants from favored racial groups.

21. Plaintiffs, categorized as white, were not among the favored racial groups that benefitted from less stringent admissions standards.

22. Defendants did not merely use race as a "plus" factor or as one of many factors to attain a diverse student body. Rather, race was one of the predominant factors (along with scores on standardized admissions tests and high school grades) used for determining admission.

23. Defendants had no compelling interest to justify their use of race in the admissions process, and were not motivated by either an interest in educational diversity or by a desire to remedy the present effects of any past discrimination.

24. Assuming *arguendo* that defendants had a compelling interest for which they used race in their admissions criteria, defendants did not consider, and never employed, any race neutral alternative to achieve that interest.

25. As a result of defendants' racially discriminatory procedures and practices, plaintiffs' applications were rejected. Each of the plaintiffs suffered humiliation, emotional distress, and pain and suffering as a consequence of his or her application being rejected. Each of the plaintiffs also suffered humiliation, emotional distress, and pain and suffering upon learning that defendants had discriminated against him or her on the basis of race.

26. As a result of defendants' discrimination, Gratz and Hamacher were forced to attend undergraduate institutions that were either less prestigious or more expensive (or both) resulting in higher educational costs and lower future earnings.

27. If not enjoined, the University of Michigan, the LSA College, and Bollinger will continue to use race in selecting students for the LSA College.

FIRST CLAIM

28. Plaintiffs repeat and reallege the allegations and averments of paragraphs 1-27 as if fully set forth herein.

29. Hollinger and Duderstadt acted under color of law to deny plaintiffs equal protection of the laws, and to discriminate on the basis of race, in violation of 42 U.S.C. §§ 1981 and 1983.

30. Bollinger and Duderstadt violated plaintiffs' clear and well-established Constitutional right to receive the same consideration for admissions as applicants of other races.

SECOND CLAIM

31. Plaintiffs repeat and reallege the allegations and averments of paragraphs 1-30 as if fully set forth herein.

32. The University of Michigan and the LSA College are recipients of federal funds. They discriminated against plaintiffs on the basis of their race, color, and/or ethnicity in violation of 42 U.S.C. § 2000d *et seq.*

RELIEF

WHEREFORE, plaintiffs demand judgment:

A. Awarding them compensatory and punitive damages in an amount to be proven at trial;

B. Declaring that defendants violated their rights to nondiscriminatory treatment under the Fourteenth Amendment and 42 U.S.C. §§ 1981, 1983, and 2000d *et seq.*;

C. Enjoining defendants from continuing to discriminate on the basis of race in violation of the Fourteenth Amendment;

D. Requiring the LSA College to offer Hamacher admission as a transfer student;

E. Awarding attorneys' fees and costs pursuant to 42 U.S.C. § 1988 and any other applicable authority; and

F. Awarding any other relief that is appropriate and just.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

JENNIFER GRATZ and PATRICK HAMACHER, for themselves and all others similarly situated, Plaintiffs, v. LEE BOLLINGER, JAMES J. DUDERSTADT, THE UNIVERSITY OF MICHIGAN, and THE UNIVERSITY OF MICHIGAN COLLEGE OF LITERATURE, ARTS AND SCIENCE, Defendants.	Civil Action No. 97-75231 Hon. Patrick J. Duggan Hon. Thomas A. Carlson

ANSWER

Defendants Lee Bollinger, James J. Duderstadt, and the Regents of the University of Michigan hereby answer the Complaint. Defendants treat named defendants "The University of Michigan" and "The University of Michigan College of Literature, Arts and Science" as referring to the "Regents of the University of Michigan," the body corporate with the authority to be sued under law, and respond to the Complaint on that basis. Accordingly, the term "defendants" as used in this Answer refers to Bollinger, Duderstadt and the Regents of the University of Michigan. Defendants would not object to the filing of an Amended Complaint that replaced "The University of Michigan" and "The University of Michigan College of Literature, Arts and Science," which are not proper defendants, with the "Regents of the University of Michigan."

Except as hereinafter expressly admitted, qualified, or otherwise admitted, defendants specifically deny each and every allegation, statement, matter and thing contained in the Complaint. Defendants respond to the numbered allegations in the Complaint on knowledge to themselves and on information and belief as to other matters, as follows:

1. No response is required to the allegations in paragraph 1 of the Complaint, which are the plaintiffs' characterization of their claims.

2. Defendants deny the allegations in paragraph 2 of the Complaint.

3. Defendants admit that, to the extent that the Court has subject-matter jurisdiction, venue is proper in this Court. Defendants deny all of the remaining allegations in paragraph 3 of the Complaint.

4. Defendant the Regents of the University of Michigan states that, on or about January 12, 1995, the University of Michigan-Ann Arbor received an application for freshman admission to the University's College of Literature, Science and the Arts for the fall 1995 term from Jennifer Gratz. On January 19, 1995, the University of Michigan-Ann Arbor sent a letter to Gratz informing her that her application was rejected, but offering her a position on an "extended wait list." Gratz did not respond to the offer, and therefore was not considered further when other students were admitted from the extended wait list. Defendant the Regents of the University of Michigan admits that Gratz was admitted to the University of

Michigan-Dearborn on December 6, 1994, and that she attends the University of Michigan-Dearborn. Defendants Bollinger and Duderstadt lack personal knowledge with respect to Gratz' application. All defendants lack knowledge and information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph 4 of the Complaint.

5. Defendant the Regents of the University of Michigan states that on or about October 23, 1996, the University of Michigan-Ann Arbor received an application for freshman admission to the University's College of Literature, Science and the Arts for the fall 1997 term from Patrick Hamacher. On November 19, 1996, the University of Michigan-Ann Arbor sent a letter to Hamacher informing him that it was delaying decision on his application. On April 14, 1997, the University of Michigan-Ann Arbor sent a letter to Hamacher informing him that his application was rejected, but offering him a position on an "extended wait list." Hamacher did not respond to the offer, and therefore was not considered further when other students were admitted from the extended wait list. Defendants Bollinger and Duderstadt lack personal knowledge with respect to Hamacher's application. Defendants deny that they employ or employed the "discriminatory admissions system" described in the Complaint. All defendants lack knowledge and information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph 5 of the Complaint.

6. Defendants admit the allegations in the first sentence of paragraph 6 of the Complaint. Defendants do not understand the second sentence of paragraph 6 of the

Complaint as pleaded, but state that the College of Literature, Science and the Arts is a college of the University of Michigan.

7. Defendants admit the allegations in the first sentence of paragraph 7 of the Complaint. In response to the second sentence, defendants state that during the time that Gratz' application was under consideration, Duderstadt, as president of the University of Michigan, served as the University's chief administrative officer, and had oversight responsibility for the University's admissions policies. Defendants admit that plaintiffs purport to sue Duderstadt in his individual capacity.

8. Defendants admit the first sentence of paragraph 8 of the Complaint, and admit that plaintiffs purport to sue Bollinger in his individual and official capacities. Defendants further state that as president of the University of Michigan, Bollinger is the University's chief administrative officer, and has oversight responsibility for the University's admissions policies. With respect to the last sentence of paragraph 8 of the Complaint, defendants state that the Complaint inaccurately describes the University of Michigan's admissions process, and therefore that no response is required. To the extent that a response is deemed necessary, defendants the Regents of the University of Michigan and Bollinger state that they do have a current intention to continue using race as one of many factors considered in admissions, and deny the remaining allegations of the last sentence of paragraph 8 of the complaint. To the extent that a response is deemed necessary, defendant Duderstadt lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the last sentence of paragraph 8 of the Complaint.

9. Defendants admit that plaintiffs purport to bring this action as a class action. No response is necessary to the plaintiffs' characterization of their claims in the remainder of paragraph 9 of the Complaint.

10. Defendants admit that plaintiffs seek to maintain a class. No response is necessary to the plaintiffs' characterization of their claims in the remainder of paragraph 10 of the Complaint.

11. Defendants admit that the University of Michigan receives thousands of applications each year for freshman admission into the College of Literature, Science and the Arts, and that some of the names and addresses of rejected applicants may be obtained from files maintained by the Office of Undergraduate Admissions. Defendants deny all of the remaining allegations in paragraph 11 of the Complaint.

12. Defendants deny the allegations in paragraph 12 of the Complaint.

13. Defendants deny the allegations in paragraph 13 of the Complaint, except that defendants lack information or knowledge sufficient to form a belief as to the truth of the allegations regarding the competence and experience of plaintiffs' counsel.

14. Defendants deny the allegations in paragraph 14 of the Complaint.

15. Defendants state that the University of Michigan is an entity created by the Michigan State Constitution. Defendants admit that the University of Michigan, which includes the College of Literature, Science and the Arts, receives federal funds.

16. Defendants admit that the University of Michigan's Application for Undergraduate Admission permits applicants to indicate their race. Defendants deny all of the remaining allegations in paragraph 16 of the Complaint.

17. Defendants state that Gratz identified her race as "white/Caucasian," but lack knowledge or information whether she so indicated on her application for freshman admission. Defendants further state that Hamacher declined to indicate his race on his application, but state on information and belief that Hamacher disclosed, in taking the ACT examination, that his race was "white/Caucasian."

18. Defendants state that the University of Michigan uses race as a factor in admissions, as part of a broad array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Defendants deny all of the remaining allegations in paragraph 18 of the Complaint.

19. Defendants state that the University of Michigan applies rigorous admissions standards to all applicants; and that all admitted students are fully qualified to succeed at the University. Defendants further state that the University of Michigan uses race as a factor in admissions, as part of a broad array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Defendants deny all of the remaining allegations in paragraph 19 of the Complaint.

20. Defendants deny the allegations in paragraph 20 of the Complaint.

21. Defendants admit that plaintiffs are not members of an underrepresented minority group and that their race was not a factor that enhanced the University of Michigan's consideration of their applications. Defendants deny all of the remaining allegations in paragraph 21 of the Complaint.

22. Defendants state that high school grades in academic courses represent the predominant factor used for determining admission to the University of Michigan, College of Literature, Science and the Arts. Defendants admit that the University of Michigan uses race as a factor in admissions, as part of a broad array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Defendants deny all of the remaining allegations of paragraph 22 of the Complaint.

23. Paragraph 23 of the Complaint states a conclusion of law to which no response is necessary. To the extent that a response is deemed necessary, defendants deny the allegations in paragraph 23 of the Complaint.

24. Defendants deny the allegations in paragraph 24 of the Complaint.

25. Defendants deny the allegations in the first sentence of paragraph 25 of the Complaint. Defendants lack knowledge or information sufficient to form a belief as to the truth or falsity of the other allegations in paragraph 25 of the Complaint.

26. Defendants deny the allegations in paragraph 26 of the Complaint.

27. Defendants admit that the University of Michigan has a current intention to continue to use race as a

factor in admissions, as part of a broad array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Defendants deny all of the remaining allegations in paragraph 27 of the Complaint.

RESPONSE TO PLAINTIFFS' FIRST CLAIM

28. Defendants repeat their responses to the allegations of paragraphs 1-27 of the Complaint as set forth above.

29. Paragraph 29 sets forth a conclusion of law to which no response is required. To the extent a response is required, defendants deny the allegations in paragraph 29 of the Complaint.

30. Paragraph 30 sets forth a conclusion of law to which no response is required. To the extent a response is required, defendants deny the allegations in paragraph 30 of the Complaint.

RESPONSE TO PLAINTIFFS' SECOND CLAIM

31. Defendants repeat their responses to the allegations of paragraphs 1-30 of the Complaint as set forth above.

32. Defendants state that the University of Michigan is an entity created by the Michigan State Constitution. Defendants admit that the University of Michigan, which includes the College of Literature, Science and the Arts, receives federal funds. Defendants deny the remaining allegations in paragraph 32 of the Complaint.

No response is required to the remainder of the Complaint, which sets forth plaintiffs' prayer for relief. To the extent that a response is required, defendants deny the remaining allegations in the Complaint.

AFFIRMATIVE DEFENSES

Defendants assert the following affirmative defenses based on their current knowledge and information.

1. The Complaint fails to state a claim upon which relief may be granted.

2. This Court lacks subject-matter jurisdiction over the Complaint because the plaintiffs lack standing.

3. Defendants Duderstadt and Bollinger did not violate plaintiffs' clearly established rights, and are therefore qualifiedly immune from suit.

4. This Court lacks subject-matter jurisdiction over the Regents of the University of Michigan, and over Bollinger in his official capacity, both of whom are immune from suit in federal court by the doctrine of sovereign immunity.

5. Plaintiffs' claims for injunctive relief are barred by the doctrine of mootness.

6. Plaintiffs have failed to mitigate their damages, if any.

7. Plaintiffs' claims are barred by the doctrine of laches.

8. Plaintiffs have named improper defendants. Defendants would not object to the filing of an Amended Complaint that replaced "The University of Michigan" and "The University of Michigan College of Literature, Arts

and Science," which are not proper defendants, with the "Regents of the University of Michigan."

9. Defendants state that they assert these affirmative defenses based upon information presently available and in order to avoid waiver. Defendants reserve the right to withdraw any of these affirmative defenses or to assert additional affirmative defenses as further information becomes available.

Wherefore, defendants pray for a judgment dismissing the Complaint with prejudice and awarding them the costs and disbursements of this action, together with attorneys' fees, and such additional relief as the Court may deem just and proper.

Respectfully submitted,

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Dated: December 3, 1997

[Certificate Of Service Omitted In Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JENNIFER GRATZ and PATRICK HAMACHER, for themselves and all others similarly situated,

Plaintiffs,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, THE UNIVERSITY OF MICHIGAN, and THE UNIVERSITY OF MICHIGAN COLLEGE OF LITERATURE, ARTS, AND SCIENCE,

Defendants.

CASE NO.: 97-CV-75231-DT
HON. PATRICK J. DUGGAN

ORDER

At a session of said Court, held in the U.S. District Courthouse, City of Detroit, County of Wayne, State of Michigan, on ___. DEC 23 1998

PRESENT: THE HONORABLE PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

For the reasons set forth in an Opinion issued this date,

IT IS ORDERED, ADJUDGED, and **DECREED** that defendants' motion for an order denying class certification is **DENIED**;

IT IS FURTHER ORDERED, ADJUDGED, and **DECREED** that plaintiffs' motion for class certification is **GRANTED** as follows:

Pursuant to Fed. R. Civ. P. 23(b)(2), the Court certifies the following class, represented by Patrick Hamacher, on the issue of liability:

> Those individuals who applied for and were not granted admission to the College of Literature, Science & the Arts of the University of Michigan for all academic years from 1995 forward and who are members of those racial or ethnic groups, including Caucasian, that defendants treat less favorably on the basis of race in considering their application for admission.

IT IS FURTHER ORDERED, ADJUDGED, and **DECREED** that plaintiffs' motion to bifurcate the trial into a liability and damage phase is **GRANTED**.

/s/ Patrick J. Duggan
PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

Copies to:

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Kerry L. Morgan, Esq.
Michael E. Rosman, Esq.
John Payton, Esq.
Leonard M. Niehoff, Esq.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JENNIFER GRATZ and PATRICK HAMACHER, for themselves and all others similarly situated,

Plaintiffs,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, THE UNIVERSITY OF MICHIGAN and THE UNIVERSITY OF MICHIGAN COLLEGE OF LITERATURE, ARTS, AND SCIENCE,

Defendants. /

CASE NO.: 97-CV-75231-DT

HON. PATRICK J. DUGGAN

OPINION

This matter is currently before the Court on plaintiffs' motion for class certification and bifurcation of liability and damage trials and defendants' motion for order denying class certification. Plaintiffs seek class certification from this Court pursuant to FED. R. CIV. P. 23(b)(1)(B) and 23(b)(2) on the issues of whether defendants engaged in unlawful discrimination; whether they should be enjoined from engaging in such discrimination in the future; and on plaintiffs' claim for punitive damages. (Pls.' Br. in Supp. Mot. Class Cert. at 1). Alternatively, plaintiffs seek to maintain a class pursuant to FED. R. CIV. P. 23(b)(3) and 23(c)(4) on the issue of whether defendants engaged in unlawful discrimination and on plaintiffs'

claim for punitive damages. *Id.* Defendants oppose plaintiffs' request for class certification contending that plaintiffs fail to demonstrate why class action is the appropriate vehicle through which to adjudicate the merits of plaintiffs' claims. In addition, plaintiffs also request the Court to order bifurcation of the liability and damage issues. The Court entertained oral argument on the parties' respective motions on December 10, 1998. For the reasons that follow, the Court grants in part, and denies in part, plaintiffs' motion for class certification. The Court denies defendants' motion for an order denying class certification. The Court also grants plaintiffs' motion for bifurcation of the liability and damages aspects of the trial.

Class certification under the Federal Rules of Civil Procedure is governed by FED. R. CIV. P. 23. In order to maintain an action pursuant to Rule 23, a prospective class must satisfy the prerequisites of FED. R. CIV. P. 23(a) which provides:

> **(a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

"The Supreme Court has required district courts to conduct a 'rigorous analysis' into whether the prerequisites of Rule 23 are met before certifying a class." *In Re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1078-79 (6th Cir. 1996) (quoting *General Tel. Co. v. Falcon*, 457 U.S. 147, 161, 102 S. Ct.

2364, 2372, 72 L. Ed. 2d 740 (1982)). Once the class representative has satisfied the prerequisites of Rule 23(a), the representative must then demonstrate "that the class he seeks to represent falls within one of the subcategories of Rule 23(b)." *Senter v. General Motors Corp.*, 532 F.2d 511, 522 (6th Cir. 1976) (citing 3 B. J. Moore, Federal Practice ¶ 23.03 at 23-228 (2d ed. 1974)). "The party seeking class certification bears the burden of proof." *In Re Am. Med.*, 75 F.3d at 1079. The Court will apply the aforementioned criteria to the plaintiffs' request for class certification.

A. Rule 23(a) Prerequisites

1. Numerosity

The first subdivision of Rule 23 requires that the class be "so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). "There is no strict numerical test for determining impracticability of joinder." *In Re Am. Med.*, 75 F.3d at 1079 (citing *Senter*, 532 F.2d at 523 n. 24). "When class size reaches substantial proportions, however, the impracticability requirement is usually satisfied by the numbers alone." *Id.* The potential class is defined as all individuals who:

> (1) applied for and were not granted admission to the College of Literature, Science & the Arts ("LSA") or who in the future intend to apply for admission into the LSA for all academic years from 1995 forward; and

> (2) are members of those racial or ethnic groups, including Caucasian, that Defendants treat less favorably in considering their applications for admission to the Law School.[1]

(Pls.' Br. in Supp. Mot. Class Cert. at 1). Plaintiffs note that "[d]efendants receive thousands of applications for admission each year for a limited number of available spaces." (Pls.' Br. in Supp. Mot. Class Cert. at 5) (citing Dfs.' Ans. at ¶ 11). Joinder of thousands of students who "applied for and were not granted admission" and are members of "racial and ethnic groups, including Caucasian" is impracticable. The Court finds that plaintiffs satisfy the numerosity requirement of Rule 23(a)(1).

2. Common questions of law or fact

"Rule 23(a) simply requires *a* common question of law or fact." *Bittinger v. Tecumseh Prod. Co.*, 123 F.3d 877, 884 (6th Cir. 1997) (citing *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993) (emphasis in original)). In this case, each plaintiff seeks a determination from this Court that defendants' admissions policy impermissibly utilizes race as a factor in determining the propriety of admission in violation of 42 U.S.C. §§ 1981 and 1983, and the Equal Protection Clause of the Constitution. The common question over the constitutionality of defendants' admissions policy is sufficient to satisfy Rule 23(a)(2).

---

[1] Presumably, counsel for plaintiffs intended to refer to the College of Literature, Science, & the Arts.

3. Typicality of claims or defenses between plaintiffs and class

The third prerequisite to a class action under Rule 23(a) is the requirement that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." FED. R. CIV. P. 23(a). The typicality test "limit[s] the class claims to those fairly encompassed by the named plaintiffs' claims." *In Re Am. Med.*, 75 F.3d at 1082 (citation and quotation omitted).

> Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct. . . . A necessary consequence of the typicality requirement is that the representative's interests will be aligned with those of the represented group, and in pursuing his own claims, the named plaintiff will also advance the interests of the class members.

Sprague v. General Motors Corp., 133 F.3d 388, 399 (6th Cir.) *cert. denied*, 118 S. Ct. 2312, 141 L. Ed. 2d 170 (1998) (quoting *In Re Am. Med.*, 75 F.3d at 1082) (citing Herbert B Newberg and Alba Conte, 1 *Newberg on Class Actions*, § 3-13, at 3-75, 76 (3d ed. 1992)).

Plaintiffs contend that "typicality" element is met where plaintiffs' claims of unlawful discrimination "arise from defendants' systematic use of race in making admissions decisions that adversely affect all applicants who are not members of the preferred racial groups." (Pls.' Br. in Supp. Mot. Class Cert. at 8-9). In contrast, defendants contend that plaintiffs are unable to meet the typicality requirement because of the nature of the individualized

determinations, exclusive of race, that factor into defendants' admissions decisions. To this end, defendants, maintain that plaintiffs "misconstrue" the defendants' admissions policy by arriving at an inappropriate definition of the proposed class. (Dfs.' Br. in Opp. Class Cert. at 19). Defendants quibble with plaintiffs' employment of the term "treated less favorably." Because defendants evaluate such criteria as a prospectvie student's academic record, standardized test score, essay, residency status, geographical location, alumni relationships, personal achievement, leadership and service, defendants contend that an applicant who possesses any one or more of these factors is "treated more favorably than one who does not." *Id.* Thus, defendants assert that the class sought to be maintained by plaintiffs, is "amorphous" and fails the typicality requirement.

The Court rejects defendants' argument. In order to meet the typicality requirement, plaintiffs must establish that "a significant relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." *Sprague*, 133 F.3d at 399. Plaintiff Gratz is a Caucasian resident of the state of Michigan who applied for admission into the fall 1995 freshman class. (Pls.' Compl. at ¶ 4). Plaintiff Gratz was placed on a "wait-list" and later denied admission. *Id.* Plaintiff Hamacher is a Caucasian resident of the state of Michigan who applied for admission into the fall 1997 freshman class. (*Id.* at ¶ 5). Plaintiff Hamacher was rejected for admission in the spring of 1997; however, plaintiff Hamacher alleges a desire to attend the University of Michigan if defendants cease application of allegedly discriminatory criteria in admissions.

The challenged conduct in this case is defendants' allegedly improper application of race as a criterion in admissions decisions. The fact that each student is subject to an array of other factors does not defeat plaintiffs' ability to satisfy the typicality requirement. "When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually satisfied, irrespective of varying fact patterns which underlie individual claims." *Smith v. University of Wash. Law School*, 2 F. Supp. 2d 1324, 1342 (W.D. Wash. 1998) (citing *Newberg* § 3.13 at 3-77 and Supp.; *Raboidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993)).

To the extent that race is a factor in each admissions decision by defendants, "a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class" sufficient to entitle plaintiffs to maintain the class. *See Sprague*, 133 F.3d at 399. "In cases alleging racial, ethnic, or sex discriminated against them in the same general fashion as against the other members of the class." *Smith*, 2 F. Supp. 2d at 1342 (citing *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 598 (2d Cir. 1986)). The lead plaintiffs allege that defendants discriminated against them in the same manner by subjecting Caucasian applicants to differing admissions criteria than that applicable to members of a minority group. In this regard, plaintiffs' claims are representative of those of the named class in that their claims arise out of the same alleged discriminatory conduct. Accordingly, the typicality requirement of Rule 23(a) is satisfied in this case.

4. Adequacy of Representation.

The Sixth Circuit requires satisfaction of two factors in order establish adequacy of representation: 1) the representative will vigorously prosecute the interests of the class through qualified counsel; and 2) the representative must have common interests with unnamed members of the class. *Senter*, 532 F.2d at 525 (citing *Gonzales v. Cassidy*, 474 F.2d 67, 73 (6th Cir. 1973)).

> In making the determination of adequacy of representation the district court should consider the experience and ability of counsel for the plaintiffs and whether there is any antagonism between the interests of the plaintiffs and other members of the class they seek to represent.

Cross v. National Trust Life Ins. Co., 553 F.2d 1026, 1031 (6th Cir. 1977).

The record of this case contains the affidavits of counsel for plaintiffs delineating their respective qualifications to serve as counsel for the class of plaintiffs. This Court finds plaintiffs' counsel to be qualified to prosecute the instant action on behalf of the class. Accordingly, the first prong on the adequacy of representation analysis is met.

With respect to the second element, the Court finds the record utterly devoid of the presence of any evidence tending to show antagonism between the interests of plaintiffs Gratz and Hamacher, and the members of the class which they seek to represent. In fact, the Court has already determined that plaintiffs share a common interest in litigating the constitutionality of the consideration of race as an admissions preference. Therefore, plaintiffs have met the adequacy of representation element of Rule 23(a).

B. Certification

Having determined that plaintiffs satisfy the prerequisites contained in FED. R. CIV. P. 23(a), the Court will now turn to an analysis of the issue of certification under subsection (b) of Rule 23. Plaintiffs seek to certify a class comprised of the following individuals:

[A]ll individuals who:

> (1) applied for and were not granted admission to LSA or who in the future intend to apply for admission into the LSA for all academic years from 1995 forward; and
>
> (2) are members of those racial or ethnic groups, including Caucasian, that defendants treat less favorably in considering their applications for admission. . . .

(Pls. Br. in Supp. Mot. Class Cert. at I).

1. Rule 23(b)(2) Certification

Plaintiffs initially seek to certify this class pursuant to FED. R. CIV. P. 23(b)(2),which provides:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * *
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

In support of certification under Rule 23(b)(2), plaintiffs note that defendants:

> discriminate in a categorical manner on the basis of racial identity, and plaintiff Hamacher seeks both declaratory and injunctive relief from defendants' unlawful practices. Plaintiff Hamacher still desires to attend the LSA and would apply to transfer if defendants ceased their discriminatory practices.

(Pls.' Br. in Supp. Mot. Class Cert. at 10). Thus, plaintiffs' assert that in light of defendants' across the board alleged discrimination in admissions criteria, plaintiffs are entitled to certification under Rule 23(b)(2).

Defendants launch a tripartite attack on plaintiffs' maintenance of a class action pursuant to Rule 23(b)(2). First defendants contend that plaintiff Hamacher lacks standing to represent a class seeking declaratory and injunctive relief. Second, defendants argue that plaintiffs cannot establish that injunctive relief predominates over plaintiffs' claims for money damages, a necessary condition to Rule 23(b) class status. Third, defendants, relying on the Sixth Circuit's holding in *Craft v. Memphis Light, Gas & Water Div.*, 534 F.2d 684, 686 (6th Cir. 1976), contend that the class action vehicle is unnecessary "when the nature of the relief requested would automatically inure to the putative members." (Dfs.' Br. in Opp. Mot. Class Cert. at 6). According to defendants, if plaintiff Hamacher were to prevail on the merits of his claim and obtain a declaratory ruling that race was an impermissible factor in admissions, a benefit would immediately inure to the putative class members in the absence of class certification.

Defendants claim that plaintiff Hamacher lacks standing because he "suffers no threat of imminent future injury. . . . " (Dfs.' Br. in Opp. Mot. Class Cert. at 21). According to defendants, Hamacher's undergraduate performance to date at Michigan State University precludes his ability to transfer to the University of Michigan.[2] In addition, defendants argue that because plaintiff Hamacher has not applied to transfer, he has no present intent to do so, and thus suffers no imminent risk of future injury sufficient to support standing to entitle him to injunctive relief. Defendants cite the Court to that portion of Hamacher's deposition testimony in which he addresses his intentions with respect to transfer to the University of Michigan.

Q: Have you applied to transfer to the University of Michigan at Ann Arbor?

A: No, I haven't.

Q: Do you intend to apply to transfer?

A: Yes, I do.

Q: When?

A: Hopefully when the policy is changed. And I'm going to get my grades up and apply to transfer.

Q: Do you have an understanding that your grades aren't up high enough now to apply to transfer?

A: I'm going to get them up and apply to transfer.

[2] According to defendants, Hamacher would need to achieve a 3.0 grade point average to attempt to transfer to the University of Michigan.

(Hamacher Dep. at 125-26). According to defendants, the aforementioned testimony establishes that Hamacher lacks the present intent to transfer to University of Michigan and bars his ability to represent a Rule 23(b)(2) class seeking injunctive and declaratory relief.

Defendants rely upon *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) and *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) for the proposition that plaintiff Hamacher lacks the requisite capacity and intent to transfer and hence, lacks standing. In *Lyons*, a plaintiff pursued a civil rights claim against the city of Los Angeles arising out of the police department's use of a chokehold in effectuating an arrest. The Supreme Court held that plaintiff lacked standing to obtain an injunction because "[t]he equitable remedy is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate irreparable injury." *Lyons*, 461 U.S. at 111. In *Lujan*, environmental groups challenged limitations on the scope of regulations designed to require consultation with the Secretaries of the Interior and Commerce before any federal agency action that may detrimentally affect an endangered species. The nature of the environmental groups claimed injury was "that the lack of consultation with respect to certain funded activities abroad 'increases the rate of extinction of endangered and threatened species.'" *Lujan*, 504 U.S. at 562 (citation omitted). The Supreme Court determined that plaintiffs' professed intentions to return to the habitats of endangered species abroad were insufficiently concrete to establish standing. "Such "some day" intentions – without any description of concrete plans, or indeed even any specification of *when* the some day will be – do not support a

finding of the "actual or imminent" injury that our cases require." *Lujan*, 504 U.S. at 564 (emphasis in original).

Plaintiff Hamacher's claim is not barred by the reasoning of *Lyons* and *Lujan*. The essence of Hamacher's claim challenges the University's practice of applying allegedly discriminatory criteria in admissions decisions. Arguably, plaintiff Hamacher has standing to seek money damages for the injury he allegedly suffered when he was denied the opportunity to compete on an equal footing for available spaces in the fall 1997 class at the University of Michigan. *See Northeastern Fla. Chapter of the Associate Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993) ("The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."); *see also Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 280-81 (1978) ("[E]ven if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing.")

With respect to plaintiff Hamacher's injunctive relief claim, Hamacher has expressed his intention to apply to transfer to the University of Michigan upon its cessation of alleged discriminatory practices in admissions. In this regard, Hamacher's intention does not mirror those intentions which the Supreme Court found to be sufficient in *Lujan*. In *Lujan*, the Supreme Court was faced with affidavits from plaintiffs indicating their "intent" to someday return to the habitats of endangered species. In contrast, plaintiff Hamacher claims that he will reapply for admission when his application is considered on an equal basis with those applications of other minority

applicants. To the extent that plaintiff Hamacher reapplies to the University of Michigan, he will again face the same "harm" in that race will continue to be a factor in admissions. In this Court's opinion, Hamacher's present grades are not a factor to be considered at this time. The relevant inquiry with respect to Hamacher's standing for injunctive relief is that he intends to transfer to the University of Michigan when defendants cease the use of race as an admissions preference. Accordingly, the Court rejects defendants' argument that plaintiff Hamacher lacks standing to maintain the class pursuant to FED. R. CIV. P. 23(b)(2).

Plaintiff Hamacher's claim is appropriate for class treatment pursuant to Rule 23(b)(2). It is undisputed that defendants' have systematically attributed a racial preference in admissions decisions with respect to non-minority students. Plaintiff is primarily seeking a declaration from this Court that such a policy is unconstitutional because it violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution, and an injunction to prohibit defendants' continued utilization of such a policy. "It is a singular policy and practice of racial discrimination pervasively applied on a classwide basis that plaintiff challenges in this lawsuit." (Pls.' Rep. Br. in Supp. Mot. Class Cert. at 2). Defendants have thus "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief." FED. R. CIV. P. 23(b)(2).

While it is true, that in addition to the declaratory and injunctive relief sought by plaintiffs, Hamacher and his proposed class intend to seek compensatory and punitive damage, certification under Rule 23(b)(2) is appropriate. "So long as the predominant purpose of the

suit is for injunctive relief, the fact that a claim for damages is also included does not vitiate the applicability of 23(b)(2)." *Jones v. Diamond*, 519 F.2d 1090, 1100 n. 17 (5th Cir. 1975); *see also Kurezi v. Eli Lilly & Co.*, 160 F.R.D. 667, 680 (N.D. Ohio 1995). As plaintiffs note in their brief, if necessary, the individual determinations with respect to damages will ultimately be made in a separate proceeding from this Court's decision on the issue of whether injunctive and declaratory relief is appropriate on the issue of defendants' liability. At the appropriate time, the Court may, if necessary, certify subclasses pursuant to Rule 23.

Moreover, the Court rejects defendants' claim that the doctrine of necessity bars plaintiffs' maintenance of the class pursuant to Rule 23(b)(2). In *Craft, supra*, the Sixth Circuit barred a plaintiffs' class action challenging the constitutionality of a municipal utility's policies pertaining to termination of utility service on the grounds that declaratory and injunctive relief, is granted, would "accrue to the benefit of others similarly situated" and, consequently . . . "no useful purpose would be served by permitting this case to proceed as a class action. . . . " *Craft*, 534 F.2d 684 (6th Cir. 1976). In contrast to *Craft*, the Court believes that a class action serves a useful purpose in the instant case because plaintiff Hamacher's claims are particularly susceptible to problems of mootness. "Certification of a class under Rule 23(b)(2) is 'especially appropriate where, as here, the claims of the members of the class may become moot as the case progresses.'" *Johnson v. City of Opelousas*, 658 F.2d 1065, 1070 (5th Cir. 1981); *see also Penland v. Warren County Jail*, 797 F.2d 332 (6th Cir. 1986) (reversing a district court's denial of class

certification and criticizing the court's application of the doctrine of necessity).

Defendants acknowledge the potential mootness problems stating that "the passage of time might render Hamacher's claim for injunctive relief moot." (Dfs.' Br. in Opp. to Class Cert. at 9). As the course of the litigation may consume a significant period of time, the claims of the individual students run the risk of becoming moot. The class action vehicle thus provides a mechanism for ensuring that a justiciable claim is before the Court. Accordingly, the Court declines to apply the doctrine of necessity to bar plaintiffs' claims.

2. Rule 23(b)(1)(B)

> Plaintiffs also seek to maintain a class pursuant to Rule 23(b)(1)(B) which provides:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests. . . .

Rule 23(b)(1)(B) class certification is frequently employed by courts where a large class of plaintiffs seek recovery from a limited fund. *See In re Jackson Lockdown/MCO Cases*, 107 F.R.D. 703, 711-12 (E.D. Mich. 1985). The claims presented in the present lawsuit do not hinge upon recovery from a limited fund. Accordingly, class certification under Rule 23(b)(1)(B) is denied.

3. Rule 23(b)(3)

As an alternative, plaintiffs seek certification under Rule 23(b)(3). However, as previously noted in this opinion, this Court will certify the class pursuant to FED. R. CIV. P. 23(b)(2). Accordingly, the Court will not entertain plaintiffs' request for Rule 23(b)(3) certification.

4. Plaintiffs' Class Certification for Damages

In addition to plaintiffs' request for certification on the discrimination issue pursuant to Rule 23(b)(2), plaintiffs also request certification on the claim for punitive damages. Plaintiffs state that at the present time they are not seeking class certification on individual damage issues. The Court notes that in the event of a finding of liability, the Court will be faced with not only determining a punitive damage award, but individual damage determinations as well. Thus, at this time, the Court declines to certify the class for a damage award, either compensatory or punitive, until such time as liability is determined in this action.

5. Conclusion

The Court will certify a class, pursuant to FED. R. CIV. P. 23(b)(2), on the issue of liability; whether defendants' use of race as a factor in admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution. The class will be represented by Mr. Hamacher and will consist of those individuals who applied for and were not granted admission to the College of Literature, Science & the Arts of the University of Michigan for all academic years from 1995 forward and who are members of those racial or ethnic

groups, including Caucasian, that defendants treat less favorably on the basis of race in considering their application for admission.[3] The claims of the class are limited to injunctive and declaratory relief. The Court will not consider claims for damages at this time.

C. Plaintiffs' Motion to Bifurcate the Trial

Plaintiffs' request that the Court bifurcate the trial into a liability and damage phase. The Court grants plaintiffs' request to bifurcate the trial. The issue of defendants' liability for plaintiffs' claims will be tried first. If the court enters a finding that defendants' admissions policy is unconstitutional, the Court will then make a determination as to how to proceed with the damage phase of the trial.

An order consistent with this opinion shall issue forthwith.

/s/ Patrick J. Duggan
PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

Copies to:

Kirk O. Kolbo, Esq.
Kerry L. Morgan, Esq.
Michael E. Rosman, Esq.
John Payton, Esq.
Leonard M. Niehoff, Esq.

Dec. 23, 1998

[3] Plaintiffs do not seek to have plaintiff Gratz represent a class certified pursuant to FED. R. CIV. P. 23(b)(2).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

JENNIFER GRATZ, et al., Plaintiffs, v. LEE BOLLINGER, et al., Defendants.	Civil Action No. 97-75231 Hon. Patrick J. Duggan Hon. Thomas A. Carlson

ORDER PROVIDING THAT THE PROPER DEFENDANTS BE NAMED

By agreement of the parties and for good cause shown, it is hereby ORDERED that the defendants herein are: Lee Bollinger, James J. Duderstadt, and the Board of Regents of the University of Michigan. It is FURTHER ORDERED that caption in this matter be amended accordingly, and the amendment and the claims stated in the amended pleading against the Board of Regents shall relate back to the date of the original pleading pursuant to Federal Rule of Civil Procedure 15(c).

So ORDERED, this ___ day of APR 01 1999, 1999

/s/ PATRICK J. DUGGAN
Hon. Patrick J. Duggan

The Exhibits on the following pages were entered in the

United States District Court for the
Eastern District of Michigan (Detroit)

[Caption Omitted In Printing]

THE UNIVERSITY OF MICHIGAN

Office of
Undergraduate
Admissions

January 19, 1995

Ms. Jennifer D. Gratz
12757 Chestnut
Southgate, MI 48195

Dear Ms. Gratz:

One of my most difficult tasks as Director is letting well qualified students like you know that we have delayed our final decision on your admission until our second review in early to mid-April.

During our initial review of your application we evaluated your high school grades and courses, your SAT I or ACT scores, and all information you provided about your extracurricular and personal accomplishments. As a result of this preliminary evaluation, your application was classified as "well qualified, but less competitive than the students who have been admitted on first review". The question that most students ask after receiving this letter is; what happens next? So that you have a better understanding of our admissions process for students in your situation, here is what you can expect:

1. You may submit scores from additional SAT I or ACT exams you take through the December test dates.

2. Your application will remain active and will be reviewed again in early to mid-April.

3. During the April review, the best qualified students from the delayed group will be admitted to fill the remaining available spaces. Typically, several hundred students are selected in this review.

4. You need do nothing further except continue to work diligently in all your classes.

You have our best wishes for an enjoyable and successful senior year.

Sincerely,

/s/ Theodore L. Spencer
Theodore L. Spencer
Director

DD

THE UNIVERSITY OF MICHIGAN

Office of
Undergraduate
Admissions

April 24, 1995

Ms. Jennifer D. Gratz
12757 Chestnut
Southgate, MI 48195

Dear Ms. Gratz:

In the initial review of your application for admission, we notified you that a final decision would be made in mid-April when we were able to determine if additional spaces would be available. All of the applications have now been reviewed and I regret to inform you we are unable to offer you admission. This decision is not a reflection of your academic achievement, but rather a result of the large number of highly qualified applicants which far exceeded the available spaces for the entering Class of 1995.

There may be a possibility that space will be available for a few students after the enrollment deposit deadline of May 1 has passed. Should this happen, we will admit students to fill those spaces. We invite you to place your name on this extended waiting list by completing and returning the enclosed form before May 10. Selection will be based on the best overall qualifications. All students who return the Extended Waiting List form will hear from us by the end of June. However, we expect to take very few students from the Extended Waiting List, and recommend students make alternative plans to attend another institution.

Your interest in the University of Michigan is deeply appreciated. Knowing that there are many fine colleges and universities in the country, we are confident you will select one which will meet your educational expectations. However, should your interest in graduating from the University of Michigan continue, we encourage you to apply for admission as a transfer student. Students with junior standing are given preference in our transfer admission process.

You have our best and sincere wishes for success as you enter the post secondary years of your education.

Sincerely,

/s/ Theodore L. Spencer
Theodore L. Spencer
Director

R/EWLO

THE UNIVERSITY OF MICHIGAN

Office of
Undergraduate
Admissions

November 19, 1996

Mr. Patrick H. Hamacher
2428 Norbert Street
Flint, MI 48504

Dear Mr. Hamacher:

Thank you for the interest in the University of Michigan. After careful consideration and review, we are unable to take final action on your application and must postpone our decision until mid-April for Fall 1997.

We expect to receive nearly 20,000 applications from first year applicants for a class of about 5,000. This requires us to use a very selective process to manage our enrollment. Therefore, we offer admission to those candidates with the strongest overall qualifications on the initial review. Although your academic credentials are in the qualified range, they are not at the level needed for first review admission to the College of Literature, Science, and The Arts.

We will reevaluate your application in mid-March and notify you in writing of a final decision by mid-April. We will not know how many postponed candidates we will be able to admit, nor the specific probability of your admission, until we evaluate all of the applications that arrive by our equal consideration date of February 1. In previous years, we have always been able to admit a number of

postponed candidates, however, this varies from year to year. Please refer to the enclosed "Questions and Answers About the Postponed Process" for more information.

We certainly hope your interest in Michigan remains strong, however, we also encourage you to explore other educational options. You have our best wishes for an enjoyable and successful senior year.

Sincerely,

/s/ Theodore L. Spencer
Theodore L. Spencer
Director

PF

THE UNIVERSITY OF MICHIGAN

Office of
Undergraduate
Admissions

MEMORANDUM

TO: Lester Monts

FROM: Ted Spencer

RE: Request for Minority Admission Policy

DATE: October 4, 1995

Lester, here is some information we have put together for you regarding Shirley McFee's request. I hope this helps you explain the University position and how it relates to our office. Please let me know if you need any more information.

ADMISSION POLICY FOR MINORITY STUDENTS

The Undergraduate Admissions Office has been formally charged to recruit and enroll a diverse student body that reflects the population of our state and national constituents. Emphasis on the recruitment of underrepresented groups was established in the early 70's under affirmative action goals subscribed to by the University. It was readdressed by the Michigan Mandate which clearly reaffirmed the principles and goals of the greater University. A significant part of the mandate is the "recruitment and enrollment of students from underrepresented groups, ie. Black, Hispanic and Native American."

The process of recruitment and application review are both well defined by the Admissions Office. The many programs directly tied to recruitment are reviewed and evaluated annually. Modifications are made to ensue the effectiveness of the programs. The same is true regarding the selecting and implementation of guidelines used for reviewing minority applicants.

To understand the process and procedures used to recruit and review applicants is simplified by separating the two functions. The following summarizes our efforts in the process of application review and effectiveness in minority recruitment programs.

Application Review

Our responsibility in evaluating minority students is to determine whether they have the ability to successfully complete the undergraduate degree program offered in the college or school they are admitted to. Many factors and procedures are used in the evaluation which are not unlike those used in the review of majority students. The significant difference is minority guidelines are set to admit all students who qualify and meet the standards set by the unit liaison with each academic unit, while majority guidelines are set to manager the number of admissions granted to satisfy the various targets set by the colleges and schools.

Criteria for all groups generally include: high school grades, standardized test scores, curriculum, competitiveness of the high school, high school counselors recommendation, essay and student extracurricular activities. It can also include an art portfolio, interview or audition depending on the program they wish to enroll in.

The use of affirmative action in the admission process is best understood by recognizing the fact that students admitted under the guidelines are academically qualified to successfully complete Michigan degree requirements. Thus, the significant difference between our evaluation of underrepresented minority applicants and majority students is the difference between meeting qualifications to predict graduation rather than selecting qualified students one over another due to the large volume of the applicant pool.

This process does advantage underrepresented groups as well as student-athletes, applicants with certain alumni ties, and artistically and musically gifted students who also are given special consideration. The University recognizes the significant contribution that these groups of students make in enriching the entire campus experience and we assure their presence as part of our student body by advantaging them in the admissions process. It is important to note, however, that an individual who is not prepared academically to be a Michigan student, regardless of their minority status, will not be admitted.

Two special academic programs offered by the University are Summer Bridge and the Comprehensive Studies program. Both are administered under the College of Literature, Science, and the Arts but serve all units for admitted freshmen. Careful selection is used in determining which student will benefit from the academic support offered by each of the programs.

Secondly the two programs assist students who may come from high schools where the competition and rigor of study was less competitive; consequently the gifted student was not exposed to the same difficulties of study found in

schools advantaged by economics or the selectivity of a private school. Again, the criteria for admission to Bridge and CSP is determined by the same academic predictors used for admissions. When it is apparent that the academic support program will benefit the student, they are placed in the program.

Minority application review is carried out by the individual counselor assigned to the geographic territory or special unit. When a decision to admit is not clear, the counselor may elect to wait for new test scores, fall semester grades or a personal interview with the student. This provides the opportunity to better evaluate the candidate after new information is received. Admission counselors can also meet with other admissions staff to receive input and advice based on their assessment.

Overall the process is highly individualized and has been effective in selecting students who have a solid chance of graduating within a four or five year period.

Minority Recruitment Programs

The very heart of our minority recruitment is the many special programs aimed at prospective and admitted students. Much of our success is attracting well qualified students is a direct result of meeting the needs of students and parents during the crucial decision making period. We offer a host of recruitment programs that encourage everything from personal phone calls to evening receptions.

The primary minority programs are provided in two formats that describe and detail the extent to which we actively recruit students. All programs are evaluated

annually and frequently modified to adjust to the changing needs of students.

CONFIDENTIAL

GUIDELINES – SCUGA 1995

THE SCUGA FACTOR

The SCUGA factors are an attempt to give some standardization to decisions made by many different counselors on many different applications. We recognize that all communities, schools, populations, course offerings, grading practices, personal circumstances, etc. are not the same. We want to have justifiable decisions that blend the consistency and rigidness of a strict formula with the variations and flexibility of a humanistic review that occurs in a "rolling admissions" process. In reality, only the "C" factor should be added to the GPA. But for our method of selection all SCUGA factors are attached (added) to the GPA. The "U" (unusual), "G" (geographic), "A" (alumni) factors of the SCUGA formula assist in enrolling students who will provide a desired mixture of characteristics believed beneficial to the University.

Counselors will determine the Adjusted Grade Point Average or Index (GPA2) from the five SCUGA factors. The GPA2 will reflect several prominent characteristics in the applicant's file that will not be displayed in the clerk-computed GPA1. Both the GPA1 and the GPA2 will be entered into the system and can be accessed on the QU screen.

Notice: Schools are not "ranked" throughout the state or country but are given a "classification" based on their school profile and academic information. The SCUGA factor should be discussed in only general terms but acknowledging that we do consider various factors in our

decisions that reflect the difference among schools and to help us enroll the mix of students desired by the University. Strict principles of "fairness" and consistency can no longer be the major focus within or among schools or among students.

Counselors must always enter the SCUGA factors on the coding section of the application and the sum as the GPA2. If no adjustment is made, simply record the GPA that was computed by the clerk beside the GPA2 line on the front of the application. *Any unusual circumstance should be noted and stapled to the application in a prominent place.*

Keep a disk file of your schools and SCUGA points. Add to it as you review applications from more schools.

S (school) factor:

_ BLANK indicates insufficient data to award SCUGA

.0 For schools that receive no SCUGA points.

.1 For better-than-average schools (probably not more than 60 in Michigan)

.2 For very good schools (probably not more than 30 in Michigan)

.3 For unusually good schools (probably not more than 3 to 4 in Michigan and 50 in the U.S.)

.4 For exceptionally strong schools – tend to be select private (8-15 in the country)

.5 For truly outstanding schools – program similar to first two years at many colleges. Students score very high on tests and large numbers attend the most selective colleges. High grades rare for most students.

The same S factor should normally be applied to all applicants from the same school and is related to the points given for the C factor. Use discretion when a

student has taken a "weak" program and use the negative "C" factor.

The following guide will be used for the "S" factor. Weight is given to the overall strength of the school program. The school profile is the primary source of such data and should be coupled with our own profile and follow up files. (The files are located on the third floor in the work area just outside of Jim Vanhecke's office). A very high percent of those attending strong four year colleges and universities, high test scores for the entire school and above average academic performance on first year follow up reports could move the school upward. A code will be entered on the Master Chart Indicating an exception.

This factor is based on average SAT/ACT scores and the number of AP/IB courses at the school as well as the % attending two and four year colleges. Resist the temptation of being generous when the school is just a little short of the excepted level. In every category ("S" factor) there will be some schools that just make a certain level and some that just miss a higher level.

The figures below represent the averages of over 300 schools. Each counselor should be able to exercise judgment as to the "S" factor for schools in each territory. Remember the "S" factor relates to the strength of the school – not just a special group. In most cases the AP/IB figure is the starting point. Then determine if the SAT/ACT & College Bound substantiate the "S" points. A strong record at UM, achievement tests, AP/AB scores, the school's curriculum guide and other information will help in making an appropriate decision. Schools rated 4 & 5 must be exceptionally strong. Such rating would be very

rare among public schools. There are also many private schools that should not be above a 2.

S = .0 Schools with SAT average below 920 and ACT below 22 20-45% attend college
No or very few Honors or AP courses

S = .1 Schools with SAT average below 979 (range = 950-1010) and ACT below 23. Seventy-eight percent attend college. At least 7 AP/IB courses

S = .2 Schools with SAT average of 1050 (range = 1020-1080) or ACT average of 25. Ninety percent attend college. Strong honors or advanced courses. At least 9AP/IB courses

S = .3 Schools with SAT average of 1130 (range = 1090-1150) or ACT average of 27. Ninety-seven percent attend college. Many Honors or rigorous courses. At least 11 AP/IB courses. Achievement scores of ≥ 550 and/or impressive results on AP exams support high level of learning.

S = .4 Schools with SAT average of 1170 (range = 1160-1210) or ACT average 28. Ninety-nine percent attend college. List would include many competitive colleges. Strong AP record even when courses are not always called AP. Look for exams taken. At least 12 AP/IB. Many records include Achievement scores that tend to be in the 650+ range. Course grades tend not to cluster at the highest end of the scale. Look at distribution of grades and scores.

S = .5 Schools with SAT average of 1260 (range = 1220+) or ACT average 30. Ninety-nine percent attend college. List would include many highly competitive/selective colleges. Impressive number of high achievement scores. Many National Merit winners. At least 13 AP/IB. Curriculum reads like the 1st and 2nd year at a typical liberal art college.

Students receive 4's & 5's on AP. Grades tend to cluster in the mid-range of the scale. Counselor comments indicate real differences in a PLUS/MINUS grading system. Students have gone in depth into an area of study. Often including foreign study rather than just travel.

If the school factor reflects the range of test scores rather than averages please being a copy to MM and we will try to assign an appropriate "S" factor. We need to build a data base on this information.

C (curriculum) factor:

Given the wide disparity in high school course selection and offerings, it seems imperative that the choice of strong courses, particularly clearly identified Honors and AP/IB, be considered in the review process. It is unfair to reward (by Admission) a student who has elected a mediocre curriculum, sometimes for as many as four years, during high school while punishing (by Postponement) those with stronger programs. Achievement of a respectable GPA in a demanding and challenging program more often represents high motivation and commitment than a contrived inflated GPA in a weak curriculum. The stronger program also better prepares the student for the quality of work expected at the University of Michigan. All students are expected to elect at least four traditional college preparatory subjects each semester. Those with less should be deferred upon first review even if GPA and test score place them in the Admit range.

C (curriculum) factor: (including 9th grade) Starting point of 0 = Strong academic program, 19 academic courses in grades 9-12. Count Honors as .5 and AP/IB as 1. for full year courses. Do NOT round up!

-.2 = Very weak academic program, relative to what is offered in the school, less than 15 academic courses in grades 9-12. Three or fewer academics in senior year. No honors or AP. Use judgment. Admission doubtful.

-.1 = Weak academic program, relative to what is offered in the school, no honors or AP, 15-18 academics in grades 9-12. Use judgment.

0 = Average to strong academic program, one AP/IB or 1-3 honors, at least 19 academic courses in grades 9-12.

.1 = For a *very strong* program. 2-3 AP/IB or 4-7 honors in year long courses and at least 19 academic courses in grades 9-12.

.2 = For an *unusually strong* program. 4-5 AP/IB or 8-11 honors in year long courses *and* at least 19 academic courses in grades 9-12.

.3 = For a *superior* program. 6 or 7 AP/IB or 12-15 honors in year long courses *and* at least 20 academic courses in grades 9-12.

.4 = A *fantastic* program. 8+ AP/IB or 16+ honors in year long courses *and* at least 20 academic courses in grades 9-12.

NOTES: Make sure that there is a reasonable degree of integrity in the school's definition of "Honors" courses. In general, you can calculate 2 honors or/and accelerated courses to equal 1 AP course. That presumes that honors at that school are not equal to or as demanding as AP/IB. A statement from the high school such as "This would be Honors at another school or faculty policy precludes such a label" *does not* qualify for our inclusion as an "honors" course and should not be counted. Use your knowledge

(not assumptions) about what different labels used by the schools mean in this area. Tracks, phase, core, level, advanced, etc. do not always mean "advanced" when thinking of such courses as being for those whose course background has been strong, have received high grades, are selected to participate and write the AP Exams.

U (unusual) factor:

The "U" factor will be based on information provided on page 4 of the application, item 23, titled ACADEMICS AND EXTRACURRICULAR ACTIVITIES. The awarding of a "U" factor will be by a Unique Factor Option (UFO) committee decision and will be used in the rolling admission determination. Counselors should submit applications for review in which students have demonstrated through outstanding achievements that they merit the addition of the "U" factor added to the GPA2 Index. *The "U" factor will be awarded on national, regional, or state recognition of academic or extracurricular activities.*

Examples of the above recognition include:

1. Elected positions at Girls or Boys State
2. National Science Foundation Award
3. National or Regional Service Club Award
4. Unique initiative in a community or entrepreneurial endeavor resulting in national, regional, or state recognition.
5. Professional theater experience at the "Broadway" level.
6. Olympic athlete or national recognition as an athlete, i.e. figure skater.
7. One person art show.
8. Writing published in nationally recognized magazine
9. Westinghouse Scholar (can be high school juniors)

(As additional accomplishments are identified, they will be added to examples for future reference.)

Counselors need to have some validation of the achievement such as high school counselor confirmation, copy of award certificate, newspaper clipping, etc.

A point of .1, .2 or .3 will be given to those applicants whose outstanding accomplishments in areas similar to those cited above warrant the extra value added to their GPA2 Index. If the addition of the .1, .2 or .3 value raises the student into the admit category on first review, admission will be granted. If the addition of the "unique" points to the GPA2 Index does not place the student in an admit cell of the guidelines, the student will be postponed and may be given priority when and if selection is made from the postponed group. The reviewing counselor will keep a copy of the application face sheet for the postpone review.

The Unique Factor Option (UFO) committee will consist of Marilyn, chair, and one member from each team, and will meet at least twice a month to review the applications submitted by counselors. A "U" factor cover sheet will be completed to aid the UFO committee in identifying the unusual circumstances that warrant review. *A counselor may not assign a "U" factor to any of their applications on their own or within their teams.* To be consistent and to keep the "U" factors assigned at a reasonable number, the decisions will all be made by the UFO committee. It is expected there will be no more than 20 to 30 students who would qualify for a "U" factor.

Exceptional Cases for Postponed Group Review

Exceptional cases are those students who have *outstanding accomplishments at the local level*. They do not qualify for a "U" factor, but can be given special consideration when/if we select students from the postponed group in the spring Counselors should review the information provided in item 23 on the application to look for awards, honors, elected positions held, unusual work experiences, outstanding counselor recommendations, *etc.*, during the student's years in high school. Remember, most applicants to U-M are very active students in leadership positions, sports activities, social clubs, etc. Active involvement in these activities is not unusual and is normal for the applicant pool. The exceptional case designation is not to be used as compensation for weaker academic achievement attributed to over involvement in non-academic activities.

Exceptional by virtue of "beyond their control" factors:

An exceptional case may also be a student whose academic record was impacted by extended illness, frequent changes of high schools, trauma and other events beyond the control of the individual but not just the problems of growing up in today's society.

Counselors should identify their exceptional cases by writing "Exceptional Case" and a key reason for the designation on the bottom of the face of the application. A copy of the face of the application should be made and kept in your files until we are ready to review applications from the postponed group.

Awarding the "U" factor or identifying exceptional cases needs to be based on accomplishments above and beyond

the normal involvement of students in their academic and extracurricular activities (or the beyond their control factors). Students who neglect their academic achievement for over involvement in extracurricular activities are not to be rewarded.

You may also want to keep a separate folder for your "WANNABES" whose only claim for any extra consideration is that they are tenacious in their desire for admission. Likthe exceptional cases, make a notation at the bottom of the application and keep a copy of the face of the application in your WANNABE folder.

G (geographic) factor:

1 For applicants from northern Michigan, (defined as counties including and north of Oceana, Newago, Mecosta, Clare, Gladwin, and Arenac counties), rural areas, and small communities that are separated geographically and/or culturally from larger and/or more sophisticated areas. Also, western states (beyond Mo, Iowa, Minn) except California and southern states below VA, Tenn (except for Florida and Texas). Foreign students are not awarded G factor points.

A (alumni) factor:

1 (Non-resident applicants only) Applicants must be a child, grandchild, sibling, or spouse of an alumnus. Do not add when "legacy" (mother/father) results in using instate guidelines.

GUIDELINES – SCUGA 1996

THE SCUGA FACTOR

The SCUGA factors are an attempt to give some standardization to decisions made by many different counselors on many different applications. We recognize that all communities, schools, populations, course offerings, grading practices, personal circumstances, etc. are not the same. We want to have justifiable decisions that blend the consistency and rigidness of a strict formula with the variations and flexibility of a humanistic review that occurs in a "rolling admissions" process. In reality, only the "C" factor should be added to the GPA. But for our method of selection all SCUGA factors are attached (added) to the GPA. The "U" (unusual), "G" (geographic), "A" (alumni) factors of the SCUGA formula assist in enrolling students who will provide a desired mixture of characteristics believed beneficial to the University.

Counselors will determine the Adjusted Grade Point Average or Index (GPA2) from the five SCUGA factors. The GPA2 will reflect several prominent characteristics in the applicant's file that will not be displayed in the clerk-computed GPA1. Both the GPA1 and the GPA2 will be entered into the system and can be accessed on the QU screen.

Notice: Schools are not "ranked" throughout the state or country but are given a "classification" based on their school profile and academic information. The SCUGA factor should be discussed in only general terms but acknowledging that we do consider various factors in our decisions that reflect the difference among schools and to

help us enroll the mix of students desired by the University. Strict principles of "fairness" and consistency can no longer be the major focus within or among schools or among students.

Counselors must always enter the SCUGA factors on the coding section of the application and the sum as the GPA2. If no adjustment is made, simply record the GPA that was computed by the clerk beside the GPA2 line on the front of the application. *Any unusual circumstance should be noted and stapled to the application in a prominent place.*

Keep a disk file of your schools and SCUGA points. Add to it as you review applications from more schools.

S (school) factor:

_ BLANK indicates insufficient data to award SCUGA

.0 For schools that receive no SCUGA points.

.1 For better-than-average schools (probably not more than 60 in Michigan)

.2 For very good schools (probably not more than 30 in Michigan)

.3 For unusually good schools (probably not more than 3 to 4 in Michigan and 50 in the U.S.)

.4 For exceptionally strong schools – tend to be select private (8-15 in the country)

.5 For truly outstanding schools – program similar to first two years at many colleges. Students score very high on tests and large numbers attend the most selective colleges. High grades rare for most students.

The same S factor should normally be applied to all applicants from the same school and is related tc the points given for the C factor. Use discretion when a student has taken a "weak" program and use the negative "C" factor.

The following guide will be used for the "S" factor. Weight is given to the overall strength of the school program. The school profile is the primary source of such data and should be coupled with our own profile and follow up files. (The files are located on the third floor in the work area just outside of Jim Vanhecke's office). A very high percent of those attending strong four-year colleges and universities, high test scores for the entire school and above average academic performance on first year follow up reports could move the school upward. A code will be entered on the Master Chart Indicating an exception.

This factor is based on the number of AP/IB courses offered at the school, the percentage of students attending two and four year colleges and average SAT/ACT scores. Resist the temptation of being generous when the school is just a little short of the excepted level. In every category ("S" factor) there will be some schools that just make a certain level and some that just miss a higher level.

The figures below represent the averages of over 300 schools. Each counselor should be able to exercise judgment as to the "S" factor for schools in each territory. Remember the "S" factor relates to the strength of the school – not just a special group. *In most cases the AP/IB figure is the starting point.* Then determine if the College Bound and SAT/ACT statistics substantiate the "S" points. A strong record at UM, achievement tests, AP/AB scores, the school's curriculum guide and other information will help in making an appropriate decision. Schools rated 4 & 5 must be exceptionally strong. Such rating would be very rare among public schools. There are also many private schools that should not be above a 2.

Note: The 1995 High School Profiles and SAT scores listed below are based on *pre-Recentered scores*.

S = .0 Very few or no Honors or AP courses
Less than 50% attend college
SAT average below 920 and ACT below 22

S = .1 At least 7 AP/IB courses. Seventy-five percent attend college. SAT average range of 950-1010 and ACT below 23.

S = .2 At least 9AP/IB courses. Strong honors or advanced courses. Eighty-five percent attend college. SAT average range of 1020-1080 or ACT average of 25.

S = .3 At least 11 AP/IB courses. Many Honors or rigorous courses. Achievement scores of ≥ 550 and/or impressive results on AP exams support high level of learning. Ninety-five percent attend college. SAT average range of 1090-1150 or ACT average of 27.

S = .4 At least 12 AP/IB. Strong AP record even when courses are not always called AP. Look for exams taken. Course grades tend not to cluster at the highest end of the scale. Look at distribution of grades and scores. Many records include Achievement scores that tend to be in the 650+ range. Ninety-nine percent attend college. List would include many competitive colleges. SAT average range of 1160-1210 or ACT average 28.

S = .5 At least 13 AP/IB. Impressive number of high achievement scores. Many National Merit winners. Curriculum reads like the 1st and 2nd year at a typical liberal art college. Students receive 4's & 5's on AP. Grades tend to cluster in the mid-range of the scale. Counselor comments indicate real differences in a PLUS/MINUS grading system. Students have gone in depth into an area of study. Often including foreign study rather than just travel.

Ninety-nine percent attend college. List would include many highly competitive/selective colleges. SAT average range of 1220+ or ACT average of 30.

If you need help in determining an appropriate "S" factor due to wide variations in selection criteria, please bring your data to MM and we will assign an appropriate "S" factor.

C (curriculum) factor:

Given the wide disparity in high school course selection and offerings, it seems imperative that the choice of strong courses, particularly clearly identified Honors and AP/IB, be considered in the review process. It is unfair to reward (by Admission) a student who has elected a mediocre curriculum, sometimes for as many as four years, during high school while punishing (by Postponement) those with stronger programs. Achievement of a respectable GPA in a demanding and challenging program more often represents high motivation and commitment than a contrived inflated GPA in a weak curriculum. The stronger program also better prepares the student for the quality of work expected at the University of Michigan. All students are expected to elect at least four traditional college preparatory subjects each semester. Those with less should be deferred upon first review even if GPA and test score place them in the Admit range.

C (curriculum) factor: (including 9th grade) Starting point of 0 = Strong academic program, 19 academic courses in grades 9-12. Count Honors as .5 and AP/IB as 1. for full year courses. Do NOT round up!

-.2 = Very weak academic program, relative to what is offered in the school, less than 15 academic courses in grades 9-12. Three or fewer academics in senior

year. No honors or AP. Use judgment. Admission doubtful.

-.1 = Weak academic program, relative to what is offered in the school, no honors or AP, 15-18 academics in grades 9-12. Use judgment.

0 = Average to strong academic program, one AP/IB or 1-3 honors, at least 19 academic courses in grades 9-12.

.1 = For a *very strong* program. 2-3 AP/IB or 4-7 honors in year long courses and at least 19 academic courses in grades 9-12.

.2 = For an *unusually strong* program. 4-5 AP/IB or 8-11 honors in year long courses *and* at least 19 academic courses in grades 9-12.

.3 = For a *superior* program. 6 or 7 AP/IB or 12-15 honors in year long courses *and* at least 20 academic courses in grades 9-12.

.4 = A *fantastic* program. 8+ AP/IB or 16+ honors in year long courses *and* at least 20 academic courses in grades 9-12.

NOTES: Make sure that there is a reasonable degree of integrity in the school's definition of "Honors" courses. In general, you can calculate 2 honors or/and accelerated courses to equal 1 AP course. That presumes that honors at that school are not equal to or as demanding as AP/IB. A statement from the high school such as "This would be Honors at another school or faculty policy precludes such a label" *does not* qualify for our inclusion as an "honors" course and should not be counted. Use your knowledge (not assumptions) about what different labels used by the schools mean in this area. Tracks, phase, core, level, advanced, etc. do not always mean "advanced" when

thinking of such courses as being for those whose course background has been strong, have received high grades, are selected to participate and write the AP Exams.

U (unusual) factor:

The "U" factor will be based on information provided on page 3 of the application, item 31, titled *Activities, Work Experience and Awards*. The awarding of a "U" factor will be by a Unique Factor Option (UFO) committee decision and will be used in the rolling admission determination. Counselors should submit applications for review in which students have demonstrated through outstanding achievements that they merit the addition of the "U" factor added to the GPA2 Index. *The "U" factor will be awarded on national, regional, or state recognition of academic or extracurricular activities.*

Examples of the above recognition include:

1. Elected positions at Girls or Boys State
2. National Science Foundation Award
3. National or Regional Service Club Award
4. Unique initiative in a community or entrepreneurial endeavor resulting in national, regional, or state recognition.
5. Professional theater experience at the "Broadway" level.
6. Olympic athlete or national recognition as an athlete, i.e. figure skater.
7. One person art show.
8. Writing published in nationally recognized magazine
9. Westinghouse Scholar (can be high school juniors)

(As additional accomplishments are identified, they will be added to examples for future reference.)

Counselors need to have some validation of the achievement such as high school counselor confirmation, copy of award certificate, newspaper clipping, etc.

A point of .1, .2 or .3 will be given to those applicants whose outstanding accomplishments in areas similar to those cited above warrant the extra value added to their GPA2 Index. If the addition of the .1, .2 or .3 value raises the student into the admit category on first review, admission will be granted. If the addition of the "unique" points to the GPA2 Index does not place the student in an admit cell of the guidelines, the student will be postponed and may be given priority when and if selection is made from the postponed group. The reviewing counselor will keep a copy of the application face sheet for the postpone review.

The Unique Factor Option (UFO) committee will consist of Marilyn, chair, and one member from each team, and will meet at least twice a month to review the applications submitted by counselors. A "U" factor cover sheet will be completed to aid the UFO committee in identifying the unusual circumstances that warrant review. *A counselor may not assign a "U" factor to any of their applications on their own or within their teams.* To be consistent and to keep the "U" factors assigned at a reasonable number, the decisions will all be made by the UFO committee. It is expected there will be no more than 20 to 25 students who would qualify for a "U" factor.

Exceptional Cases for Postponed Group Review

Exceptional cases are those students who have *outstanding accomplishments at the local level.* They do not qualify for a "U" factor, but can be given special consideration when/if we select students from the postponed group

in the spring Counselors should review the information provided in item 31 on the application to look for awards, honors, elected positions held, unusual work experiences, outstanding counselor recommendations, etc., during the student's years in high school. Remember, most applicants to U-M are very active students in leadership positions, sports activities, social clubs, etc. Active involvement in these activities is not unusual and is normal for the applicant pool. The exceptional case designation is not to be used as compensation for weaker academic achievement attributed to over involvement in non-academic activities.

Exceptional by virtue of "beyond their control" factors:

An exceptional case may also be a student whose academic record was impacted by extended illness, frequent changes of high schools, trauma and other events beyond the control of the individual but not just the problems of growing up in today's society.

Counselors should identify their exceptional cases by writing "Exceptional Case" and a key reason for the designation on the bottom of the face of the application. A copy of the face of the application should be made and kept in your files until we are ready to review applications from the postponed group.

Awarding the "U" factor or identifying exceptional cases needs to be based on accomplishments above and beyond the normal involvement of students in their academic and extracurricular activities (or the beyond their control factors). Students who neglect their academic achievement for over involvement in extracurricular activities are not to be rewarded.

You may also want to keep a separate folder for your "WANNABES" whose only claim for any extra consideration is that they are tenacious in their desire for admission. Like the exceptional cases, make a notation at the bottom of the application and keep a copy of the face of the application in your WANNABE folder.

G (geographic) factor:

.1 For applicants from northern Michigan, (defined as counties including and north of Oceana, Newago, Mecosta, Clare, Gladwin, and Arenac counties), rural areas, and small communities that are separated geographically and/or culturally from larger and/or more sophisticated areas. Also, western states (beyond Mo, Iowa, Minn) except California and southern states below VA, Tenn (except for Florida and Texas). Foreign students are not awarded G factor points.

A (alumni) factor:

.1 For all applicants whose grandparents, parents, siblings or spouse have been enrolled in any unit on the Ann Arbor campus as degree seeking students. (revised 10-6-95)

For units that have separate guidelines for resident and non-resident applications, non-resident legacies (applicants whose parents attended U-M Ann Arbor campus) will be evaluated for admission using instate guidelines in addition to receiving .1 for the alumni factor.

GUIDELINES – SCUGA 1997

SCUGA

(School, Curriculum, Unusual, Geographic, Alumni)

The SCUGA factors are an attempt to give some standardization to decisions made by many different counselors on many different applications. We recognize that all communities, schools, populations, course offerings, grading practices, personal circumstances, etc. are not the same. We want to have justifiable decisions that blend the consistency and rigidness of a strict formula with the variations and flexibility of a humanistic review that occurs in a "rolling admissions" process. In reality, only the "C" factor should be added to the GPA. But for our method of selection all SCUGA factors are attached (added) to the GPA. The "U" (unusual), "G" (geographic), "A" (alumni) factors of the SCUGA formula assist in enrolling students who will provide a desired mixture of characteristics believed beneficial to the University.

Counselors will determine the adjusted Grade Point Average or Selector Index (GPA2) from the five SCUGA factors. The GPA2 will reflect several prominent characteristics in the applicant's file that will not be displayed in the clerk-computed GPA1. Both the GPA1 and the GPA2 will be entered into the system and can be accessed on the QU screen.

Notice: Schools are not "ranked" throughout the state or country but are given a "classification" based on their school profile and academic information. The "S" factor should be discussed only in general terms acknowledging that we do consider various factors in our decisions that reflect the difference among schools which help us enroll

the mix of students desired by the University. *Strict principles of "fairness" and consistency can no longer be the major focus within or among schools or among students.*

Counselors must always enter the SCUGA factors on the coding section of the application and their sum on the GPA2 line. If no adjustment is made, simply record the GPA that was computed by the clerk on the GPA2 line of the application folder.

Record the "S" factor you assign to your high schools and report updates to Janet Hall so she can keep the master chart of "S" factors current. Add to it as you review applications from more schools.

S (school) factor:

_ BLANK indicates insufficient data to award SCUGA

.0 For schools that receive no SCUGA points.

.1 For better-than-average schools (probably not more than 60 in Michigan)

.2 For very good schools (probably not more than 30 in Michigan)

.3 For unusually good schools (probably not more than 3 to 4 in Michigan and 50 in the U.S.)

.4 For exceptionally strong schools – tend to be select private (8-15 in the country)

.5 For truly outstanding schools – program similar to first two years at many colleges. Students score very high on tests and large numbers attend the most selective colleges. High grades rare for most students.

The same S factor should normally be applied to all applicants from the same school and is related to the points given for the C factor. Use discretion when a student has taken a "weak" program and use the negative "C" factor.

The following guide will be used for the "S" factor. Weight is given to the overall strength of the school program. The school profile is the primary source of such data and should be coupled with our own profile and follow up files. (Follow Up reports for the most recent 2 years are located on the third floor in the work area just outside of Jim Vanhecke's office). A very high percent of those attending strong four year colleges and universities, high test scores for the entire school and above average academic performance on first year follow up reports could move the school upward. A code will be entered on the Master Chart indicating an exception.

This factor is based on the number of AP/IB courses offered at the school, the percentage of students attending two and four year colleges and average SAT I/ACT scores. Resist the temptation of being generous when the school is just a little short of the expected level. In every category ("S" factor) there will be some schools that just make a certain level and some that just miss a higher level.

The figures below represent the averages of over 300 schools. Each counselor should be able to exercise judgment as to the "S" factor for schools in each territory. Remember the "S" factor relates to the strength of the school – not just a special group. *In most cases the AP/IB figure is the starting point.* Then determine if the College Bound and SAT I/ACT statistics substantiate the "S" points. A strong record at UM, SAT II subject tests, AP/AB scores, the school's curriculum guide and other information will help in making an appropriate decision. Schools rated 4 & 5 must be exceptionally strong. Such rating would be very rare among public schools. There are also many private schools that should not be above a 2.

Note: The 1996 High School Profiles and SAT I scores listed below are based on *Recentered scores.*

S = .0 Very few or no Honors or AP courses
Less than 50% attend college
SAT I average below 1040 and ACT below 22

S = .1 At least 7 AP/IB courses. Seventy-five percent attend college.
SAT I average range of 1050-1080 and ACT below 23.

S = .2 At least 9 AP/IB courses. Strong honors or advanced courses. Eighty-five percent attend college. SAT I average range of 1130-1160 or ACT average of 25.

S = .3 At least 11 AP/IB courses. Many honors or rigorous courses. SAT II subject scores of $\geq$ 610 and/or impressive results on AP exams support high level of learning. Ninety-five percent attend college. SAT I average range of 1200-1230 or ACT average of 27.

S = .4 At least 12 AP/IB. Strong AP record even when courses are not always called AP. Look for exams taken. Course grades tend not to cluster at the highest end of the scale. Look at distribution of grades and scores. Many records include SAT II subject scores that tend to be in the 710+ range. Ninety-nine percent attend college. List would include many competitive colleges. SAT I average range of 1240-1270 or ACT average of 28.

S = .5 At least 13 AP/IB. Impressive number of high SAT II subject scores. Many National Merit winners. Curriculum reads like the 1st and 2nd year at a typical liberal art college. Students receive 4's & 5's on AP. Grades tend to cluster in the mid-range of the scale. Counselor comments indicate real differences in a PLUS/MINUS grading system. Students have gone in depth into an area of study.

Often including foreign study rather than just travel. Ninety-nine percent attend college. List would include many highly competitive/selective colleges. SAT I average range of 1320+ or ACT average of 30.

If you need help in determining an appropriate "S" factor due to wide variations in selection criteria, please bring your data to MM and we will assign an appropriate "S" factor.

C (curriculum) factor:

Given the wide disparity in high school course selection and offerings, it seems imperative that the choice of strong courses, particularly clearly identified Honors and AP/IB, be considered in the review process. It is unfair to reward (by Admission) a student who has elected a mediocre curriculum, sometimes for as many as four years, during high school while punishing (by Postponement) those with stronger programs. Achievement of a respectable GPA in a demanding and challenging program more often represents high motivation and commitment than a contrived inflated GPA in a weak curriculum. The stronger program also better prepares the student for the quality of work expected at the University of Michigan. All students are expected to elect at least four traditional college preparatory subjects each semester. Those with less should be deferred upon first review even if GPA and test score place them in the Admit range.

C (curriculum) factor: (including 9th grade) Starting point of 0 = Strong academic program, 19 academic courses in grades 9-12. Count Honors as .5 and AP/IB as 1. for full year courses. Do NOT round up!

-.2 = Very weak academic program, relative to what it offered in the school, less than 15 academic courses in grades 9-12. Three or fewer academics in senior year. No honors or AP. Use judgment. Admission doubtful.

-.1 = Weak academic program, relative to what is offered in the school, no honors or AP, 15-18 academics in grades 9-12. Use judgment.

0 = Average to strong academic program, one AP/IB or 1-3 honors, at least 19 academic courses in grades 9-12.

.1 = For a *very strong* program. 2-3 AP/IB or 4-7 honors in year long courses and at least 19 academic courses in grades 9-12.

.2 = For an *unusually strong* program. 4-5 AP/IB or 8-11 honors in year long courses *and* at least 19 academic courses in grades 9-12.

.3 = For a *superior* program. 6 or 7 AP/IB or 12-15 honors in year long courses *and* at least 20 academic courses in grades 9-12.

.4 = A *fantastic* program. 8+ AP/IB or 16+ honors in year long courses *and* at least 20 academic courses in grades 9-12.

NOTES: Make sure that there is a reasonable degree of integrity in the school's definition of "Honors" courses. In general, you can calculate 2 honors or/and accelerated courses to equal 1 AP course. That presumes that honors at that school are not equal to or as demanding as AP/IB. A statement from the high school such as "This would be Honors at another school or faculty policy precludes such a label" *does not* qualify for our inclusion as an "honors" course and should not be counted. Use your knowledge (not assumptions) about what different labels used by the

schools mean in this area. Tracks, phase, core, level, advanced, etc. do not always mean "advanced" when thinking of such courses as being for those whose course background has been strong, have received high grades, are selected to participate and write the AP Exams.

U (unusual) factor:

The "U" factor will be based on information provided on page 3 of the application, item 31, titled *Activities, Work Experience and Awards* as well as the *essay* and *other information included with the application.* The awarding of a "U" factor will be used in the rolling admission determination. Counselors should consider applications for the Unusual in which students have demonstrated through achievements or unusual backgrounds that they merit the addition of the "U" factor added to the GPA2 Index.

The U factor can be awarded in 4 areas: *Leadership and Service, Personal Achievements, Essay Analysis* and *Contribution to a Diverse Class.*

I. *Leadership and Service.* Examples of strong leadership include:

- Elected positions at Girls or Boys State
- Unique initiative in a community endeavor resulting in special recognition.
- State or Service Club Award
- Successful entrepreneur.

An Unusual factor of .1 to .2 can be given to those applicants whose TRULY OUTSTANDING ACCOMPLISHMENTS in areas similar to those cited above warrant the extra value added to their GPA2 Index. If the addition of the .1 or .2 value raises the student into the admit category on first review, admission will be granted. If the addition of the "unique" points

to the GPA2 Index does not place the student in an admit cell of the guidelines, the student will be postponed and may be given priority when and if selection is made from the postponed group.

II. *Personal Achievements.* Examples of indicators of personal achievements include:

- National Science Foundation Award
- Westinghouse Scholar (can be high school juniors)
- State or national recognition as an athlete.
- Winning a regional, state, or national art show.
- Writing published in a state or nationally recognized magazine
- Professional theater experience.

An Unusual factor of .1 or .2 can be given for outstanding personal achievements.

III. *Essays* are required. If the essay is missing the application is incomplete and cannot be marked up for admission. The essay will be evaluated for *Content, Style, Originality,* and *Risk.* A .1 Unusual factor can be awarded for an *outstanding* essay. Very poor essays could detract from the admissibility of an applicant. For extremely poor essays a -.1 could be used.

IV. *Contribution to a Diverse Class.* The University is committed to a rich educational experience for it's students. A diverse, as opposed to a homogeneous, student population enhances the educational experience for all students. To insure a diverse class, significant weight will be given in the admissions process to indicators of students contribution to a diverse class. An Unusual factor of .2 or .5 will be given for the potential contribution to a diverse class from only one of the following indicators:

- An applicant who is a member of a Federally recognized underrepresented race or ethnicity, which is also underrepresented on the UM Ann Arbor Campus, and who is from a school or community where a significant majority of students is of a different race from the applicant (.5).
- Location of the school in a predominately minority neighborhood (.5).
- Students who are economically, socially, or educationally disadvantaged. Indicators of such disadvantagement might include the CB application fee waiver request form, parents occupation, excessive work hours while attending school, overcoming extraordinary obstacles such as severe illness, abuse or homelessness (.5).
- Underrepresented in the unit to which they are applying (e.g., males into Nursing, females into Engineering) (.2).

Awarding the "U" factor in items I or II or identifying exceptional cases needs to be based on accomplishments above and beyond the normal involvement of students in their academic and extracurricular activities (or the beyond their control factors). *Students who neglect their academic achievement for over involvement in extracurricular activities are not to be rewarded.*

Because the University is committed to enrolling a diverse group of students whose unique life experiences reflect those from all economic, social, and educational backgrounds, the combination of points awarded the "U" factor in all four areas (I, II, III, IV) may equal a maximum of 1.0.

Exceptional Cases for Postponed Group Review

Exceptional cases are those students who have *outstanding accomplishments at the local level.* They do not qualify for a "U" factor, but can be given special consideration when/if we select students from the postponed group in the spring. Counselors should review the information provided in item 31 on the application to look for awards, honors, elected positions held, unusual work experiences, outstanding counselor recommendations, etc., during the student's years in high school. Remember, most applicants to U-M are very active students in leadership positions, sports activities, social clubs, etc. Active involvement in these activities is not unusual and is normal for the applicant pool. The exceptional case designation is not to be used as compensation for weaker academic achievement attributed to over involvement in non-academic activities.

Exceptional by virtue of "beyond their control" factors:

An exceptional case may also be a student whose academic record was impacted by extended illness, frequent changes of high schools, trauma and other events beyond the control of the individual but not just the problems of growing up in today's society.

Counselors should identify their exceptional cases by writing "Exceptional Case" and a key reason for the designation on the bottom of the face of the application. A copy of the face of the application should be made and kept in your files until we are ready to review applications from the postponed group.

You may also want to keep a separate folder for your "WANNABES" whose only claim for any extra consideration is that they are tenacious in their desire for admission. Like the exceptional cases, make a notation at the bottom of the application and keep a copy of the fact of the application in your WANNABE folder.

G (geographic) factor:

.1 For applicants from northern Michigan, (defined as counties including and north of Oceans, Newago, Mecosta, Clare, Gladwin, and Arenac counties), rural areas, and small communities that are separated geographically and/or culturally from larger and/or more sophisticated areas. Also, western states (beyond Mo, Iowa, Minn) except California and southern states below VA. Tenn (except for Florida and Texas). Foreign students are not awarded G factor points.

A (alumni) factor:

.1 For all applicants whose grandparents, parents, siblings or spouse have been enrolled in any unit on the Ann Arbor campus as degree seeking students. (revised 10-6-95)

For units that have separate guidelines for resident and non-resident applications, non-resident legacies (applicants whose parents attended U-M Ann Arbor campus) will be evaluated for admission using instate guidelines in addition to receiving .1 for the alumni factor.

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COLLEGE OF LITERATURE, SCIENCE AND THE ARTS GUIDELINES FOR ALL TERMS OF 1995

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**First-Review -- INSTATE & LEGACY (NON-MINORITY) TABLE I

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>4	rtst	rtst/ PDTE	PDTE/a	a	A	A	A	A	A	A
3.8-3.9	rtst	rtst	PDTE	PDTE	PDTE	A	A	A	A	A
3.6-3.7	rtst	rtst	rtst	PDTE	PDTE	PDTE	a	a	a	a
3.4-3.5	rtst	rtst	rtst	PDTE/ rtst	PDTE	PDTE	PDTE	a	a	a
3.2-3.3	RTST	RTST	RTST	rtst	PDTE	PDTE	PDTE	PDTE	PDTE	PDTE
3.0-3.1	RTST	RTST	RTST	rr&t	rssr	rssr	rssr	rssr	PDTE	PDTE
2.8-2.9	RR&T	RR&T	RR&T	rr&t	rssr	rssr	rssr	rssr	PDTE	PDTE
2.6-2.7	RR&T	RR&T	RR&T	RR&T	RSSR	RSSR	RSSR	RSSR	rssr	rssr
2.4-2.5	RR&T	RR&T	RR&T	RR&T	RSSR	RSSR	RSSR	RSSR	rssr	rssr
2.2-2.3	RR&T	RR&T	RR&T	RR&T	RSSR	RSSR	RSSR	RSSR	rssr	rssr
<2.1	RR&T	RR&T	RR&T	RR&T	RSSR	RSSR	RSSR	RSSR	rssr	rssr

Notes:
A- Admit
RTST- Reject, Test Scores
RR&T- Reject, Secondary School Record and Test
RSSR- Reject, Secondary School Record
PDTE- Postpone Decision
Bold Caps for A & R- Automatic by clerks; lower case a & r decisions by counselors.
**Admit all students at the 98% or 99% if there are no serious deficiencies. ADMIT TOP 5% from counties other than Livingston, Macomb, Oakland, Washtenaw or Wayne.
Be very conservative in awarding SCUGA points: All students are expected to elect a demanding program.
[illegible] to be referred to UM before admission is offered.

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CONFIDENTIAL LSA Freshman Guidelines 1995 All Terms

** First-Review -- OUT-OF-STATE (NON-MINORITY) TABLE II

	0-17 400-810	18-20 400-850	21-22 860-940	23-24 950-1020	25-26 1030-1100	27-28 1110-1190	29-30 1200-1280	31-32 1290-1370	33-34 1380-1480	35-36 1490-1600
>4	rtst	rtst	rtst	PDTE	A	A	A	A	A	A
3.8-3.9	rtst	rtst	rtst	PDTE	PDTE	A	A	A	A	A
3.6-3.7	rtst	rtst	rtst	PDTE	PDTE	PDTE	a	a	a	a
3.4-3.5	rtst	rtst	rtst	rtst	PDTE	PDTE	PDTE	PDTE	PDTE/a	PDTE/a
3.2-3.3	RTST	RTST	RTST	rtst	rssr	rssr	PDTE	PDTE	PDTE	PDTE
3.0-3.1	RTST	RTST	RTST	RTST	rssr	rssr	rssr	rssr	PDTE/ rssr	PDTE/ rssr
2.8-2.9	RR&T	RR&T	RR&T	RR&T	RR&T	RSSR	rssr	rssr	PDTE/ rssr	PDTE/ rssr
2.6-2,7	RR&T	RR&T	RR&T	RR&T	RSSR	RSSR	RSSR	RSSR	rssr	PDTE/ rssr
2.4-2.5	RR&T	RR&T	RR&T	RR&T	RSSR	RSSR	RSSR	RSSR	rssr	rssr
2.2-2.3	RR&T	RR&T	RR&T	RR&T	RSSR	RSSR	RSSR	RSSR	rssr	rssr
<2.1	RR&T	RR&T	RR&T	RR&T	RSSR	RSSR	RSSR	RSSR	rssr	rssr

Notes:
A- Admit
RSSR- Reject, Secondary School Record
RR&T- Reject, Secondary School Record and Test
PDTE- Postpone Decision
RTST- Reject, Test Score

Bold Caps for A & R- Automatic by clerks; lower case a & r decisions by counselors.
**Admit if H.S.P.R. is 99th percentile
Be very conservative in awarding SCUGA points: All students are expected to elect a demanding program.
Applications falling outside the guidelines should be referred to MM before admission is offered.

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LSA Freshman Guidelines 1995 All Terms

First-Review -- INSTATE (MINORITY) TABLE III

	0-17 400-810	18-20 820-850	21-22 860-940	23-24 950-1020	25-26 1030-1100	27-28 1110-1190	29-30 1200-1280	31-32 1290-1370	33-34 1380-1480	35-36 1490-1600
>4	*	A/ACSP/ ABR/DSF	A/ACSP DSF	A/ACSP	A	A	A	A	A	A
3.8-3.9	*	A/ACSP/ ABR/DSF	A/ACSP DSF	A/ACSP	A/ACSP	A	A	A	A	A
3.6-3.7	*	A/ACSP/ ABR/DSF	A/ACSP DSF	A/ACSP	A/ACSP	A	A	A	A	A
3.4-3.5	*	A/ACSP/ ABR/DSF	A/ACSP DSF	A/ACSP	A/ACSP	A	A	A	A	A
3.2-3.3	*	A/ACSP/ ABR/DSF	A/ACSP DSF	A/ACSP	A/ACSP	A/ACSP	A/ACSP	A	A	A
3.0-3.1	*	A/ACSP/ ABR/DSF	ACSP DSF	ACSP	A/ACSP	A/ACSP	A/ACSP	A/ACSP	A/ACSP	A/ACSP
2.8-2.9	*	DGSF (BR)	DGSF (ACSP)	DGF (ACSP)	DGF (ACSP)	DGF (ACSP)	DGF (ACSP)	DGF (ACSP)	DGF (ACSP)	DGF (ACSP)
2.6-2.7	*	DGSF (BR)	DGSF (ACSP/ R-MIN)	DGSF (BR)	DGF (BR)	DGF (BR)	DGF (BR)	DGF (BR)	DGF (BR)	DGF (BR)
2.4-2.5	RR&T R-MIN	RR&T R-MIN	DGSF (BR)	DGSF (BR)	DGF (BR)	DGF (BR)	DGF (BR)	DGF (BR)	DGF (BR)	DGF (BR)
2.2-2.3	RR&T R-MIN	RR&T R-MIN	RR&T R-MIN	RSSR R-MIN	RSSR R-MIN	RSSR R-MIN	RSSR R-MIN	RSSR R-MIN	RSSR R-MIN	RSSR R-MIN
<2.1	RR&T R-MIN	RR&T R-MIN	RR&T R-MIN	RSSR R-MIN	RSSR R-MIN	RSSR R-MIN	RSSR R-MIN	RSSR R-MIN	RSSR R-MIN	RSSR R-MIN

Notes:
A= Admit
A-BP= Admit to Bridge Program (Nonresident applicants should not be offered admission to the Bridge Program)
A-CSP= Admit to Comprehensive Studies Program
DGF= Delay for fall term grades
DSP= Delay for senior year SAT's or ACT's
DGSF= Delay for fall term grades and senior year SAT's or ACT's
(BR)= Submit for Bridge review for one of the options indicated
Pers. R= Reject (not qualified). Send a personal letter of rejection
*Usually not to be admitted. Consult with MM prior to any action.
Be very conservative in awarding SCUGA points: All students are expected to elect a demanding program. Applications falling outside the guidelines should be referred to MM or ORC before admissions if offered.
NOTE: THOSE ADMITTED TO SUMMER BRIDGE IN THE FIRST TWO COLUMNS ARE REQUIRED TO ATTEND DURING THE SUMMER. THEY CANNOT

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CONFIDENTIAL LSA Freshman Guidelines 1995 All Terms

First-Review -- OUTSTATE (MINORITY) TABLE IV

	0-17 400-810	18-20 820-850	21-22 860-940	23-24 950-1020	25-26 1030-1100	27-28 1110-1190	29-30 1200-1280	31-32 1290-1370	33-34 1380-1480	35-36 1490-1600
>4	*	A/ACSP DSF	A/ACSP DSF	A/ACSP	A	A	A	A	A	A
3.8-3.9	*	A/ACSP DSF	A/ACSP DSF	A/ACSP	A/ACSP	A	A	A	A	A
3.6-3.7	*	A/ACSP DSF	A/ACSP DSF	A/ACSP	A/ACSP	A	A	A	A	A
3.4-3.5	*	A/ACSP DSF	A/ACSP DSF	A/ACSP	A/ACSP	A	A	A	A	A
3.2-3.3	*	A/ACSP DSF	A/ACSP DSF	A/ACSP	A/ACSP	A/ACSP	A/ACSP	A	A	A
3.0-3.1	*	A/ACSP DSF	A/ACSP DSF	ACSP	A/ACSP	A/ACSP	A/ACSP	A/ACSP	A/ACSP	A/ACSP
2.8-2.9	*	DGSF (ACSP/ R-MIN)	DGSF (ACSP)	DGF (ACSP)	DGF (ACSP)	DGF (ACSP)	DGF (ACSP)	DGF (ACSP)	DGF (ACSP)	DGF (ACSP)
2.6-2.7	*	DGSF (ACSP/ R-MIN)	DGSF (ACSP/ R-MIN)	DGSF (ACSP/ R-MIN)	DGF (ACSP/ R-MIN)	DGF (ACSP/ R-MIN)	DGF (ACSP- R-MIN)	DGF (ACSP- R-MIN)	DGF (ACSP- R-MIN)	DGF (ACSP- R-MIN)
2.4-2.5	RR&T R-MIN	RR&T R-MIN	DGSF (ACSP/ R-MIN)	DGSF (ACSP/ R-MIN)	DGF (ACSP/ R-MIN)	DGF (ACSP/ R-MIN)	DGF (ACSP- R-MIN)	DGF (ACSP- R-MIN)	DGF (ACSP- R-MIN)	DGF (ACSP- R-MIN)
2.2-2.3	RR&T R-MIN	RR&T R-MIN	RR&T R-MIN	RSSR R-MIN	RSSR R-MIN	RSSR R-MIN	RSSR R-MIN	RSSR R-MIN	RSSR R-MIN	RSSR R-MIN
<2.1	RR&T R-MIN	RR&T R-MIN	RR&T R-MIN	RSSR R-MIN	RSSR R-MIN	RSSR R-MIN	RSSR R-MIN	RSSR R-MIN	RSSR R-MIN	RSSR R-MIN

Notes:
A= Admit
A-BP= Admit to Bridge Program (Nonresident applicants should not be offered admission to the Bridge Program)
A-CSP= Admit to Comprehensive Studies Program
DGF= Delay for fall term grades
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DGSF= Delay for fall term grades and senior year SAT's or ACT's*(ORC)= Submit for ORC review for one of the options indicated
Pers. R= Reject (not qualified). Send a personal letter of rejection

*Usually not to be admitted. Consult with MM prior to any action.

Be very conservative in awarding SCUGA points: All students are expected to elect a demanding program. Applications falling outside the guidelines should be referred to MM before admissions if offered.

[illegible] delines LSA-LSA Charts/8-19-94 .

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COLLEGE OF LITERATURE, SCIENCE AND THE ARTS
GUIDELINES FOR ALL TERMS OF 1995
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I. ADMISSION OF FRESHMEN

A. DEFINITION OF A FRESHMAN APPLICANT:

FTIAC (first time in any college). **A freshman is defined as an entering student who has never attended any college following high school graduation.** This definition includes students enrolling in the fall term who take college classes as guest students in the summer immediately preceding the fall semester. The definition also applies to students who enter with advanced standing by earning college credit through Advanced Placement Examinations, or courses taken at a college prior to high school graduation.

All other students will be designated as transfer students (Type 4) with Level (1, 2, 3, 4) being determined by the amount of transferable credit projected for the term of entry. This will include those freshman level students who attend college in the fall and apply for admission to LS&A for the winter semester. They will be coded as transfer students (Type 4) at the freshman level (Level 1) and be evaluated according to transfer guidelines for Winter 1995

B. OVERVIEW OF ADMISSION POLICIES (First Review)

1. TERMS OF ADMISSION

Admission to LS&A will be highly selective for all four semesters of the academic calendar. *Admission* is granted to applicants with *very competitive* credentials ON A

ROLLING BASIS from early fall to November 1 for winter semester, and until February 1 for spring, summer, and fall semesters.

Winter applicants who meet competitive criteria based on the Fall 1995 guidelines, or who were previously admitted, did not accept admission, and did not enroll in another institution for the fall term, will be admitted on a rolling basis through the November 1 equal consideration deadline.* All other applicants with lower credentials will be denied admission. There will be no postponed group for the winter term. (Note: It is necessary to delay for a final high school transcript if it has not been previously submitted. A decline in the senior year grades is cause to deny admission even if the student was admissible based on 10th and 11th year GPA.)

*Students with the same credentials who do enroll in another college for the fall semester will be coded as transfer students and admitted if there was is no problem with senior year grades.

Spring admissions standards require the same competitive criteria as for all other terms. Applications will be accepted through the February 1 equal consideration deadline. Students who do not meet the competitive guidelines will be denied admission. There will be no postponed pool for spring semester.

The summer and fall group of applicants whose credentials fall in the range designated as *qualified/non-competitive* will be *postponed* for a second review following the February 1 equal consideration deadline.

Summer and fall applicants whose credentials fall *below the guidelines set for postponed* applicants will be *denied* admission on the first review.

2. ASSIGNED REVIEWER

a. *Automatic Review.* Applicants whose credentials are at a pre-determined level will be processed by an Automatic Admit clerk from Central Services without counselor review and either admitted or denied admission. All automatically admitted students will have their essays and extracurricular activities reviewed by the counselor assigned to their high school following admission to identify any outstanding achievement. Because of the extremely strong academic credentials of these automatically admitted students, the essay and extracurricular information will not be a factor in admission.

b. *Counselor Reviewer.*

(1) Applications with GPA1 and test scores outside the Automatic Review ranges will be reviewed by a counselor.

(2) All applications from private high schools where the class rank has to

be estimated or adjusted will receive counselor review.

(3) All applications from underrepresented minority groups will be reviewed by counselors.

c. *SCUGA Guidelines.* SCUGA stands for *S*chool, *C*urriculum, *U*nusual, *G*eographic, and *A*lumni factors that are taken into consideration when reviewing applications. A combination of the SCUGA factors result in the GPA2 or Index which is used in determining what action to take on the student's application in the first review process. The SCUGA instructions and guidelines are located in a separate document and no longer part of the LS&A guidelines because other units also use them in developing the GPA2 Index.

3. GENERAL REQUIREMENTS

Decisions will be based on the following criteria:

a. <u>High School Graduation.</u>

(1) all freshman students are required to earn a high school diploma (or GED equivalent for older students) prior to enrolling in the College.

(2) Exceptions to the graduation requirement may be made for extremely gifted and brilliant students who meet YSEP standards and are admitted under those conditions. (Look in Table of

Contents for YSEP location in guidelines)

b. *Course Preparation.* All students are expected to take a demanding college preparatory curriculum in 9th through 12th grades. The following minimum preparation is suggested for all student applying for admission to LS&A: English – 4 years, foreign language – 2 years (recommended 4 years), mathematics – 3 years (through intermediate algebra), science – 3 years (2 laboratory science courses), social studies – 3 years, and 5 additional courses to earn a total of 20 units of study.

c. *Presidents Council Requirements.* Fall of 1995 is the year the Presidents Council Requirements go into effect. Students have been asked to list on page 3 of the application the number of courses they will have completed that meet the requirements.

(1) Counselors are to identify students who they postpone and are deficient in meeting the presidents Council Requirements by noting the deficiencies on the face of the application (e.g. Pres. Coun. defic. = 1 sem/yr soc stud).

(2) A copy of the face of the application is to be forward to MM for evaluation when we review applications from the postponed pool.

d. *SAT/ACT scores.*

(1) All freshman applicants are required to have their SAT/ACT scores sent directly from the testing agencies.

(2) The highest set of scores will be used to make the admission decision.

(3) A list of postponed applicants whose new scores bump them into the admit category will be run after the receipt of December test tapes. The applications of students who become admissible will be pulled from the files and given to the counselors to take action.

* * *

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LSA Freshman Guidelines - All 1996 Terms - TABLE I
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Instate and Legacy: First Review Decisions

In General, use the top row in each cell for majority applicants and the middle and bottom rows for underrepresented minorities and other disadvantaged students.

	0-17 400-840	18-19 850-920	20-21 930-1000	22-23 1010-1080	24-26 1090-1190	27-28 1200-1270	29-30 1280-1350	31-33 1360-1490	34-36 1500-1600
>4	rtst *	rtst A..ACSP.. ABP..DSP	rtst..PDTE A..ACSP DSP	PDTE..a A..ACSP	a A	A A	A A	A A	A A
3.8-3.9	rtst *	rtst A..ACSP.. ABP..DSP	rtst A..ACSP DSP	PDTE A..ACSP	a A..ACSP	A A	A A	A A	A A
3.6-3.7	rtst *	rtst A..ACSP.. ABP..DSP	rtst A..ACSP DSP	PDTE A..ACSP	PDTE A..ACSP	PDTE A	a A	a A	a A
3.4-3.5	rtst *	rtst A..ACSP.. ABP..DSP	rtst A..ACSP DSP	PDTE..rtst A..ACSP	PDTE A..ACSP	PDTE A	PDTE A	a A	a A
3.2-3.3	RTST *	RTST A..ACSP.. ABP..DSP	RTST A..ACSP DSP	rtst A..ACSP	PDTE..DSSR A..ACSP	PDTE..DSSR A..ACSP	PDTE..DSSR A..ACSP	PDTE..DSSR A	PDTE..DSSR A
3.0-3.1	RTST *	RTST A..ACSP.. ABP..DSP	RTST ACSP DSP	rr&t ACSP	rssr A..ACSP	rssr A..ACSP	rssr A..ACSP	rssr A..ACSP	PDTE..DSSR A..ACSP
2.8-2.9	RR&T *	RR&T DGSF (BP)	RR&T DGSP (ACSP)	rr&t DGP (ACSP)	rssr DGP (ACSP)	rssr DGP (ACSP)	rssr DGP (ACSP)	rssr DGP* (ACSP)	PDTE..DSSR DGP (ACSP)
2.6-2.7	RR&T *	RR&T DGSP (BP)	RR&T DGSP (ACSP.. R/MIN)	RR&T DGSP (BP)	RSSR DGP (BP)	RSSR DGP (BP)	RSSR DGP (BP)	RSSR DGP (BP)	rssr DGP (BP)
2.4-2.5	RR&T RR&T R/MIN	RR&T RR&T R/MIN	RR&T DGSP (BP)	RR&T DGSP (BP)	RSSR DGP (BP)	RSSR DGP (BP)	RSSR DGP (BP)	RSSR DGP (BP)	rssr DGP (BP)
≤ 2.3	RR&T RR&T R/MIN	RR&T RR&T R/MIN	RR&T RR&T R/MIN	RR&T RSSR R/MIN	RSSR RSSR R/MIN	RSSR RSSR R/MIN	RSSR RSSR R/MIN	RSSR RSSR R/MIN	rssr RSSR R/MIN

Generally, admit students at the 98% or 99% if there are no serious deficiencies. Generally, admit top 5% from counties other than Livingston, Macomb, Oakland, Washtenaw or Wayne if there are no serious deficiencies.
Discuss all exceptions for majority applicants that fall outside the guidelines with MM.
* Asterisk means usually not to be admitted. Discuss all exceptions for minority applicants that fall outside the guidelines with JV.
NOTE: All admits to Summer Bridge, must be approved by either GT, JV or MM before going to letter production.

UMA 005774

READING THE CELLS

A. TOP ROW
1. Majority decisions are made based on the acronym in top row of each cell. All admit or reject BOLD CAP markups are done automatically by clerks. Lower case admit and reject decisions are made by counselors. All decisions determined through SCUGA adjustments are made by counselors.
2. Due to the variety of Letters that can be ordered with a single Action code, the acronym in the top row of each cell is an Action code rather than a Letter code. Counselors need to refer to the accompanying Guide for Action/Letter combinations to determine the appropriate letter to order.
3. In the past few years, for expediency, we eliminated sending Delay for Grades (DGF)/Delay for Scores (DSF)/Delay for Grades and Scores (DGSF) letters to majority students in LSA and Engineering units. If the student's credentials fell in a postponed cell, we always entered a postponed (PDTE Action code) markup, and sent the Delay Decision (DD) letter. This year, counselors have the option to mark up either a PDTE Action Code and send the DD letter, or if they have concerns about the trend in a student's grades and need more information before determining what the Action should be, a DGF letter can be ordered requesting fall semester grades. The Action code for this delay is DSSR. Either PDTE or DSSR can be appropriate depending on the specific circumstances.

B. MIDDLE AND BOTTOM ROWS
1. Counselors use middle and bottom rows of a cell to make decisions on all underrepresented minority or other disadvantaged students.
2. The underrepresented minority and other disadvantaged student pool has several specific letters to send depending on each unique circumstance, and therefore,
3. The admit and delay acronyms on the middle and bottom rows of the cell are Letter codes, not Action codes. Counselors need to refer to the Guide for Action/Letter combinations to enter the correct Action code acronym.
4. The reject acronyms are Action codes with the R/MIN letter as the personalized reject letter to be sent.
5. The acronym in parenthesis is the letter to be sent if requested information is acceptable. Questions are to be referred to JV.

UMA 005775

LSA Freshman Guidelines - All 1996 Terms - TABLE II

CONFIDENTIAL

Out-of-State First Review Decisions

In General, use the top row in each cell for majority applicants and use the middle and bottom rows for underrepresented minorities and other disadvantaged students.

	0-17 400-840	18-19 850-920	20-21 930-1000	22-23 1010-1080	24-26 1090-1190	27-28 1200-1270	29-30 1280-1350	31-33 1360-1490	34-36 1500-1600
>4	rtat *	rtat A..ACSP DSF	rtat A..ACSP DSF	PDTE A..ACSP	a A	A A	A A	A A	A A
3.8-3.9	rtat *	rtat A..ACSP DSF	rtat A..ACSP DSF	PDTE A..ACSP	PDTE A..ACSP	A A	A A	A A	A A
3.6-3.7	rtat *	rtat A..ACSP DSF	rtat A..ACSP DSF	PDTE A..ACSP	PDTE A..ACSP	PDTE A	PDTE A	a A	a A
3.4-3.5	rtat *	rtat A..ACSP DSF	rtat A..ACSP DSF	rtat A..ACSP	PDTE A..ACSP	PDTE A	PDTE A	PDTE A	PDTE A
3.2-3.3	RTAT *	RTAT A..ACSP DSF	RTAT A..ACSP DSF	rtat A..ACSP	rasr A..ACSP	rasr A..ACSP	PDTE..DSSR A..ACSP	PDTE..DSSR A	PDTE..DSSR A
3.0-3.1	RTAT *	RTAT A..ACSP DSF	RTAT A..ACSP DSF	RTAT A..ACSP	rasr A..ACSP	rasr A..ACSP	rasr A..ACSP	rasr A..ACSP	PDTE..rasr A..ACSP
2.8-2.9	RRAT *	RRAT DGSP (ACSP.. R/MIN)	RRAT DGSP (ACSP)	RRAT DGF (ACSP)	RRAT DGF (ACSP)	RSSR DGF (ACSP)	rasr DGF (ACSP)	rasr DGF (ACSP)	PDTE..rasr DGF (ACSP)
2.6-2.7	RRAT *	RRAT DGSP (ACSP.. R/MIN)	RRAT DGSP (ACSP.. R/MIN)	RRAT DGSP (ACSP.. R/MIN)	RSSR DGF (ACSP.. R/MIN)	RSSR DGF (ACSP.. R/MIN)	RSSR DGF (ACSP.. R/MIN)	RSSR DGF (ACSP.. R/MIN)	PDTE..rasr DGF (ACSP.. R/MIN)
2.4-2.5	RRAT RR&T R/MIN	RRAT RR&T R/MIN	RRAT DGSP (ACSP.. R/MIN)	RRAT DGSP (ACSP.. R/MIN)	RSSR DGF (ACSP.. R/MIN)	RSSR DGF (ACSP.. R/MIN)	RSSR DGF (ACSP.. R/MIN)	RSSR DGF (ACSP.. R/MIN)	rasr DGF (ACSP.. R/MIN)
≤ 2.3	RRAT RR&T R/MIN	RRAT RR&T R/MIN	RRAT RR&T R/MIN	RRAT RSSR R/MIN	RSSR RSSR R/MIN	RSSR RSSR R/MIN	RSSR RSSR R/MIN	RSSR RSSR R/MIN	rasr RSSR R/MIN

Generally, admit students at the 99% if there are no serious deficiencies.
Discuss all exceptions for majority applicants that fall outside the guidelines with MM.
* Asterisk - usually not to be admitted. Discuss all exceptions for minority applicants that fall outside the guidelines with JV.

Shared/GuidLines/LSA 96 LSA Chrts Out-of-State 95-96/9-95

READING THE CELLS

A. TOP ROW

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2. Due to the variety of Letters that can be ordered with a single Action code, the acronym in the top row of each cell is an Action code rather than a Letter code. Counselors need to refer to the accompanying Guide for Action/Letter combinations to determine the appropriate letter to order.
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4. The reject acronyms are Action codes with the R/MIN letter as the personalized reject letter to be sent.
5. The acronym in parenthesis is the letter to be sent if requested information is acceptable. Questions are to be referred to JV.

LSA: MOST FREQUENTLY USED ACTION/LETTER CODES			
Action(s)	Letter ID	Prepared by:	Letterbook SECTION
A	A	ITD	Admit
A	A NOEDR	ITD	Admit
A	ABP	ITD	CSP
A	ABP NOEDR	ITD	CSP
A	ABPRC	ITD	CSP
A	ABPRCNEDR	ITD	CSP
A	ACSP	ITD	CSP
A	ACSPNOEDR	ITD	CSP
A	ACSPRC	ITD	CSP
A	ACSPRCNED	ITD	CSP
A	AINT	ITD	Admit
A	APH	ITD	Admit
A	APHINT	ITD	Admit
A	APHNOEDR	ITD	Admit
A	APHRC	ITD	Admit
A	APHRCNED	ITD	Admit
A	APHRCINT	ITD	Admit
A	APHRCINTNED	Computer	Admit
A	ARC	ITD	Admit
A	ARC NOEDR	ITD	Admit
A	NA	ITD	Admit
A	OTA	ITD	Admit
A	OTA-CSP	ITD	CSP
A	STA/CC/R	ITD	Admit
A	STA/NT	ITD	Admit
A	STA/NT NE	ITD	Admit
DCT/MCT, DOTH/MOTH, DR&T/MR&T, DSSR/MSSR, DTST/MTST, DELP/MELP	D	Computer	Postpone/ Delay

DIV, DOTH	IV	Computer	Postpone/ Delay
DOTH	CDF	ITD	Postpone/ Delay
DOTH	CDT	ITD	Postpone/ Delay
DOTH	DAB-L	Computer	Postpone/ Delay
DR&T	DGSF	ITD	Postpone/ Delay
DSRV	DSR	ITD	Postpone/ Delay
DSSR	DGF	ITD	Postpone/ Delay
DTST	DSF	ITD	Postpone/ Delay
None	BC	Preprint	Admit
None	C-L	Glossary	Admit
None	FPD	Computer	Admit
None	HC	ITD	Admit
None	RES	ITD	Misc.
None	RES-MIL	Computer	Misc.
None	RINT	ITD	Reject
None	YW/B	ITD	Admit
PDTE	DD	ITD	Postpone/ Delay
PDTE	PT	ITD	Postpone/ Delay
R, RCT, RELP, ROTH, RFAC, RSSR	RT	ITD	Reject
R, RELP, RIV, RR&T, RSSR, RTST, RFAC	R	ITD	Reject
R, RELP, RIV, RR&T, RSST, RTST	R/MIN	ITD	Reject & CSP

RCT, ROTH	CRT	ITD	Reject
RFAC, RSSR	FYR-L	ITD	Reject
WSSR, WCT, WTST, WELP, WIV, WAUD, WPRT, WRSP, WOTH	WDW	Computer	Withdrawal/ Cancel

Shared/Guidelines/LSA 96-LSA Action & Letter Codes/9-95

COLLEGE OF LITERATURE, SCIENCE AND THE ARTS
GUIDELINES FOR ALL TERMS OF 1996
CONFIDENTIAL

I. ADMISSION OF FRESHMEN

A. DEFINITION OF A FRESHMAN APPLICANT: FTIAC (first time in any college). **A freshman is defined as an entering student who has never attended any college following high school graduation.** This definition includes students enrolling in the fall term who take college classes as guest students in the summer immediately preceding the fall semester. The definition also applies to students who enter with advanced standing by earning college credit through Advanced Placement Examinations, or courses taken at a college prior to high school graduation.

All other students will be designated as transfer students (Type 4) with Level (1, 2, 3, 4) being determined by the amount of transferable credit projected for the term of entry. This will include those freshman level students who attend college in the fall and apply for admission to LSA for the winter semester. They will be coded as transfer students (Type 4) at the freshman level (Level 1) and be evaluated according to transfer guidelines for Winter *1996*

B. OVERVIEW OF ADMISSION POLICIES (First Review)

1. **TERMS OF ADMISSION**

Admission to LSA will be highly selective for all four semesters of the academic calendar. Admission is granted to applicants with very competitive credentials on a rolling basis from early fall to November 1 for winter semester, and until February 1 for spring, summer, and fall semesters.

Winter applicants who met competitive criteria based on the Fall *1996* guidelines, or who were previously admitted, did not accept admission, and did not enroll in another institution for the fall term, will be admitted on a rolling basis through the November 1 equal consideration deadline.* All other applicants with lower credentials will be denied admission. There will be no postponed group for the winter term. (Note: It is necessary to delay for a final high school transcript if it has not been previously submitted. A decline in the senior year grades is cause to deny admission even if the student was admissible based on 10th and 11th year GPA.)

*Students with the same credentials who do enroll in another college for the fall semester will be coded as transfer students and admitted if there was no problem with senior year grades.

Spring admissions standards require the same competitive criteria as for all other terms. Applications will be accepted through the February 1 equal consideration deadline.

Students who do not meet the competitive guidelines will be denied admission. There will be no postponed pool for spring semester.

The summer and fall group of applicants whose credentials fall in the range designated as qualified/non-competitive will be postponed for a second review following the February 1 equal consideration deadline.

Summer and fall applicants whose credentials fall below the guidelines set for postponed applicants will be denied admission on the first review.

2. **ASSIGNED REVIEWER**

a. Automatic Review. Applicants whose credentials are at a pre-determined level will be processed by an Automatic Admit clerk from Central Services without counselor review and either admitted or denied admission. All automatically admitted students will have their essays and extracurricular activities reviewed by the counselor assigned to their high school following admission to identify any outstanding achievement. Because of the extremely strong academic credentials of these automatically admitted students, the essay and extracurricular information will not be a factor in admission.

b. Counselor Reviewer.

(1) Applications with GPA1 and test scores outside the Automatic Review ranges will be reviewed by a counselor.

(2) All applications from private high schools where the class rank has to be estimated or adjusted will receive counselor review.

(3) All applications from underrepresented minority groups will be reviewed by counselors.

c. SCUGA Guidelines. SCUGA stands for School, Curriculum, Unusual, Geographic, and Alumni factors that are taken into consideration when reviewing applications. A combination of the SCUGA factors result in the GPA2 or Index which is used in determining what action to take on the student's application in the first review process. The SCUGA instructions and guidelines are located in a separate document and no longer part of the LSA guidelines because other units also use them in developing the GPA2 Index.

3. GENERAL REQUIREMENTS

Decisions will be based on the following criteria:

a. High School Graduation.

(1) *All* freshman students are required to earn a high school diploma (or GED equivalent for older students) prior to enrolling in the College.

(2) Exceptions to the graduation requirement may be made for extremely gifted and brilliant students

who meet YSEP standards and are admitted under those conditions. (Look in Table of Contents for YSEP location in guidelines)

(3) Home schooled students whose grades do not reflect a measure of accomplishment from participation in a typical classroom with other students, will have to satisfy additional standards which will assure they are as competitively admissible as students who attend public or private high schools. See MM for specific requirements.

b. Course Preparation. All students are expected to take a demanding college preparatory curriculum in 9th through 12th grades. The following minimum preparation is suggested for all student applying for admission to LSA: English – 4 years, foreign language – 2 years (recommended 4 years), mathematics – 3 years (through intermediate algebra), science – 3 years (2 laboratory science courses), social studies – 3 years, and 5 additional courses to earn a total of 20 units of study.

c. Presidents Council Requirements. *The Presidents Council Requirements went into effect in the Fall of 1995. Students have been asked to list on page 3 of the application the number of courses they will have completed that meet the requirements.*

(1) Deficiencies in the Presidents Council Requirements will be a factor taken into consideration during selection of students from the postponed pool.

d. SAT/ACT scores. (All SAT scores reflect the Recentered Scale)

(1) All freshman applicants are required to have their SAT/ACT scores sent directly from the testing agencies.

(2) The highest set of scores will be used to make the admission decision.

(3) A list of postponed applications whose new scores bump them into the admit category will be run *periodically after the receipt of fall test tapes*. The applications of students who become admissible will be pulled from the files and given to the counselors to take action.

* * *

Office of Undergraduate Admissions **CONFIDENTIAL**
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COLLEGE OF LITERATURE, SCIENCE AND THE ARTS GUIDELINES FOR ALL TERMS OF 1997

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LSA Freshman Guidelines - 997 Terms - TABLE I

CONFIDENTIAL

Instate and Legacy: First Review Decisions

Use the action in the top row of the grid for students in general.
Use the action in the bottom row for students whose experiences reflect those in Area IV of the "U"nusual factor of SCUGA.

ACT/SAT Scores

Selection Index	01-19 400-920	20-21 930-1000	22-23 1010-1080	24-26 1090-1190	27-28 1200-1270	29-30 1280-1350	31-32 1360-1440	33-34 1450-1520	35-36 1530-1600
>4	dtst/e dtst/Δ	dtst/pdte dtst/a*	dtst/pdte/a dtst/a*	a a	A a	A a	A a	A a	A a
3.8-3.9	dtst/e dtst/Δ	dtst/pdte dtst/a*	dtst/pdte/a dtst/a*	a a*	A a	A a	A a	A a	A a
3.6-3.7	dtst/e dtst/Δ	dtst/pdte dtst/a*	dtst/pdte dtst/a*	pdte/a a*	pdte/a a*	a a*	a a*	a a*	a a*
3.4-3.5	dr&t/e dr&t/Δ	dr&t/pdte dr&t/a*	dr&t/pdte dr&t/a*	dr&t/pdte dr&t/a*	dssr/pdte dssr/a*	a a*	a a*	a a*	a a*
3.2-3.3	dr&t/e dr&t/Δ	dr&t/pdte dr&t/a*	dr&t/pdte dr&t/a*	dr&t/pdte dr&t/a*	dssr/pdte dssr/a*	dssr/pdte dssr/a*	dssr/pdte dssr/a*	dssr/pdte dssr/a*	dssr/pdte dssr/a*
3.0-3.1	dr&t/rr&t dr&t/Δ	dr&t/rr&t dr&t/a**	dr&t/rr&t dr&t/a**	dr&t/pdte dr&t/a**	dssr/pdte dssr/a**	dssr/pdte dssr/a**	dssr/pdte dssr/a**	dssr/pdte dssr/a**	dssr/pdte dssr/a**
2.8-2.9	RR&T rr&t	dr&t/rr&t dr&t/rr&t	dr&t/rr&t dr&t/rr&t	dr&t/rr&t dr&t/rr&t	dssr/rssr dssr/rssr	dssr/rssr dssr/rssr	dssr/pdte dssr/a**	dssr/pdte dssr/a**	dssr/pdte dssr/a**
2.6-2.7	RR&T rr&t	RR&T rr&t	RR&T rr&t	RSSR rssr	RSSR rssr	RSSR rssr	RSSR rssr	RSSR rssr	RSSR rssr
2.4-2.5	RR&T rr&t	RR&T rr&t	RR&T rr&t	RSSR rssr	RSSR rssr	RSSR rssr	RSSR rssr	RSSR rssr	RSSR rssr
≤ 2.3	RR&T rr&t	RR&T rr&t	RR&T rr&t	RSSR rssr	RSSR rssr	RSSR rssr	RSSR rssr	RSSR rssr	RSSR rssr

Instructions

1. Decisions are made based on the action acronym of each cell. All admit or reject BOLD UPPER CASE markups are done automatically by clerks. Lower case admit and reject decisions are made by counselors. All decisions determined through SCUGA adjustments are made by counselors.
2. If there is more than one action on a line within a cell, the first option is usually the preferred action. If a delay for grades (dssr) is not indicated, a declining trend in grades would warrant delaying for fall term grades regardless of the designated action. Counselors need to refer to the accompanying Guide for Action/Letter combinations to determine the appropriate letter markup.

Legend for Actions in Table

A	Automatic admit
a	counselor admit
a*	CSP option
a**	Bridge option.
dr&t	delay for secondary school record and test scores
dssr	delay for secondary school record
dtst	delay for test scores
pdte	postpone
rr&t	reject secondary school record and test scores
rssr	reject for secondary school record
rtst	reject for test scores

Generally, admit students at the 98% or 99% if there are no serious deficiencies. Generally, admit top 5% from counties other than Livingston, Macomb, Oakland, Washtenaw or Wayne if there are no serious deficiencies.
a Means usually not to be admitted. Discuss all exceptions that fall outside the guidelines with MM.
Δ Means usually not to be admitted. Discuss all exceptions for Area IV "U" factor applicants that fall outside the guidelines with JV, GT, MM, TS or RS.

UMA ARCH

BEST AVAILABLE COPY

LSA Freshman Guidelines - All 1997 Terms - TABLE II
CONFIDENTIAL
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3.8-3.9	dtst/e dtst/Δ	dtst/pdte dtst/a*	dtst/pdte dtst/a*	dtst/pdte a*	A a	A a	A a	A a	A a
3.6-3.7	dtst/e dtst/Δ	dtst/pdte dtst/a*	dtst/pdte dtst/a*	pdte a*	pdte a*	pdte a*	a a*	a a*	a a*
3.4-3.5	drst/e drst/Δ	drst/pdte drst/a*	drst/pdte drst/a*	drst/pdte drst/a*	dssr/pdte dssr/a*	dssr/pdte a*	dssr/pdte a*	dssr/pdte a*	dssr/pdte a*
3.2-3.3	drst/e drst/Δ	drst/pdte drst/a*	drst/pdte drst/a*	drst/pdte drst/a*	dssr/pdte dssr/a*	dssr/pdte dssr/a*	dssr/pdte dssr/a*	dssr/pdte dssr/a*	dssr/pdte dssr/a*
3.0-3.1	drst/rrst drst/Δ	drst/rrst drst/a*/ rrst	drst/rrst drst/a*/ rrst	drst/pdte drst/a*/ rrst	dssr/pdte dssr/a*/ rssr	dssr/pdte dssr/a*/ rssr	dssr/pdte dssr/a*/ rssr	dssr/pdte dssr/a*/ rssr	dssr/pdte dssr/a*/ rssr
2.8-2.9	RR&T rrst	drst/rrst drst/rrst	drst/rrst drst/rrst	drst/rrst drst/rrst	dssr/rssr dssr/rssr	dssr/rssr dssr/rssr	dssr/pdte dssr/rssr	dssr/pdte dssr/rssr	dssr/pdte dssr/rssr
2.6-2.7	RR&T rrst	RR&T rrst	RR&T rrst	RSSR rssr	RSSR rssr	RSSR rssr	RSSR rssr	RSSR rssr	RSSR rssr
2.4-2.5	RR&T rrst	RR&T rrst	RR&T rrst	RSSR rssr	RSSR rssr	RSSR rssr	RSSR rssr	RSSR rssr	RSSR rssr
≤ 2.3	RR&T rrst	RR&T rrst	RR&T rrst	RSSR rssr	RSSR rssr	RSSR rssr	RSSR rssr	RSSR rssr	RSSR rssr

Generally, adm[illegible] rates at the 99% if there are no serious deficiencies.

Instructions

1. Decisions are made based on the action acronym of each cell. All admit or reject BOLD UPPER CASE markups are done automatically by clerks. Lower case admit and reject decisions are made by counselors. All decisions determined through SCUGA adjustments are made by counselors.
2. If there is more than one action on a line within a cell, the first option is usually the preferred action. If a delay for grades (dssr) is not indicated, a declining trend in grades would warrant delaying for fall term grades regardless of the designated action. Counselors need to refer to the accompanying Guide for Action/Letter combinations to determine the appropriate letter markup.

Legend for Actions in Table

A	Automatic admit
a	counselor admit
a*	CSP option
dr&t	delay for secondary school record and test scores
dssr	delay for secondary school record
dtst	delay for test scores
pdte	postpone
rr&t	reject secondary school record and test scores
rssr	reject for secondary school record
rtst	reject for test scores

LSAS: MOST FREQUENTLY USED ACTION/LETTER CODES			
Action(s)	Letter ID	Prepared by:	Letterbook SECTION
A	A	ITD	Admit
A	A NOEDR	ITD	Admit
A	ABSUM	ITD	CSP
A	ABSUMNEDR	ITD	CSP
A	ABSUMRC	ITD	CSP
A	ABSUMRCNE	ITD	CSP
A	ACSP	ITD	CSP
A	ACSPNOEDR	ITD	CSP
A	ACSPRC	ITD	CSP
A	ACSPRCNED	ITD	CSP
A	AINT	ITD	Admit
A	APH	ITD	Admit
A	APHINT	ITD	Admit
A	APHNOEDR	ITD	Admit
A	APHRC	ITD	Admit
A	APHRCNED	ITD	Admit
A	APHRCINT	ITD	Admit
A	ARC	ITD	Admit
A	ARC NOEDR	ITD	Admit
A	NA	ITD	Admit
A	OTA	ITD	Admit
A	OTA-CSP	ITD	CSP
A	STA/CC/R	ITD	Admit
A	STA/NT	ITD	Admit
A	STA/NT NE	ITD	Admit
DCT/MCT, DOTH/MOTH, DR&T/MR&T, DSSR/MSSR, DTST/MTST, DELP/MELP	D	Computer	Postpone/ Delay

DIV, DOTH	IV	Computer	Postpone/ Delay
DOTH	CDF	ITD	Postpone/ Delay
DOTH	CDT	ITD	Postpone/ Delay
DOTH	DAB-L	Computer	Postpone/ Delay
DR&T	DGSF	ITD	Postpone/ Delay
DSRV	DSR	ITD	Postpone/ Delay
DSSR	DGF	ITD	Postpone/ Delay
DTST	DSF	ITD	Postpone/ Delay
None	BC	Preprint	Admit
None	C-L	Glossary	Admit
None	FPD	Computer	Admit
None	HC	ITD	Admit
None	RES	ITD	Misc.
None	RES-MIL	Computer	Misc.
None	RINT	ITD	Reject
None	YWB	ITD	Admit
PDTE	DD	ITD	Postpone/ Delay
PDTE	PT	ITD	Postpone/ Delay
R, RCT, RELP, ROTH, RFAC, RSSR	RT	ITD	Reject
R, RELP, RIV, RR&T, RSSR, RTST, RFAC	R	ITD	Reject
RCT, ROTH	CRT	ITD	Reject
RFAC, RSSR	FYR-L	ITD	Reject

WSSR, WCT, WTST, WELP, WIV, WAUD, WPRT, WRSP, WOTH	WDW	Computer	Withdrawal/ Cancel

I. ADMISSION OF FRESHMEN

A. DEFINITION OF A FRESHMAN APPLICANT: FTIAC (first time in any college). **A freshman is defined as an entering student who has never attended any college following high school graduation.** This definition includes students enrolling in the fall term who take college classes as guest students in the summer immediately preceding the fall semester. The definition also applies to students who enter with advanced standing by earning college credit through Advanced Placement Examinations, or courses taken at a college prior to high school graduation.

All other students will be designated as transfer students (Type 4) with Level (1, 2, 3, 4) being determined by the amount of transferable credit projected for the term of entry. This will include those freshman level students who attend college in the fall and apply for admission to LSA for the winter semester. They will be coded as transfer students (Type 4) at the freshman level (Level 1) and be evaluated according to transfer guidelines for Winter *1997*

B. OVERVIEW OF ADMISSION POLICIES (First Review)

1. **TERMS OF ADMISSION**

Admission to LSA will be highly selective for all four semesters of the academic calendar. Admission is granted to applicants with very competitive credentials on a rolling basis from early fall to November 1 for winter semester, and until February 1 for spring, summer, and fall semesters.

Winter applicants who met competitive criteria based on the Fall *1997* guidelines, or who were previously admitted, did not accept admission, and did not enroll in another institution for the fall term, will be admitted on a rolling basis through the November 1 equal consideration deadline.* All other applicants with lower credentials will be denied admission. There will be no deferred group for the winter term. (Note: It is necessary to delay for a final high school transcript if it has not been previously submitted. A decline in the senior year grades is cause to deny admission even if the student was admissible based on 10th and 11th year GPA.)

*Students with the same credentials who do enroll in another college for the fall semester will be coded as transfer students and admitted if there is no problem with senior year grades.

Spring admissions standards require the same competitive criteria as for all other terms. Applications will be accepted through the February 1 equal consideration deadline.

Students who do not meet the competitive guidelines will be denied admission. There will be no postponed pool for spring semester.

The summer and fall group of applicants whose credentials fall in the range designated as qualified/non-competitive will be postponed for a second review following the February 1 equal consideration deadline.

Summer and fall applicants whose credentials fall below the guidelines set for postponed applicants will be denied admission on the first review.

2. **ASSIGNED REVIEWER**

a. Automatic Review. Applicants whose credentials are at a pre-determined level will be processed by an Automatic Admit clerk from Central Services without counselor review and either admitted or denied admission. All automatically admitted students will have their essays and extracurricular activities reviewed by the counselor assigned to their high school following admission to identify any outstanding achievement. Because of the extremely strong academic credentials of these automatically admitted students, the essay and extracurricular information will not be a factor in admission.

b. Counselor Reviewer.

(1) Applications with GPA1 and test scores outside the Automatic Review ranges will be reviewed by a counselor.

(2) All applications from private high schools where the class rank has to be estimated or adjusted will receive counselor review.

(3) All applications from underrepresented minority groups will be reviewed by counselors.

c. SCUGA Guidelines. SCUGA stands for School, Curriculum, Unusual, Geographic, and Alumni factors that are taken into consideration when reviewing applications. A combination of the SCUGA factors result in the Selection Index (S.I.) which is used in determining what action to take on the student's application in the first review process. The SCUGA instructions and guidelines are located in a separate document.

3. GENERAL REQUIREMENTS

Decisions will be based on the following criteria:

a. **High School Graduation.**

(1) *All* freshman students are required to earn a high school diploma (or GED equivalent for older students) prior to enrolling in the College.

(2) Exceptions to the graduation requirement may be made for extremely gifted and brilliant students who meet YSEP standards and are admitted under

those conditions. (Look in Table of Contents for YSEP location in guidelines)

(3) *Home schooled students whose grades do not reflect a measure of accomplishment from participation in a typical classroom with other students, will have to provide additional evidence of preparation, such as earning scores on specific SAT II Subject exams at a level which will assure they are as competitively admissible as students who attend public or private high schools. See MM for specific requirements.*

b. Course Preparation. All students are expected to take a demanding college preparatory curriculum in 9th through 12th grades. The following minimum preparation is suggested for all student applying for admission to LSA: English – 4 years, foreign language – 2 years (recommended 4 years), mathematics – 3 years (through intermediate algebra), science – 3 years (2 laboratory science courses), social studies – 3 years, and 5 additional courses to earn a total of 20 units of study.

– *Presidents Council Requirements. The Presidents Council Requirements went into effect in the Fall of 1995. Students have been asked to list the number of courses they will have completed that meet the requirements on page 3 of the*

application. Deficiencies in the Presidents Council Requirements will be a factor taken into consideration during selection of students from the postponed pool.

c. Grade-Point Average. Grades earned in academic courses taken during the sophomore and junior years will be used in the first review of the application. Senior fall semester grades will be a factor for students who are postponed (deferred) for March review.

d. ACT/SAT I scores. (All SAT I scores reflect the Recentered Scale)

(1) All freshman applicants are required to have their ACT/SAT I scores sent directly from the testing agencies.

(2) The highest set of scores will be used to make the admission decision.

(3) A list of postponed applications whose new scores bump them into the admit category will be run *periodically after the receipt of fall test tapes*. The applications of students who become admissible will be pulled from the files and given to the counselors to take action.

* * *

UNDERGRA U OF M ADMISSION SYSTEM

TRANSACTION: APPLICATION INFORMATION RETRIEVE 10/28/97 14:55:02

OPTION: TRX: 6QU KEY: 3839841281AOA 150400890aa106962

QUESTION MARKS MEAN THAT A TABLE TRANSLATION CANNOT BE FOUND.

383 98 4128 1 GRATZ, JENNIFER, DENISE,/ S: F B: 09/03/77 C/V: US/GEOG: 281 WAYNE RES: 1 MICH RES EFFYYT:

CIVILRTS: 5 OPP: MIGRANT: ATHLETE: 00 ALUMNI: 0 MT: APPL RECEIVED: 01/12/95 ?

ENTRYTP 1 FRESH UNIT/SUB 5040 LSAIFX FIELD 0890 BIOMEDICAL SCIENCES

REG YYT: 962 FALL 95 PGMLVL1/2: 1 1 SUBFIELD: 000

1TERM: DUALDEG: PRFADMIT:

RPRTSCH: 233464 SOUTHGATE-ANDERSON HIGH S CEEB AP: N HONORS: PILOT:

UNIT ACT/MOD: RFAC R SPACE ACT DATE: 04/25/95 L/W PREF: 2 FEE HOLD:

SUBU ACT/MOD: EDR STAT: DATE: / /

COND ADM: SAT:V 000 M 000 TOT: 0000 00/00

GPA1/QL: 3.700 CAL HS%/QL: 96 CAL ACT:E 25 M 23 RD 27 SR 25 C 25: 06/94

GPA2/QL: 3.800 CRED: LTRS: R/EWLO RINT

12757 CHESTNUT DD

SOUTHGATE MI 48195 RODATE: 00/00/00

HOYYT: 000 OFAYYT: 000

UNDERGRA U OF M ADMISSION SYSTEM

TRANSACTION: APPLICATION INFORMATION RETRIEVE 10/28/97 15:24:51

OPTION: TRX: 6QU KEY: 3670230431AOA 150100910AA106982

367 02 3043 1 HAMACHER, PATRICK, H,/ S: M B: 03/30/79 C/V: US/GEOG: 224 GENESEE RES: 1 MICH RES EFFYYT:

CIVILRTS: 5 OPP: MIGRANT: ATHLETE: 00 ALUMNI: 1 NT:

APPL RECEIVED: 10/23/96 S. CARRANZA

ENTRYTP 1 FRESH UNIT/SUB 5010 LS & A FIELD 0910 BIOCHEMISTRY

REG YYT: 982 FALL 97 PGMLVL1/2: 1 1 SUBFIELD: 000

1TERM: DUALDEG: PRFADMIT:

RPRTSCH: 231490 L M POWERS CATHOLIC HIGH CEEB AP: N HONORS: PILOT:

UNIT ACT/MOD: RFAC R SPACE ACT DATE: 04/15/97 L/W PREF: 6 FEE HOLD:

SUBU ACT/MOD: EDR STAT: DATE: / /

COND ADM: SAT: V 000 M 000 TOT: 0000 00/00

GPA1/QL: 2.800 CAL HS%/QL: 56 CAL ACT:E 25 M 27 RD 28 SR 30 C 28: 04/96

GPA2/QL: 3.000 CRED: LTRS: R/EWLO/AL PF

2428 NORBERT STREET

FLINT MI 48504 RODATE: 00/00/00 HOYYT: 000
OFAYYT: 000

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COLLEGE OF LITERATURE, SCIENCE AND THE ARTS GUIDELINES FOR ALL TERMS OF 1998

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College of Literature, Science, and the Arts
Selection Index Action Chart
1998

Instructions

Use student's individual Selection Index number from Selection Index Worksheet to determine action on the chart.

If there is more than one action listed, the first option is usually the preferred action.

Where actions are separated by "or" the counselor may choose whichever action he/she deems most appropriate. Where there is a choice of DSSR/PDTE, if declining grades or previous weak program, select DSSR; if the academic record has been consistent, select PDTE as the appropriate action. Be comfortable that the student is "qualified" when you postpone, since their application may be considered for admission from the postponed group later in the process. Counselors need to refer to the LSA Guide for Action/Letter combinations to determine the appropriate letter markup.

In-State:

- Generally, admit students at the 98% or 99% if there are no serious deficiencies.

- Generally admit top 5% from counties other than Livingston, Macomb, Oakland, Washtenaw or Wayne if there are no serious deficiencies.

Out-of-State:

- Generally, admit students at the 99% if there are no serious deficiencies.

Sel. Ind. #	Action
150 | 100	Admit
99 | 95	A/PDTE
94 | 90	PDTE/A
89 | 75	DSSR or DTST or DR&T or PDTE
74 ↓	DSSR or DTST or RSSR or RTST or RR&T

Key

A= Admit

DR&T= Delay for secondary school record and test scores.

DSSR= Delay for secondary school record.

DTST= Delay for test scores.

PDTE= Postpone

RR&T= Reject for secondary school record and test scores

RSSR= Reject for secondary school record

RTST= Reject for test scores

LSAS: MOST FREQUENTLY USED ACTION/LETTER CODES

Action(s)	Letter ID	Prepared by:	Letterbook SECTION
A	A	ITD	Admit
A	A NOEDR	ITD	Admit
A	ABSUM	ITD	CSP
A	ABSUMNEDR	ITD	CSP
A	ABSUMRC	ITD	CSP
A	ABSUMRCNE	ITD	CSP
A	ACSP	ITD	CSP
A	ACSPNOEDR	ITD	CSP
A	ACSPRC	ITD	CSP
A	ACSPRCNED	ITD	CSP
A	AINT	ITD	Admit
A	APH	ITD	Admit
A	APHINT	ITD	Admit
A	APHNOEDR	ITD	Admit
A	APHRC	ITD	Admit
A	APHRCNED	ITD	Admit
A	APHRCINT	ITD	Admit
A	ARC	ITD	Admit
A	ARC NOEDR	ITD	Admit
A	NA	ITD	Admit
A	OTA	ITD	Admit
A	OTA-CSP	ITD	CSP
A	STA/CC/R	ITD	Admit
A	STA/NT	ITD	Admit
A	STA/NT NE	ITD	Admit
A	TA	ITD	Admit
DCT/MCT, DOTH/MOTH, DR&T/MR&T, DSSR/MSSR, DTST/MTST, DELP/MELP	D	Computer	Postpone/ Delay
DIV, DOTH	IV	Computer	Postpone/ Delay
DOTH	CDF	ITD	Postpone/ Delay
DOTH	CDT	ITD	Postpone/ Delay
DOTH	DAB-L	Computer	Postpone/ Delay
DR&T	DGSF	ITD	Postpone/ Delay
DSRV	DSR	ITD	Postpone/ Delay
DSSR	DGF	ITD	Postpone/ Delay
DTST	DSF	ITD	Postpone/ Delay
None	BC	Preprint	Admit
None	C-L	Glossary	Admit
None	FPD	Computer	Admit
None	HC	ITD	Admit
None	RES	ITD	Misc.
None	RES-MIL	Computer	Misc.
None	RINT	ITD	Reject
None	YWB	ITD	Admit
PDTE	PF	ITD	Postpone/ Delay
PDTE	PT	ITD	Postpone/ Delay
R, RCT, RELP, ROTH, RFAC, RSSR	RT	ITD	Reject
R, RELP, RIV, RR&T, RSSR, RTST, RFAC	R	ITD	Reject
RCT, ROTH	CRT	ITD	Reject
RFAC, RSSR	FYR-L	ITD	Reject

WSSR, WCT, WTST, WELP, WIV, WAUD, WPRT, WRSP, WOTH	WDW	Computer	Withdrawal/ Cancel
Shared/Guidelines/LSA 98-LSA Action & Letter Codes/9-22-97			

I. ADMISSION OF FRESHMEN

A. DEFINITION OF A FRESHMAN APPLICANT: FTIAC (first time in any college). **A freshman is defined as an entering student who has never attended any college following high school graduation.** This definition includes students enrolling in the fall term who take college classes as guest students in the summer immediately preceding the fall semester. The definition also applies to students who enter with advanced standing by earning college credit through Advanced Placement Examinations, or courses taken at a college prior to high school graduation.

All other students will be designated as transfer students (Type 4) with Level (1, 2, 3, 4) being determined by the amount of transferable credit projected for the term of entry. This will include those freshman level students who attend college in the fall and apply for admission to LSA for the winter semester. They will be coded as transfer students (Type 4) at the freshman level (Level 1) and be evaluated according to transfer guidelines for Winter *1998*

B. OVERVIEW OF ADMISSION POLICIES (First Review)

1. **TERMS OF ADMISSION**

Admission to LSA will be highly selective for all four semesters of the academic calendar. Admission is granted to applicants with very competitive credentials on a rolling basis from early fall to November 1 for winter semester, and until February 1 for spring, summer, and fall semesters.

Winter applicants who met competitive criteria based on the Fall *1998* guidelines, or who were previously admitted, did not accept admission, and did not enroll in another institution for the fall term, will be admitted on a rolling basis through the November 1 equal consideration deadline.* All other applicants with lower credentials will be denied admission. There will be no postponed group for the winter term. (Note: It is necessary to delay for a final high school transcript if it has not been previously submitted. A decline in the senior year grades is cause to deny admission even if the student was admissible based on 10th and 11th year GPA.)

*Students with the same credentials who do enroll in another college for the fall semester will be coded as transfer students and admitted if there was no decline in senior year grades.

Spring admissions standards require the same competitive criteria as for all other terms. Applications will be accepted through the February 1 equal consideration deadline.

Students who do not meet the competitive guidelines will be denied admission. There will be no postponed pool for spring semester.

The summer and fall group of applicants whose credentials fall in the range designated as qualified/non-competitive will be postponed for a second review following the February 1 equal consideration deadline.

Summer and fall applicants whose credentials fall below the guidelines set for postponed applicants will be denied admission on the first review.

2. **ASSIGNED REVIEWER**

a. Automatic Review. Applicants whose credentials are at a pre-determined level will be processed by an Automatic Admit clerk from Central Services without counselor review and either admitted or denied admission. All automatically admitted students will have their essays and extracurricular activities reviewed by the counselor assigned to their high school following admission to identify any outstanding achievement. Because of the extremely strong academic credentials of the automatically admitted students, the essay and extracurricular information will not be a factor in admission.

b. Counselor Reviewer.

(1) Applications with UM computed GPA (hereafter called GPA) and test scores outside the Automatic

Review ranges will be reviewed by a counselor.

(2) All applications from private high schools where the class rank has to be estimated or adjusted will receive counselor review.

(3) All applications from underrepresented minority identity or educatoin and from socioeconomically disadvantaged background or education groups will be reviewed by counselors.

3. **GENERAL REQUIREMENTS**

Decisions will be based on the following criteria:

a. High School Graduation.

(1) *All* freshman students are required to earn a high school diploma (or GED equivalent for older students) prior to enrolling in the College.

(2) Exceptions to the graduation requirement may be made for extremely gifted and brilliant students who meet YSEP standards and are admitted under those conditions. (Look in Table of Contents for YSEP location in guidelines)

(3) Home schooled students whose grades do not reflect a measure of accomplishment from participation in a typical classroom with other students, will have to provide additional evidence of preparation,

such as earning scores on specific SAT II Subject exams at a level which will assure they are as competitively admissible as students who attend public or private high schools. Home schooled students will be assigned to OUA liaison, Marilyn McKinney.

b. Course Preparation. All students are expected to take a demanding college preparatory curriculum in 9th through 12th grades. The following minimum preparation is suggested for all student applying for admission to LSA: English – 4 years, foreign language – 2 years (recommended 4 years), mathematics – 3 years (through intermediate algebra), science – 3 years (2 laboratory science courses), social studies – 3 years, and 5 additional courses to earn a total of 20 units of study.

c. Grade-Point Average. Grades earned in academic courses taken during the sophomore and junior years will be used in the first review of the application. Senior fall semester grades will be a factor for students who are postponed (deferred) for March review.

d. ACT/SAT I scores. (All SAT I scores reflect the Recentered Scale)

(1) All freshman applicants are required to have their ACT/SAT I scores sent directly from the testing agencies.

(2) The highest set of scores will be used to make the admission decision.

(3) A list of postponed applicants whose new scores bump them into the admit category will be run *periodically after the receipt of additional test tapes*. The applications of students who become admissible will be pulled from the files and given to the counselors to take action.

4. SELECTION INDEX

Admission is based on several factors that combine to produce a freshman class that provides a mixture of attributes and characteristics valued by the University. The process for building the class is found in the Guidelines for the Calculation of a Selection Index 1998. The guidelines are to be used to determine a Selection Index number which will be matched to the action column on the 1998 College of LSA Selection Index Action Chart to determine the appropriate action to take on each application. An appropriate letter markup is to be selected from the LSA: Most Frequently Used Action/Letter Codes sheet on page 2 of the LSA Guidelines or by referring to the Letter Book.

* * *

1998 Guidelines for the Calculation of a Selection Index for all Schools and Colleges Except Engineering

The Guidelines for the Calculation of a Selection Index are an attempt to give some standardization to decisions made by many different counselors on many different applications. We recognize that all communities, schools, populations, course offerings, grading practices, personal circumstances, etc. are not the same. We want to make justifiable decisions that blend the consistency of a formula with the flexibility of a review that is ultimately a matter of human judgment and which must adapt to a "rolling admissions" process.

Admissions is more art than science, and these guidelines should not be read otherwise. These guidelines contain limited descriptions of the rationales behind the Index categories and factors. Obviously, the rationales and the appropriate application of these factors in all situations are too complex to be completely described by this type of document. If you require a more detailed discussion of the rationales or the application of a factor is troublesome in any particular case, you should discuss the matter with your team leader.

The Selection Index has a maximum value of 150 points, with the final score for an applicant representing the cumulative attributes that the individual will bring to the incoming freshman class. Fully ⅔ of the points of the Selection Index are attributable to academics. When test scores are added to the academics, only 27% of the maximum possible points are derived from other factors that assist in enrolling students who will provide a mixture of

attributes and characteristics valued by the University. It is our sincere belief that this mixture contributes to the education of our students, as well as fulfills the University's mission to prepare society's future citizens and leaders.

The Selection Index for an applicant is a summation of points assigned to factors in one of three categories: Test Score, Academic, and Other Factors. The Test Score category consists of up to 12 points based on the applicant's best ACT or SAT test score from any one sitting. Up to 98 points can be received in the Academic category, based on the academic unweighted Grade Point Average (GPA), the category of school attended ("S" factor), and the strength or weakness of the curriculum ("C" factor). Lastly, an applicant may receive up to 40 points in the Other Factors category, with the individual factors described in later sections of this document. Thus, a student can receive up to 110 points on factors in the Test Score and Academic categories of his or her application and up to 40 points from the Other Factors component.

The Selection Index reflects a variety of factors in the applicant's file that are not considered in the UM-computed academic unweighted GPA. Both the UM-computed GPA and the Selection Index will be entered into the system and can be accessed on the QU screen on DSC.

Counselors must always circle or enter the appropriate points for the various factors on the coding worksheet and the sum as the Selection Index. Any unusual circumstance should be noted and stapled to the application in a prominent place.

ACADEMIC

The Academic category is comprised of the GPA, school, and curriculum factors.

Grade Point Average

The UM-computed GPA (calculated from 10th and 11th grade academic courses) is multiplied by 20 to determine the applicant's score for this factor. The Selection Index Worksheet has a table of the multiples of 20 from a 1.7 to 4.0 GPA. Note that an applicant can score up to 80 points, which constitutes 53% of the possible 150 points an applicant can receive.

S (school) Factor

Schools are not ranked throughout the state or country but are given a classification based on their school profile and academic information. The school factor acknowledges that we do consider various factors in our decisions that reflect the differences among schools.

Keep a disk and hard copy of your schools and their respective classifications. Counselors should add new schools to the list as the year progresses and collect the high school profiles of schools that are already on the list. The same S factor should normally be applied to all applicants from the same school, unless an applicant has attended schools with different S factors. At the end of the application review season, update your S factor list based on the high school profiles. Turn in the additions and revisions to the secretary responsible for updating the entire file for the next season of application review.

The S factor is based on the number of AP/IB courses offered at the school, the percentage of students attending two and four year colleges, and average SAT/ACT scores. The school profile is the primary source of such data. Resist the temptation of being generous when the school is just a little short of the expected level. There will be some schools in every category (S factor) that just make a certain level and some that just miss a higher level. Additional information such as above average academic performance of a school's students based on UM first year follow-up reports could move the school upward. **A code of "E" will be entered on the Master Chart indicating such an exception.**

The guide below is based on the averages of over 300 schools. Each counselor should be able to exercise judgment as to the S factor for schools in their territory. Remember the S factor relates to the strength of the school – not just a special group within that school. *In most cases, the AP/IB figure is the starting point.* Then, you should determine if the College Bound and SAT/ACT statistics substantiate the S points. A strong record at UM, SAT II Subject tests, AP/IB scores, the school's curriculum guide, and other information will help in making an appropriate decision. Schools with a factor of 4 or 5 must be exceptionally strong and are very rare in general, and more so among public schools. Conversely, there are many private schools that should be less than a factor of 2.

Note: The 1996 High School Profiles and SAT I scores listed below are based on **Recentered** scores.

S = 0 Very few or no Honors or AP courses. Less than 50% attend college. SAT I average below 1040 and ACT below 22.

S = 1 At least 7 AP/IB courses. Seventy-five percent attend college. SAT I average range of 1050-1080 and ACT below 23.

S = 2 At least 9 AP/IB courses. Strong honors or advanced courses. Eighty-five percent attend college. SAT I average range of 1130-1160 or ACT average of 25.

S = 3 At least 11 AP/IB courses. Many Honors or rigorous courses. SAT II subject scores of ≥ 610 and/or impressive results on AP exams support high level of learning. Ninety-five percent attend college. SAT I average range of 1200-1230 or ACT average of 27.

S = 4 At least 12 AP/IB. Strong AP record even when courses are not always called AP. Look for exams taken. Course grades tend not to cluster at the highest end of the scale. Look at distribution of grades and scores. Many records include SAT II subject scores that tend to be in the 710+ range. Ninety-nine percent attend college. List would include many competitive colleges. SAT I average range of 1240-1270 or ACT average of 28.

S = 5 At least 13 AP/IB. Impressive number of high SAT II subject scores. Many National Merit winners. Curriculum reads like the 1st and 2nd year at a typical liberal art college. Students receive 4's & 5's on AP. Grades tend to cluster in the mid-range of the scale. Counselor comments indicate real differences in a PLUS/MINUS grading system. Students have gone in depth into an area of study. Often including foreign study rather than just travel. Ninety-nine percent attend college. List would include many highly competitive/selective colleges. SAT I average range of 1320+ or ACT average of 30.

If you need help in determining an appropriate S factor due to wide variations in selection criteria, bring your data to MM, and we will assign an appropriate S factor.

The conversion of S factors to Selection Index points is on the Selection Index Worksheet.

C (curriculum) Factor

Given the wide disparity in high school course selection and offerings, it is imperative that the choice of strong courses, particularly clearly identified Honors and AP/IB, be considered in the review process. It is unfair to reward a student with admission who has elected a mediocre curriculum (sometimes for as many as four years during high school), while punishing by postponements those with stronger programs. Achievement of a respectable GPA in a demanding and challenging program more often represents high motivation and commitment than a contrived, inflated GPA in a weak curriculum. The strong program also better prepares the student for the quality of work expected at the University of Michigan. All students are expected to elect at least four traditional college preparatory subjects each semester. Those with less should be deferred upon first review even if GPA and test score place them in the Admit range.

The starting point for any applicant is zero points for a strong academic program, consisting of 19 academic courses in grades 9-12. Do not include art, business, computer application, drafting, engineering, music, typing, or vocational courses as academics. Only count English, foreign languages, mathematics, science, social science,

and computer programming (Fortran, Basic, C, Pascal) courses as academics.

Make sure that there is a reasonable degree of integrity in the school's definition of "Honors" courses. In general, you can calculate 2 honors and/or accelerated courses to equal 1 AP/IB course, so long as the honors courses at that school are not equal to or as demanding as the AP/IB courses. A statement from the high school such as "This would be Honors at another school" or "Faculty policy precludes such a label" *does not* qualify for our inclusion as an "honors" course and should not be counted. Use your knowledge (not assumptions) about what different labels used by the schools mean in this area. Tracks, phase, core, level, advanced, etc. do not always mean "advanced" when thinking of such courses as being for those whose course background has been strong, have received high grades, or are selected to participate and write the AP Exams.

When making your computation of number of academics and honors/AP: Do NOT round up! Also, take into consideration a downward trend in grades and/or weak course selection.

C = -2 Very weak academic program, relative to what is offered in the school, less than 15 academic courses in grades 9-12. Three or fewer academics in senior year. No honors or AP. Use judgment. Admission doubtful.

C = -1 Weak academic program, relative to what is offered in the school, no honors or AP, 15-18 academics in grades 9-12. Use judgment.

C = 0 Average to strong academic program, one AP/IB or 1-3 honors, at least 19 academic courses in grades 9-12.

C = 1 For a *very strong* program. 2-3 AP/IB or 4-7 honors in year long courses and at least 19 academic courses in grades 9-12.

C = 2 For an *unusually strong* program. 4-5 AP/IB or 8-11 honors in year long courses *and* at least 19 academic courses in grades 9-12.

C = 3 For a *superior* program. 6 or 7 AP/IB or 12-15 honors in year long courses *and* at least 20 academic courses in grades 9-12.

C = 4 A *fantastic* program. 8+ AP/IB or 16+ honors in year long courses *and* at least 20 academic courses in grades 9-12.

The conversion of C factors to Selection Index points is on the Selection Index Worksheet.

TEST SCORE

An applicant may receive one of five established point totals for the best score of the ACT or SAT from any one exam. Do not add the best verbal and best math subscores from two different exam dates together. The points are assigned to the following ranges of scores:

Points	ACT	SAT
0	01-19	400-920
6	20-21	930-1000
10	22-26	1010-1190
11	27-30	1200-1350
12	31-36	1360-1600

Note that an applicant having a test score in the zero points range for the Test Score category, even if admissible due to a very strong score in the Academic category, is likely to have a difficult time succeeding without substantial academic assistance. Thus, the counselor should consider such an applicant as a candidate for the Summer Bridge Program. Summer Bridge is open to Michigan residents only.

OTHER FACTORS

When reviewing an applicant's file, please circle and/or award all points that apply to the factors constituting the Other Factors category. **However, a total of 40 points is the maximum that can be added to the Selection Index score for the Other Factors category. Moreover, no applicant can receive points for more than one of the following factors: socioeconomically disadvantaged student or education, underrepresented racial/ethnic minority identity or education, an officially recruited athlete, Provost's discretion, or professional diversity.**

Geography

An applicant may receive points for residency in one or more of three special geographic areas. An instate student may receive a maximum of 16 points, while an out-of-state student may receive only 2 points, if residing in a designated state.

Michigan Residency: As a public institution supported by the citizens of Michigan, it is important that our incoming freshman class have a large representation of students

from Michigan. To achieve that goal, each Michigan resident is awarded 10 points.

Residency in an Underrepresented County: The vast majority of enrolling incoming freshmen are from the southern counties of Michigan. To promote interaction among students from all parts of the state, applicants from northern Michigan (defined as counties including and north of Oceana, Newaygo, Mecosta, Clare, Gladwin, and Arenac counties), rural areas, and small communities that are separated geographically and/or culturally from more populated areas, will be awarded 6 points. Applicants from the following areas should receive these points:

Lower Peninsula

Alcona	Gladwin	Montmorency
Alpena	Grand Traverse	Newaygo
Antrium	Iosco	Oceana
Arenac	Kalkaska	Ogemaw
Benzie	Lake	Osceola
Cheboygan	Leelaunau	Oscoda
Charlevoix	Manistee	Otsego
Clare	Mason	Presque Isle
Crawford	Mecosta	Roscommon

Upper Peninsula

Alger	Gogebic	Mackinac
Baraga	Houghton	Menominee
Chippewa	Iron	Ontonagon
Delta	Keweenaw	Schoolcraft
Dickinson	Luce	

Residency in a state from a region which is underrepresented at the University of Michigan: Applicants from western states (beyond Missouri, Iowa, Minnesota) except

California and southern states below Virginia and Tennessee (except for Florida and Texas) are awarded 2 points. Students who are residents of the following states can receive these points:

Alabama	Kansas	North Dakota
Alaska	Louisiana	Oklahoma
Arizona	Mississippi	Oregon
Arkansas	Montana	South Carolina
Colorado	Nebraska	South Dakota
Georgia	Nevada	Utah
Hawaii	New Mexico	Washington
Idaho	North Carolina	Wyoming

International students are not awarded any geographic factor points.

Alumni Relationships

To recognize the continuing service and support provided to the University, points will be awarded for certain alumni relationships:

Legacy – The applicant, whose parent or step-parent attended UM-Ann Arbor as degree-seeking students, should be awarded 4 points.

or

Other Alumni Relationships – The applicant, whose grandparents, siblings, or spouse attended UM-Ann Arbor as degree seeking students, should be awarded 1 point.

Points cannot be awarded for both categories.

Essay

The essay is required. If the essay is missing, the application is incomplete and cannot be marked up for admission. The essay will be evaluated for content, style, originality, and risk. One point may be awarded for an outstanding essay.

Personal Achievement

Points for Personal Achievement will be based on information provided on page 3 of the application, item 31, "Activities, Work Experience and Awards", as well as other information provided with the application. The applicant must demonstrate a state, regional, or national level of achievement in academic competitions, art, athletics (applies to non-recruited athletes only), music, professional theater, or science. Remember, most applicants to UM are very active students in leadership positions, sports activities, social clubs, etc. in their high schools and local communities. Involvement in these activities is not unusual and is normal for the applicant pool. The Personal Achievement factor is **not to be used as** compensation for weaker academic achievement attributed to overinvolvement in non-academic activities.

Examples of personal achievements include a National Science Foundation Award; Westinghouse Scholars; state, regional, or national recognition in an academic competition (e.g., forensics); state, regional, or national recognition as an athlete; placing in a state, regional, or national art show; having writing published in a state, regionally, or nationally recognized magazine or journal; or professional theater experience. Do not award points for

personal achievement at the local level – that level of accomplishment is normal within the applicant pool.

Counselors should have some validation of the achievement such as high school counselor confirmation, copy of award certificate, newspaper clipping, etc.

Points	
1	State level achievement
3	Regional level achievement
5	National level achievement

Leadership and Service

Points for Leadership will be based on information provided on page 3 of the application, item 31. "Activities, Work Experience and Awards", as well as other information provided with the application. The applicant must demonstrate a state, regional, or national level of achievement. Remember, most applicants to UM are very active students in leadership positions, sports activities, social clubs, etc. Active involvement in these activities is not unusual and is normal for the applicant pool. The Leadership and Service factor **is not to be used** as compensation for weaker academic achievement attributed to over-involvement in non-academic activities.

Examples of strong leadership include elected positions at Girls' or Boys' State, a unique initiative in a community endeavor resulting in special recognition, state or service club award, or successful entrepreneurship.

Points	
1	State level achievement
3	Regional level achievement
5	National level achievement

Socioeconomically Disadvantaged Student or Education

The University is committed to a rich educational experience for its students, which should include interaction with students of all socioeconomic backgrounds. A diverse, as opposed to a homogeneous, student population enhances the education experience for all students. Consequently, 20 points will be awarded to an applicant who:

> is socioeconomically disadvantaged, with indicators such as parents' occupations, single parent upbringing, a deceased parent, necessary excessive work hours while attending school, overcoming extraordinary obstacles, such as abuse, or homelessness; or
>
> is a student educated in a high school serving a population that is predominantly socioeconomically disadvantaged.

Underrepresented Racial/Ethnic Minority Identity or Education

The University is committed to an educational experience that involves students interacting with other students of different races and ethnicities than their own. Consequently, 20 points will be awarded to an applicant who:

> is a member of a federally recognized underrepresented race or ethnicity, which is also underrepresented on the UM Ann Arbor campus; or
>
> is a student educated in a high school serving a population that is predominantly comprised of federally recognized underrepresented races and/or ethnicities, which are also underrepresented on the UM Ann Arbor campus.

Scholarship Athlete

In anticipation of their contributions to the University and in recognition of the tradition and national prominence of Michigan intercollegiate athletics, applicants being officially recruited and considered for athletic scholarships should have 20 points added to their score.

Provost's Discretion

At the discretion of the Provost (only), up to an additional 20 points may be awarded to an applicant.

Professional Diversity

Over time, some professions have become composed predominantly of one gender or another. The School of Nursing has identified a need to enroll more members of an underrepresented gender to enhance its educational environment and to improve the diversity within its profession. A counselor should award 5 points to those applicants who are men apply to the School of Nursing. (See the Guidelines for Calculation of an Engineering Selection Index for the Professional Diversity points awarded for women applicants to the College of Engineering.)

Place student label here or fill in the following information

Name _____
SIN _____
Unit _____
Term _____

Confidential

Selection Index Worksheet

(For LS&A and selected Schools and Divisions, other than Engineering)

For Internal Use Only

	Points (circle)	ACADEMIC
GPA	40	2.0
	42	2.1
	44	2.2
	46	2.3
	48	2.4
	50	2.5
	52	2.6
	54	2.7
	56	2.8
	58	2.9
	60	3.0
	62	3.1
	64	3.2
	66	3.3
	68	3.4
	70	3.5
	72	3.6
	74	3.7
	76	3.8
	78	3.9
	80	4.0
School Factor	0	0
	2	1
	4	2
	6	3
	8	4
	10	5
Curriculum Factor	-4	-2
	-2	-1
	0	0
	2	1
	4	2
	6	3
	8	4

	Points (circle one)	TEST SCORE	
ACT/ SAT I	0	01-19	400-920
	6	20-21	930-1000
	10	22-26	1010-1190
	11	27-30	1200-1350
	12	31-36	1360-1600

Add points in this column for sub score 1

Points (circle)		OTHER FACTORS (*Maximum 40 points*)
Geography		
10		Michigan Resident
6		Underrepresented Michigan County
2		Underrepresented State
Alumni		
4	*Assign only 1 option*	Legacy (*parents / stepparents*) or
1		Other (*grandparents, siblings, spouses*)
Essay		
1		Outstanding Essay
Personal Achievement		
1	*Assign only 1 option*	State
3		Regional
5		National
Leadership & Service		
1	*Assign only 1 option*	State
3		Regional
5		National
Miscellaneous		
20		Socio-economic Disadvantage
20		Underrepresented Racial/Ethnic Minority Identification or Education
5	*Assign only 1 option*	Men in Nursing
20		Scholarship Athlete (*assigned by athletic counselor only*)
20		Provost's Discretion

Add points in this column for sub score 2

TOTAL

Sub score 1 + Sub score 2 = Selection Index

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

JENNIFER GRATZ, and PATRICK HAMACHER, and all others similarly situated,

Plaintiffs,

vs.

LEE BOLLINGER, JAMES DUDERSTADT, THE UNIVERSITY OF MICHIGAN, and THE UNIVERSITY OF MICHIGAN COLLEGE OF LITERATURE, ARTS, AND SCIENCE,

Defendants,

and

EBONY PATTERSON, RUBEN MARTINEZ, LAURENT CRENSHAW, KARLA R. WILLIAMS, LARRY BROWN, TIFFANY HALL, KRISTEN M.J. HARRIS, MICHAEL SMITH, KHYLA CRAINE, NYAH CARMICHAEL, SHANNA DUBOSE, EBONY DAVIS, NICOLE BREWER, KARLA HARLIN, BRIAN HARRIS, KATRINA GIPSON, CANDICE B.N. REYNOLDS, by and through their parents or guardians, DENISE

Civil Action No. 97-75231
Hon. Patrick J. Duggan

ANSWER

PATTERSON, MOISE MARTINEZ, LARRY CRENSHAW, HARRY J. WLLIAMS, PATRICIA SWAN-BROWN, KAREN A. MCDONALD, LINDA A. HARRIS, DEANNA A. SMITH, ALICE BRENNAN, IVY RENE CHARMICHAEL, SARAH L. DUBOSE, INGER DAVIS, BARBARA DAWSON, ROY D. HARLIN, WYATT G. HARRIS, GEORGE C. GIPSON, SHAWN R. REYNOLDS, AND CITIZENS FOR AFFIRMATIVE ACTION'S PRESERVATION,

Defendant-Intervenors.

ANSWER OF INTERVENING DEFENDANTS

NOW COME intervening defendants, Ebony Patterson, Ruben Martinez, Laurent Crenshaw, Karla R. Williams, Larry Brown, Tiffany Hall, Kristen M.J. Harris, Michael Smith, Khyla Craine, Nyah Carmichael, Shanna DuBose, Ebony Davis, Nicole Brewer, Karla Harlin, Brian Harris, Katrina Gipson, Candice B.N. Reynolds[1], and

[1] The individual applicants are minors who move to intervene by their parents or guardians, respectively, Denise Patterson, Moises Martinez, Larry Crenshaw, Harry J. Williams, Patricia Swan-Brown, Karen A. McDonald, Linda A. Harris, Deanna Smith, Alice Brennan, Ivy Rene Carmichael, Sarah L. DuBose, Inger Davis, Barbara Dawson, Roy D. Harlin, Wyatt G. Harris, George C. Gipson, and Shawn R. Reynolds.

Citizens for Affirmative Action's Preservation ("CAAP") and answer the Complaint. Except as hereafter expressly admitted, qualified, or otherwise admitted, intervening defendants specifically deny each and every allegation contained in the Complaint. Intervening defendants respond to the numbered allegations in the Complaint on personal knowledge or on information and belief as to other matters, as follows:

1. No response is required to the allegations in paragraph 1 of the complaint, which are the plaintiff's characterizations of their clients.

2. Intervening defendants deny the allegations in paragraph 2 of the Complaint.

3. Intervening defendants admit that, to the extent that the Court has subject-matter jurisdiction, venue is proper in this Court. Intervening defendants deny all of the remaining allegations in paragraph 3 of the Complaint.

4. Intervening defendants neither admit nor deny the allegations in paragraph 4 of the Complaint, lacking knowledge or information sufficient to form a belief as to the truth or falsity thereof.

5. Intervening defendants neither admit nor deny the allegations in paragraph 5 of the Complaint, lacking knowledge or information sufficient to form a belief as to the truth or falsity thereof.

6. Intervening defendants admit the allegations in the first sentence of paragraph 6 of the Complaint. Intervening defendants neither admit nor deny the remaining allegations in paragraph 6 of the Complaint, lacking knowledge or information sufficient to form a

belief as to the truth or falsity thereof, but state that the College of Literature, Science and the Arts is a college of the University of Michigan.

7. Intervening defendants neither admit nor deny the allegations of paragraph 7 of the Complaint, lacking knowledge or information sufficient to form a belief as to the truth or falsity thereof.

8. Intervening defendants neither admit nor deny the allegations or paragraph 8 of the Complaint, lacking knowledge or information sufficient to form a belief as to the truth or falsity thereof.

9. Intervening defendants admit that plaintiffs purport to bring this action as a class action. No response is necessary to the plaintiffs' characterization of their claims in the remainder of paragraph 9 of the Complaint.

10. Intervening defendants admit plaintiffs seek to maintain a class. No response is necessary to the plaintiffs' characterization of their claims in the remainder of paragraph 10 of the Complaint.

11. Intervening defendants neither admit nor deny the allegations in paragraph 11 of the Complaint, lacking knowledge or information sufficient to form a belief as to the truth or falsity thereof.

12. Intervening defendants deny the allegations in paragraph 12 of the Complaint.

13. Intervening defendants deny the allegations in paragraph 13 of the Complaint, except that intervening defendants neither admit nor deny the allegations regarding the competence and experience of plaintiffs' counsel,

lacking knowledge or information sufficient to form a belief as to the truth or falsity thereof.

14. Intervening defendants deny the allegations in paragraph 14 of the Complaint.

15. Intervening defendants state that the University of Michigan is an entity created by the Michigan State Constitution. Intervening defendants state upon information and belief that the University of Michigan receives federal funds. Intervening defendants neither admit nor deny the remaining allegations in paragraph 15 of the Complaint, lacking knowledge or information sufficient to form a belief as to the truth or falsity thereof.

16. Intervening defendants admit that the University of Michigan's Application for Undergraduate Admissions permits applicant to indicate their race. Intervening defendants deny all of the remaining allegations in paragraph 16 of the Complaint.

17. Intervening defendants neither admit or deny the allegations in paragraph 17 of the Complaint, lacking knowledge or information sufficient to form a belief as to the truth or falsity thereof.

18. Intervening defendants state upon information and belief that the University of Michigan uses race as a factor in admissions, as part of a broad array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Intervening defendants deny all of the remaining allegations in paragraph 18 of the Complaint.

19. Intervening defendants state upon information and belief that the University of Michigan applies rigorous admissions standards to all applicants; and that all

admitted students are fully qualified to succeed at the University. Intervening defendants further state upon information and belief that the University of Michigan uses race as a factor in admissions, as part of a broad array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Intervening defendants deny all of the remaining allegations in paragraph 19 of the Complaint.

20. Intervening defendants deny all the allegations in paragraph 20 of the Complaint.

21. Intervening defendants neither admit nor deny the allegations in paragraph 21 of the Complaint, lacking knowledge or information sufficient to form a belief as to the truth or falsity thereof.

22. Intervening defendants state upon information and belief that high school grades in academic courses represent the predominant factor used for determining admissions to the University of Michigan, College of Literature, Science and the Arts. Intervening defendants state upon information and belief that the University of Michigan uses race as a factor in admissions, as part of a broad array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Intervening defendants deny all of the remaining allegations of paragraph 22 of the Complaint.

23. Paragraph 23 of the Complaint states a conclusion of law to which no response is necessary. To the extent that a response is deemed necessary, intervening defendants deny the allegations in paragraph 23 of the Complaint.

24. Intervening defendants neither admit nor deny the allegations in paragraph 24 of the Complaint, lacking knowledge or information sufficient to form a belief as to the truth or falsity thereof.

25. Intervening defendants deny the allegations in the first sentence of paragraph 25 of the Complaint. Intervening defendants neither admit nor deny the allegations in the second sentence of paragraph 25 of the Complaint, lacking knowledge or information sufficient to form a belief as to the truth or falsity thereof. Intervening defendants deny the allegations in the third sentence of paragraph 25 of the Complaint.

26. Intervening defendants deny the allegations in paragraph 26 of the Complaint.

27. Intervening defendants state upon information and belief that the University of Michigan has a current intention to continue to use race as a factor in admissions, as part of a broad array of qualifications and characteristics which racial or ethnic origin is but a single though important element. Intervening defendants deny all of the remaining allegations in paragraph 27 of the Complaint.

RESPONSE TO PLAINTIFF'S FIRST CLAIM

28. Intervening defendants incorporate by reference their responses to the allegations of paragraphs 1-27 of the Complaint set forth above.

29. Paragraph 29 sets forth a conclusion of law to which no response is required. To the extent a response is required, intervening defendants deny the allegations in paragraph 29 of the Complaint.

30. Paragraph 30 sets forth a conclusion of law to which no response is required. To the extent a response is required, intervening defendants deny the allegations in paragraph 30 of the Complaint.

RESPONSE TO PLAINTIFF'S SECOND CLAIM

31. Intervening defendants incorporate by reference their responses to the allegations of paragraphs 1-30 of the Complaint as set forth above.

32. Intervening defendants state that the University of Michigan is an entity created by the Michigan State Constitution. Intervening defendants state upon information and belief that the University of Michigan, which includes the College of Literature, Science and the Arts, receives federal funds. Intervening defendants deny the remaining allegations in paragraph 32 of the Complaint.

No response is required to the remainder of the Complaint, which sets forth plaintiffs' prayer for relief. To the extent that a response is required, intervening defendants deny the remaining allegations in the Complaint.

AFFIRMATIVE DEFENSES

Defendants assert the following affirmative defenses based on their current knowledge and information.

1. The Complaint fails to state a claim upon which relief may be granted.

2. This Court lacks subject-matter jurisdiction over the Complaint because the plaintiffs lack standing.

3. Plaintiff's claims for injunctive relief are barred by the doctrine of mootness.

4. The Regents of the University of Michigan are permitted under the Fourteenth Amendment to the United States Constitution to use race as one of the many factors considered in admissions in order to remedy the present effects of past and present discrimination and to foster a diverse educational environment.

5. Intervening defendants state that they assert these affirmative defenses on the basis of knowledge or information presently available and in order to avoid "Waiver. Intervening defendants reserve the right to withdraw any of these affirmative defenses or to assert additional affirmative defenses as further information becomes available.

Wherefore, intervening defendants pray for judgement dismissing the Complaint with prejudice and awarding them the costs and disbursements of this action, together with attorneys' fees, and such additional relief as the Court may deem just and proper.

Respectfully submitted,

Dated: October 7, 1999

ELAINE R. JONES
DIRECTOR-COUNSEL

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[Certificate Of Service Omitted In Printing]

1999 Guidelines for the Calculation of a Selection Index for all Schools and Colleges Except Engineering

The Guidelines for the Calculation of a Selection Index are an attempt to give some standardization to decisions made by many different counselors on many different applications. We recognize that all communities, schools, populations, course offerings, grading practices, personal circumstances, etc. are not the same. We want to make justifiable decisions that blend the consistency of a formula with the flexibility of a review that is ultimately a matter of human judgment and which must adapt to a "rolling admissions" process.

Admissions is more art than science, and these guidelines should not be read otherwise. These guidelines contain limited descriptions of the rationales behind the Index categories and factors. Obviously, the rationales and the appropriate application of these factors in all situations are too complex to be completely described by this type of document. If you require a more detailed discussion of the rationales or the application of a factor is troublesome in any particular case, you should discuss the matter with your team leader.

The Selection Index has a maximum value of 150 points, with the final score for an applicant representing the cumulative attributes that the individual will bring to the incoming freshman class. Fully 2/3 of the points of the Selection Index are attributable to academics. When test scores are added to the academics, only 27% of the maximum possible points are derived from other factors that assist in enrolling students who will provide a mixture of attributes and characteristics valued by the University. It is our sincere belief that this mixture contributes to the

education of our students, as well as fulfills the University's mission to prepare society's future citizens and leaders.

The Selection Index for an applicant is a summation of points assigned to factors in one of three categories: Test Score, Academic, and Other Factors. The Test Score category consists of up to 12 points based on the applicant's best ACT or SAT test score from any one sitting. Up to 98 points can be received in the Academic category, based on the academic unweighted Grade Point Average (GPA), the category of school attended ("S" factor), and the strength or weakness of the curriculum ("C" factor). Lastly, an applicant may receive up to 40 points in the Other Factors category, with the individual factors described in later sections of this document. Thus, a student can receive up to 110 points on factors in the Test Score and Academic categories of his or her application and up to 40 points from the Other Factors component.

The Selection Index reflects a variety of factors in the applicant's file that are not considered in the UM-computed academic unweighted GPA. Both the UM-computed GPA and the Selection Index will be entered into the system and can be accessed on the QU screen on DSC.

Counselors must always circle or enter the appropriate points for the various factors on the coding worksheet and the sum as the Selection Index. Any unusual circumstance should be noted and stapled to the application in a prominent place.

ACADEMIC

The Academic category is comprised of the GPA, school, and curriculum factors.

Grade Point Average

The UM-computed GPA (calculated from 10th and 11th grade academic courses) is multiplied by 20 to determine the applicant's score for this factor. The Selection Index Worksheet has a table of the multiples of 20 from a 1.7 to 4.0 GPA. Note that an applicant can score up to 80 points, which constitutes 53% of the possible 150 points an applicant can receive.

S (school) Factor

Schools are not ranked throughout the state or country but are given a classification based on their school profile and academic information. The school factor acknowledges that we do consider various factors in our decisions that reflect the differences among schools.

Keep a disk and hard copy of your schools and their respective classifications. Counselors should add new schools to the list as the year progresses and collect the high school profiles of schools that are already on the list. The same S factor should normally be applied to all applicants from the same school, unless an applicant has attended schools with different S factors. At the end of the application review season, update your S factor list based on the high school profiles. Turn in the additions and revisions to the secretary responsible for updating the entire file for the next season of application review.

The S factor is based on the number of AP/IB courses offered at the school, the percentage of students attending two and four year colleges, and average SAT/ACT scores. The school profile is the primary source of such data. Resist the temptation of being generous when the school is just a little short of the expected level. There will be some schools in every category (S factor) that just make a certain level and some that just miss a higher level. Additional information such as above average academic performance of school's students based on UM first year follow-up reports could move the school upward. **A code of "E" will be entered on the Master Chart indicating such an exception.**

The guide below is based on the averages of over 300 schools. Each counselor should be able to exercise judgment as to the S factor for schools in their territory. Remember the S factor relates to the strength of the school – not just a special group within that school. *In most cases, the AP/IB figure is the starting point.* Then, you should determine if the SAT I or ACT statistics substantiate the S points. Use the test that is taken by the greater number of students in the high school in your deliberations. In the midwest, the ACT will be the test to use, the SAT I will likely be the test to use for schools on both coasts. A strong record at UM, SAT II Subject tests, AP/IB scores, the school's curriculum guide, and other information will help in making an appropriate decision. Schools with a factor of 4 or 5 must be exceptionally strong and are very rare in general, and more so among public schools. Conversely, there are many private schools that should be less than a factor of 2.

Note: The 1997 High School Profiles and SAT I scores listed below are based on **Recentered** scores.

S = 0 Very few or no Honors or AP courses. Less than 50% attend college. SAT I average 1040 or below and ACT 22 or below.

S = 1 At least 7 AP/IB courses. Seventy-five percent attend college. SAT I average range of 1050-1120 and ACT 23 or 24.

S = 2 At least 9 AP/IB courses. Strong honors or advanced courses. Eighty-five percent attend college. SAT I average range of 1130-1190 or ACT average of 25 or 26.

S = 3 At least 11 AP/IB courses. Many Honors or rigorous courses. SAT II subject scores of ≥ 610 and/or impressive results on AP exams support high level of learning. Ninety-five percent attend college. SAT I average range of 1200-1230 or ACT average of 27.

S = 4 At least 12 AP/IB. Strong AP record even when courses are not always called AP. Look for exams taken. Course grades tend not to cluster at the highest end of the scale. Look at distribution of grades and scores. Many records include SAT II subject scores that tend to be in the 710+ range. Ninety-nine percent attend college. List would include many competitive colleges. SAT I average range of 1240-1310 or ACT average of 28 or 29.

S = 5 At least 13 AP/IB. Impressive number of high SAT II subject scores. Many National Merit winners. Curriculum reads like the 1st and 2nd year at a typical liberal art college. Students receive 4's & 5's on AP. Grades tend to cluster in the mid-range of the scale. Counselor comments indicate real differences in a PLUS/MINUS grading system. Students have gone in depth into an area of study.

Often including foreign study rather than just travel. Ninety-nine percent attend college. List would include many highly competitive/selective colleges. SAT I average range of 1320+ or ACT average of 30+.

If you need help in determining an appropriate S factor due to wide variations in selection criteria, bring your data to MM, and we will assign an appropriate S factor.

The conversion of S factors to Selection Index points is on the Selection Index Worksheet.

C (curriculum) Factor

Given the wide disparity in high school course selection and offerings, it is imperative that the choice of strong courses, particularly clearly identified Honors and AP/IB, be considered in the review process. It is unfair to reward a student with admission who has elected a mediocre curriculum (sometimes for as many as four years during high school), while punishing by postponements those with stronger programs. Achievement of a respectable GPA in a demanding and challenging program more often represents high motivation and commitment than a contrived, inflated GPA in a weak curriculum. The stronger program also better prepares the student for the quality of work expected at the University of Michigan. All students are expected to elect at least four traditional college preparatory subjects each semester. Those with less should be deferred upon first review even if GPA and test score place them in the Admit range.

The starting point for any applicant is zero points for a strong academic program, consisting of 19 academic

courses in grades 9-12. Do not include art, business, computer application, drafting, engineering, music, typing, or vocational courses as academics. Only count English, foreign languages, mathematics, science, social science, and computer programming (Fortran, Basic, C, Pascal) courses as academics.

Make sure that there is a reasonable degree of integrity in the school's definition of "Honors" courses. In general, you can calculate 2 honors and/or accelerated courses to equal 1 AP/IB course, so long as the honors courses at that school are not equal to or as demanding as the AP/IB courses. A statement from the high school such as "This would be Honors at another school" or "Faculty policy precludes such a label" *does not* quality for our inclusion as an "honors" course and should not be counted. Use your knowledge (not assumptions) about what different labels used by the schools mean in this area. Tracks, phase, core, level, advanced, etc. do not always mean "advanced" when thinking of such courses as being for those whose course background has been strong, have received high grades, or are selected to participate and write the AP Exams.

When making your computation of number of academics and honors/AP: Do NOT round up! Also, take into consideration a downward trend in grades and/or weak course selection.

C = -2 Very weak academic program, relative to what is offered in the school, less than 15 academic courses in grades 9-12. Three or fewer academics in senior year. No honors or AP. Use judgment. Admission doubtful.

C = -1 Weak academic program, relative to what is offered in the school, no honors or AP, 15-18 academics in grades 9-12. Use judgment.

C = 0 Average to strong academic program, one AP/IB or 1-3 honors, at least 19 academic courses in grades 9-12.

C = 1 For a *very strong* program. 2-3 AP/IB or 4-7 honors in year long courses and at least 19 academic courses in grades 9-12.

C = 2 For an *unusually strong* program. 4-5 AP/IB or 8-11 honors in year long courses *and* at least 19 academic courses in grades 9-12.

C = 3 For a *superior* program. 6 or 7 AP/IB or 12-15 honors in year long courses *and* at least 20 academic courses in grades 9-12.

C = 4 A *fantastic* program. 8+ AP/IB or 16+ honors in year long courses *and* at least 20 academic courses in grades 9-12.

The conversion of C factors to Selection Index points is on the Selection Index Worksheet.

TEST SCORE

An applicant may receive one of five established point totals for the best score of the ACT or SAT from any one exam. Do not add the best verbal and best math subscores from two different exam dates together. The points are assigned to the following ranges of scores:

Points	ACT	SAT
0	01-19	400-920
6	20-21	930-1000
10	22-26	1010-1190
11	27-30	1200-1350
12	31-36	1360-1600

Note that an applicant having a test score in the zero points range for the Test Score category, even if admissible due to a very strong score in the Academic category, is likely to have a difficult time succeeding without substantial academic assistance. Thus, the counselor should consider such an applicant as a candidate for the Summer Bridge Program. Summer Bridge is open to Michigan residents only.

OTHER FACTORS

When reviewing an applicant's file, please circle and/or award all points that apply to the factors constituting the Other Factors category. **However, a total of 40 points is the maximum that can be added to the Selection Index score for the Other Factors category. Moreover, no applicant can receive points for more than one of the following factors: socioeconomically disadvantaged student or education, underrepresented racial/ethnic minority identity or education, an officially recruited athlete, Provost's discretion, or professional diversity.**

Geography

An applicant may receive points for residency in one or more of three special geographic areas. An instate student may receive a maximum of 16 points, while an out-of-state student may receive only 2 points, if residing in a designated state.

Michigan Residency: As a public institution supported by the citizens of Michigan, it is important that our incoming freshman class have a large representation of students

from Michigan. To achieve that goal, each Michigan resident is awarded 10 points.

Residency in an Underrepresented County: The vast majority of enrolling incoming freshmen are from the southern counties of Michigan. To promote interaction among students from all parts of the state, applicants from northern Michigan (defined as counties including and north of Oceana, Newaygo, Mecosta, Clare, Gladwin, and Arenac counties), rural areas, and small communities that are separated geographically and/or culturally from more populated areas, will be awarded 6 points. Applicants from the following areas should receive these points:

Lower Peninsula

Alcona	Gladwin	Montmorency
Alpena	Grand Traverse	Newaygo
Antrium	Iosco	Oceana
Arenac	Kalkaska	Ogemaw
Benzie	Lake	Osceola
Cheboygan	Leelaunau	Oscoda
Charlevoix	Manistee	Otsego
Clare	Mason	Presque Isle
Crawford	Mecosta	Roscommon

Upper Peninsula

Alger	Gogebic	Mackinac
Baraga	Houghton	Menominee
Chippewa Iron	Ontonagon	
Delta	Keweenaw	Schoolcraft
Dickinson Luce		

Residency in a state from a region which is underrepresented at the University of Michigan: Applicants from western states (beyond Missouri, Iowa, Minnesota) except

California and southern states below Virginia and Tennessee (except for Florida and Texas) are awarded 2 points. Students who are residents of the following states can receive these points:

Alabama	Kansas	North Dakota
Alaska	Louisiana	Oklahoma
Arizona	Mississippi	Oregon
Arkansas	Montana	South Carolina
Colorado	Nebraska	South Dakota
Georgia	Nevada	Utah
Hawaii	New Mexico	Washington
Idaho	North Carolina	Wyoming

International students are not awarded any geographic factor points.

Alumni Relationships

To recognize the continuing service and support provided to the University, points will be awarded for certain alumni relationships:

Legacy – The applicant, whose parent or step-parent attended UM-Ann Arbor as degree-seeking students, should be awarded 4 points.

or

Other Alumni Relationships – The applicant, whose grandparents, siblings, or spouse attended UM-Ann Arbor as degree seeking students, should be awarded 1 point.

Points cannot be awarded for both categories.

Essay

The essay is required. If the essay is missing, the application is incomplete and cannot be marked up for admission. The essay will be evaluated for content, style, originality, and risk. One point may be awarded for an outstanding essay.

Personal Achievement

Points for Personal Achievement will be based on information provided on page 3 of the application, item 31, "Activities, Work Experience and Awards", as well as other information provided with the application. The applicant must demonstrate a state, regional, or national level of achievement in academic competitions, art, athletics (applies to non-recruited athletes only), music, professional theater, or science. Remember, most applicants to UM are very active students in leadership positions, sports activities, social clubs, etc. in their high schools and local communities. Involvement in these activities is not unusual and is normal for the applicant pool. The Personal Achievement factor is **not to be used as** compensation for weaker academic achievement attributed to over-involvement in non-academic activities.

Examples of personal achievements include a National Science Foundation Award; Westinghouse Scholars; state, regional, or national recognition in an academic competition (e.g., forensics); state, regional, or national recognition as an athlete; placing in a state, regional, or national art show; having writing published in a state, regionally, or nationally recognized magazine or journal; or professional theater experience. Do not award points for

personal achievement at the local level – that level of accomplishment is normal within the applicant pool.

Counselors should have some validation of the achievement such as high school counselor confirmation, copy of award certificate, newspaper clipping, etc.

Points	
1	State level achievement
3	Regional level achievement
5	National level achievement

Leadership and Service

Points for Leadership will be based on information provided on page 3 of the application, item 31. "Activities, Work Experience and Awards", as well as other information provided with the application. The applicant must demonstrate a state, regional, or national level of achievement. Remember, most applicants to UM are very active students in leadership positions, sports activities, social clubs, etc. Active involvement in these activities is not unusual and is normal for the applicant pool. The Leadership and Service factor **is not to be used** as compensation for weaker academic achievement attributed to over-involvement in non-academic activities.

Examples of strong leadership include elected positions at Girls' or Boys' State, a unique initiative in a community endeavor resulting in special recognition, state or service club award, or successful entrepreneurship.

Points	
1	State level achievement
3	Regional level achievement
5	National level achievement

Socioeconomically Disadvantaged Student or Education

The University is committed to a rich educational experience for its students, which should include interaction with students of all socioeconomic backgrounds. A diverse, as opposed to a homogeneous, student population enhances the education experience for all students. Consequently, 20 points will be awarded to an applicant who:

> is socioeconomically disadvantaged, with indicators such as parents' occupations, single parent upbringing, a deceased parent, necessary excessive work hours while attending school, overcoming extraordinary obstacles, such as abuse, or homelessness; or
>
> is a student educated in a high school serving a population that is predominantly socioeconomically disadvantaged.

Underrepresented Racial/Ethnic Minority Identity or Education

The University is committed to an educational experience that involves students interacting with other students of different races and ethnicities than their own. Consequently, 20 points will be awarded to an applicant who:

> is a member of a federally recognized underrepresented race or ethnicity, which is also underrepresented on the UM Ann Arbor campus; or
>
> is a student educated in a high school serving a population that is predominantly comprised of federally recognized underrepresented races and/or ethnicities, which are also underrepresented on the UM Ann Arbor campus.

Place student label here or fill in the following information

Name _____
SIN _____
Unit _____
Term _____

1999 Form **Confidential**

Selection Index Worksheet

(For LS&A and selected Schools and Divisions, other than Engineering)

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	Points (circle)	ACADEMIC
GPA	40	2.0
	42	2.1
	44	2.2
	46	2.3
	48	2.4
	50	2.5
	52	2.6
	54	2.7
	56	2.8
	58	2.9
	60	3.0
	62	3.1
	64	3.2
	66	3.3
	68	3.4
	70	3.5
	72	3.6
	74	3.7
	76	3.8
	78	3.9
	80	4.0
School Factor	0	0
	2	1
	4	2
	6	3
	8	4
	10	5
Curriculum Factor	-4	-2
	-2	-1
	0	0
	2	1
	4	2
	6	3
	8	4

	Points (circle one)	TEST SCORE	
ACT/ SAT I	0	01-19	400-920
	6	20-21	930-1000
	10	22-26	1010-1190
	11	27-30	1200-1350
	12	31-36	1360-1600

Add points in this column for sub score 1

Points (circle)		OTHER FACTORS (*Maximum 40 points*)
Geography		
10		Michigan Resident
6		Underrepresented Michigan County
2		Underrepresented State
Alumni		
4	*Assign only 1 option*	Legacy (*parents / stepparents*) or Other (*grandparents, siblings, spouses*)
1		
Essay		
1		Outstanding Essay
Personal Achievement		
1	*Assign only 1 option*	State
3		Regional
5		National
Leadership & Service		
1	*Assign only 1 option*	State
3		Regional
5		National
Miscellaneous		
20		Socio-economic Disadvantage
20		Underrepresented Racial/Ethnic Minority Identification or Education
5	*Assign only 1 option*	Men in Nursing
20		Scholarship Athlete (*assigned by athletic counselor only*)
20		Provost's Discretion

Add points in this column for sub score 2

TOTAL

Sub score 1 + Sub score 2 = Selection Index

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2000 Guidelines for the Calculation of a Selection Index for all Schools and Colleges Except Engineering

The Guidelines for the Calculation of a Selection Index are an attempt to give some standardization to decisions made by many different counselors on many different applications. We recognize that all communities, schools, populations, course offerings, grading practices, personal circumstances, etc. are not the same. We want to make justifiable decisions that blend the consistency of a formula with the flexibility of a review that is ultimately a matter of human judgment and which must adapt to a "phased admissions" process.

Admissions is more art than science, and these guidelines should not be read otherwise. These guidelines contain limited descriptions of the rationales behind the Index categories and factors. Obviously, the rationales and the appropriate application of these factors in all situations are too complex to be completely described by this type of document. If you require a more detailed discussion of the rationales or the application of a factor is troublesome in any particular case, you should discuss the matter with your team leader.

The Selection Index has a maximum value of 150 points, with the final score for an applicant representing the cumulative attributes that the individual will bring to the incoming freshman class. Fully ⅔ of the points of the Selection Index are attributable to academics. When test scores are added to the academics, only 27% of the maximum possible points are derived from other factors that

assist in enrolling students who will provide a mixture of attributes and characteristics valued by the University. It is our sincere belief that this mixture contributes to the education of our students, as well as fulfills the University's mission to prepare society's future citizens and leaders.

The Selection Index for an applicant is a summation of points assigned to factors in one of three categories: Academic, Test Score, and Other Factors. The Test Score category consists of up to 12 points based on the applicant's best ACT or SAT test score from any one sitting. Up to 98 points can be received in the Academic category, based on the academic unweighted Grade Point Average (GPA), the category of school attended ("S" factor), and the strength or weakness of the curriculum ("C" factor). Lastly, an applicant may receive up to 40 points in the Other Factors category, with the individual factors described in later sections of this document. Thus, a student can receive up to 110 points on factors in the Test Score and Academic categories of his or her application and up to 40 points from the Other Factors component.

The Selection Index reflects a variety of factors in the applicant's file that are not considered in the UM-computed academic unweighted GPA. Both the UM-computed GPA and the Selection Index will be entered into the system and can be accessed on the PeopleSoft Overall Rating panel.

Counselors must always circle or enter the appropriate points for the various factors on the coding worksheet and the sum as the Selection Index. Any unusual circumstance should be noted and stapled to the application in a prominent place.

ACADEMIC

The Academic category is comprised of the GPA, school, and curriculum factors.

Grade Point Average

The UM-computed GPA (calculated from 10th and 11th grade academic courses) is multiplied by **20** to determine the applicant's score for this factor. The Selection Index Worksheet has a table of the multiples of 20 from a 2.0 to 4.0 GPA. Note that an applicant can score up to **80** points, which constitutes 53% of the possible 150 points an applicant can receive. If an applicant's GPA is below 2.0, multiply the GPA X 20 to determine the SI points: i.e. 1.5 X 20 = 30.

S (school) Factor

Schools **are not ranked** throughout the state or country but are given a classification based on their school profile and academic information. The school factor acknowledges that we do consider variables in our decisions that reflect the differences among schools.

Keep a disk and hard copy of your schools and their respective classifications. Counselors should add new schools to the list as the year progresses and collect the high school profiles of schools that are already on the list. The same S factor should be applied to all applicants from the same school, unless an applicant has attended schools with different S factors. At the end of the application review season, update your S factor list based on the high school profiles. Turn in the additions and revisions to the

secretary responsible for updating the entire file for the next season of application review.

The S factor is based on the number of AP/IB courses offered at the school, the percentage of students attending two and four year colleges, and average SAT/ACT scores. The school profile is the primary source of such data. Resist the temptation of being generous when the school is just a little short of the expected level. There will be some schools in every category (S factor) that just make a certain level and some that just miss a higher level. Additional information such as above average academic performance of a school's students based on UM first year follow-up reports could move the school upward. **A code of "E" will be entered on the Master Chart indicating such an exception.**

The guide below is based on the averages of over 300 schools. Each counselor should be able to exercise judgment as to the S factor for schools in their territory. Remember the S factor relates to the strength of the school – not just a special group within that school. *In most cases, the AP/IB figure is the starting point.* Next consider the college bound percentage of students in the school. Then, you should determine if the SAT I or ACT statistics substantiate the S points. *Use the test that is taken by the greater number of students in the high school in your deliberations.* In the midwest, the ACT will be the test to use, the SAT I will likely be the test to use for schools on both coasts. A strong record at UM, SAT II Subject tests, AP/IB scores, the school's curriculum guide, and other information will help in making an appropriate decision. Schools with a factor of 4 or 5 must be exceptionally strong and are very rare in general, and more so among public

schools. Conversely, there are many private schools that should be less than a factor of 2.

Note: The 1997 and later High School Profiles include **Recentered** SAT I scores. Any S factors determined prior to 1997 were based on original SAT scores.

S = 0 Very few or no Honors or AP courses. Less than 50% attend college. SAT I average 1040 or below and ACT below 22.

S = 1 At least 7 AP/IB courses. Seventy-five percent attend college. SAT I average range of 1050-1120 and ACT below 23 or 24.

S = 2 At least 9 AP/IB courses. Strong honors or advanced courses. Eighty-five percent attend college. SAT I average range of 1130-1190 or ACT average of 25 or 26.

S = 3 At least 11 AP/IB courses. Many Honors or rigorous courses. SAT II subject scores of $\geq$ 610 and/or impressive results on AP exams support high level of learning. Ninety-five percent attend college. SAT I average range of 1200-1190 or ACT average of 27.

S = 4 At least 12 AP/IB. Strong AP record even when courses are not always called AP. Look for exams taken. Course grades tend not to cluster at the highest end of the scale. Look at distribution of grades and scores. Many records include SAT II subject scores that tend to be in the 710+ range. Ninety-nine percent attend college. List would include many competitive colleges. SAT I average range of 1240-1310 or ACT average of 28 or 29.

S = 5 At least 13 AP/IB. Impressive number of high SAT II subject scores. Many National Merit winners. Curriculum reads like the 1st and 2nd year at a

typical liberal art college. Students receive 4's & 5's on AP. Grades tend to cluster in the mid-range of the scale. Counselor comments indicate real differences in a PLUS/MINUS grading system. Students have gone in depth into an area of study. Often including foreign study rather than just travel. Ninety-nine percent attend college. List would include many highly competitive/selective colleges. SAT I average range of 1320+ or ACT average of 30+.

If you need help in determining an appropriate S factor due to wide variations in selection criteria, bring your data to MM, and we will assign an appropriate S factor.

The conversion of S factors to Selection Index points is on the Selection Index Worksheet.

C (curriculum) Factor

Given the wide disparity in high school course selection and offerings, it is imperative that the choice of strong courses, particularly clearly identified Honors and AP/IB, be considered in the review process. It is unfair to reward a student with admission who has elected a mediocre curriculum (sometimes for as many as four years during high school), while deferring those with stronger programs. Achievement of a respectable GPA in a demanding and challenging program more often represents high motivation and commitment than an inflated GPA in a weak curriculum. The stronger program also better prepares the student for the quality of work expected at the University of Michigan. All students are expected to elect at least four traditional college preparatory subjects each semester. Those with less will probably be deferred

upon first review. Counselors should enter the value of 3 in the Review Flag Rating Value field on the Overall Rating panel, if the applicant has less than the expected amount.

The starting point for any applicant is zero points for a strong academic program, consisting of 19 academic courses in grades 9-12. Do not include art, business, computer application, drafting, engineering, music, typing, or vocational courses as academics. Only count English, foreign languages, mathematics, science, social science, and computer programming (Fortran, Basic, C, Pascal) courses as academics.

Make sure that there is a reasonable degree of integrity in the school's definition of "Honors" courses. In general, you can calculate 2 honors courses to equal 1 AP/IB course, so long as the honors courses at that school are not equal to or as demanding as the AP/IB courses. A statement from the high school such as "This would be Honors at another school" or "Faculty policy precludes such a label" *does not* quality for our inclusion as an "honors" course and should not be counted. Use your knowledge (not assumptions) about what different labels used by the schools mean in this area. Tracks, phase, core, level, advanced, etc. do not always mean "advanced" when thinking of such courses as being for those whose course background has been strong, have received high grades, or are selected to participate and write the AP Exams.

When making your computation of number of academics and honors/AP: Do NOT round up! Also, take into consideration a downward trend in grades and/or weak course selection.

C = -2 Very weak academic program, relative to what is offered in the school, less than 15 academic courses in grades 9-12. Three or fewer academics in senior year. No honors or AP/IB. Use judgment. Admission doubtful.

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C = 0 Average to strong academic program, one AP/IB or 1-3 honors, at least 19 academic courses in grades 9-12.

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C = 4 A *fantastic* program. 8+ AP/IB or 16+ honors in year long courses *and* at least 20 academic courses in grades 9-12.

The conversion of C factors to Selection Index points is on the Selection Index Worksheet.

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An applicant may receive one of five established point totals for the best score of the ACT or SAT from any one exam. Do not add the best verbal and best math subscores

from two different exam dates together. The points are assigned to the following ranges of scores:

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An applicant may receive points for residency in one or more of three special geographic areas. An instate student may receive a maximum of 16 points, while an out-of-state student may receive only 2 points, if residing in a designated state.

Michigan Residency: As a public institution supported by the citizens of Michigan, it is important that our incoming freshman class have an appropriate representation of students from Michigan. To achieve that goal, each Michigan resident is awarded 10 points.

Residency in an Underrepresented County: The vast majority of enrolling incoming freshmen are from the southern counties of Michigan. To promote interaction among students from all parts of the state, applicants from northern Michigan (defined as counties **including and north** of Oceana, Newaygo, Mecosta, Clare, Gladwin, and Arenac counties), rural areas, and small communities that are separated geographically and/or culturally from more populated areas, will be awarded 6 points. Applicants from the following areas should receive these points:

Lower Peninsula

Alcona	Gladwin	Montmorency
Alpena	Grand Traverse	Newaygo
Antrium	Iosco	Oceana
Arenac	Kalkaska	Ogemaw
Benzie	Lake	Osceola
Cheboygan	Leelaunau	Oscoda
Charlevoix	Manistee	Otsego
Clare	Mason	Presque Isle
Crawford	Mecosta	Roscommon

Upper Peninsula

Alger	Gogebic	Mackinac
Baraga	Houghton	Menominee
Chippewa	Iron	Ontonagon
Delta	Keweenaw	Schoolcraft
Dickinson	Luce	

Residency in a state from a region which is underrepresented at the University of Michigan. Students who are residents of the following states can receive these points:

Alabama	Maine	Oregon
Alaska	Mississippi	Rhode Island
Arkansas	Montana	South Carolina
Hawaii	Nebraska	South Dakota
Idaho	Nevada	Utah
Kansas	New Mexico	Vermont
Louisiana	North Dakota	West Virginia
	Oklahoma	Wyoming

International students are not awarded any geographic factor points.

Alumni Relationships

To recognize the continuing service and support provided to the University, points will be awarded for certain alumni relationships:

Legacy – The applicant, whose parent or step-parent attended UM-Ann Arbor as degree-seeking students, should be awarded 4 points.

or

Other Alumni Relationships – The applicant, whose grandparents, siblings, or spouse attended UM-Ann Arbor as degree seeking students, should be awarded 1 point.

Points cannot be awarded for both categories.

Essay

The essay is required. If the essay is missing, the application is incomplete and cannot be marked up for review. The essay will be evaluated for content, style, originality, and risk. An applicant may receive up to 3 points for the essay depending on whether it is rated outstanding (3 pts.), excellent (2 pts.), or very good (1 pt.).

In rating the essay, counselors should consider the following criteria:

- **Content**

  The applicant's written materials should be clear, well-organized and sustain a well-focused discussion.

- **Style**

  The applicant's use of language should be fluent and effective, with varied sentence structure and vocabulary appropriate to the subject.

  The applicant should demonstrate faculties with the conventions (grammar, usage, and mechanics) of standard written English.

- **Originality/Risk taking**

  The applicant should display an extraordinary ability to explore ideas with insightful reasoning, persuasive examples, a mature out look and/or deep concern for society.

If the student's essay is average or below average points should *not* be given.

Personal Achievement

Points for Personal achievement will be based on the information provided in "Activities, Work Experience and Awards," as well as other information provided with the application.

Applicant may receive up to 5 points for personal achievement depending on whether it is rated outstanding (5 pts.), excellent (3 pts.), or very good (1 pt.). When evaluating personal achievement, counselors should look primarily for evidence of persistence, character and commitment to high ideals and the level of awards. In addition, counselors should consider the following general criteria:

- **Evidence of persistence**
  - The applicant's application reflects barriers overcome and a desire to succeed in all his/her high school endeavors.
  - The applicant was employed during the school year while maintaining academic excellence and service in school and community activities. (Can be reflected in essay and/or high school counselor's recommendation)
  - In addition, some applicants may have overcome adverse family, social or economic conditions and still achieved academically.
- **Character and Commitment to high ideals.**
  - The applicant's materials should demonstrate a strong respect for others and their perspectives.
  - The applicant's application materials should reflect a strong ability to work effectively with others.

- The applicant's application materials should show considerable evidence of having taken advantage of opportunities, by displaying maturity in commitment, initiative and responsibility.
- The applicant's application should also show evidence of being a self-starter and role model.

- **Awards**

The applicant's awards should include outstanding high school, state, regional or national honors. The applicant's materials should illustrate the highest level of achievement and special talents, in academic competition, art, athletes (applies to non-recruited athletes only), music, theater, or science.

- **Recommendations**

High school counselors or other school officials should include recommendations to provide additional information about the applicant's achievement and to validate the level of participation for personal achievement.

If the applicant's personal achievement is average or below average points should *not* be given.

Leadership and Service

Points for leadership and service, will be based on information provided in "Activities, Work Experience and Awards", as well as other information provided with the application.

Applicant may receive up to 5 points for leadership and service depending on whether it is rated outstanding (5 pts.), excellent (3 pts.), or very good (1 pt.). When

evaluating leadership and service, counselors should use the following general criteria.

- Meaningful activities and experiences, which reflect a commitment to school activities through continued participation across the four years in a variety of activities.
- Leadership positions, elected or appointed, with an increase in responsibility and leadership across the four years as reflected by increasingly higher elected office held. (High school counselor often substantiates this level of involvement and passion.) In addition, the applicant must show meaningful contributions to the high school.
- The applicant must have forged frontiers in activities – not simply a laundry list of activities. The breadth and quality of activities is critical, especially quality of accomplishment. For example, community activities should show evidence of meaningful contributions to their community.

- **Awards**

The applicant's awards should include outstanding high school, state, regional or national honors. The applicant's materials should illustrate the highest level of achievement and special talents, in academic competition, art, athletes (applies to non-recruited athletes only), music, theater, or science.

- **Recommendations**

High school counselors or other school officials should include recommendations to provide additional information about the applicant's achievement and to validate the level of participation for personal achievement.

If the applicant's leadership and service, is average or below average points should *not* be given.

Socioeconomically Disadvantaged Student or Education

The University is committed to a rich educational experience for its students, which should include interaction with students of all socioeconomic backgrounds. A diverse, as opposed to a homogeneous, student population enhances the education experience for all students. Consequently, **20** points will be awarded to an applicant who:

is socioeconomically disadvantaged, with indicators such as parents' occupations, single parent upbringing, a deceased parent, necessary excessive work hours while attending school, overcoming extraordinary obstacles, such as abuse, or homelessness; or

is a student educated in a high school serving a population that is predominantly socioeconomically disadvantaged.

Underrepresented Racial/Ethnic Minority Identity or Education

The University is committed to an educational experience that involves students interacting with other students of different races and ethnicities than their own. Consequently, **20** points will be awarded to an applicant who:

is a member of a federally recognized underrepresented race or ethnicity, which is also underrepresented on the UM Ann Arbor campus; or

is a student educated in a high school serving a population that is predominantly comprised of federally recognized

underrepresented races and/or ethnicities, which are also underrepresented on the UM Ann Arbor campus.

Scholarship Athlete

In anticipation of their contributions to the University and in recognition of the tradition and national prominence of Michigan intercollegiate athletics, applicants being officially recruited and considered for athletic scholarships should have **20** points added to their score.

Provost's Discretion

At the discretion of the Provost (only), up to an additional **20** points may be awarded to an applicant.

Professional Diversity

Over time, some professions have become composed predominantly of one gender or another. The School of Nursing has identified a need to enroll more members of an underrepresented gender to enhance its educational environment and to improve the diversity within its profession. A counselor should award 5 points to those applicants who are men applying to the School of Nursing. (See the Guidelines for Calculation of an Engineering Selection Index for the Professional Diversity points awarded for women applicants to the College of Engineering.)

Place student label here or fill in the following information

Name _____
SIN _____
Unit _____
Term _____

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Selection Index Worksheet

(For LS&A and selected Schools and Divisions, other than Engineering)

	Points (circle)	ACADEMIC
GPA	40	2.0
	42	2.1
	44	2.2
	46	2.3
	48	2.4
	50	2.5
	52	2.6
	54	2.7
	56	2.8
	58	2.9
	60	3.0
	62	3.1
	64	3.2
	66	3.3
	68	3.4
	70	3.5
	72	3.6
	74	3.7
	76	3.8
	78	3.9
	80	4.0
School Factor	0	0
	2	1
	4	2
	6	3
	8	4
	10	5
Curriculum Factor	-4	-2
	-2	-1
	0	0
	2	1
	4	2
	6	3
	8	4

	Points (circle one)	TEST SCORE	
ACT/ SAT I	0	01-19	400-920
	6	20-21	930-1000
	10	22-26	1010-1190
	11	27-30	1200-1350
	12	31-36	1360-1600

Add points in this column for sub score 1

Points (circle)		OTHER FACTORS (*Maximum 40 points*)
Geography		
10		Michigan Resident
6		Underrepresented Michigan County
2		Underrepresented State
Alumni		
4	*Assign only 1 option*	Legacy (*parents / stepparents*) or Other (*grandparents, siblings, spouses*)
1		
Essay		
1	*Assign only 1 option*	Very Good / Excellent / Outstanding
2		
3		
Personal Achievement		
1	*Assign only 1 option*	Very Good / Excellent / Outstanding
3		
5		
Leadership & Service		
1	*Assign only 1 option*	Very Good / Excellent / Outstanding
3		
5		
Miscellaneous		
20		Socio-economic Disadvantage
20		Underrepresented Racial/Ethnic Minority Identification or Education
5	*Assign only 1 option*	Men in Nursing
20		Scholarship Athlete (*assigned by athletic counselor only*)
20		Provost's Discretion

Add points in this column for sub score 2

TOTAL

Sub score 1 + Sub score 2 = Selection Index

240

THE UNIVERSITY OF **MICHIGAN**

Office of
Undergraduate
Admissions

MEMORANDUM

TO: Counselors and Others

FROM: Ted Spencer /s/ Ted Spencer

RE: Reason for Diversity

DATE: September 25, 1996

This statement can be used by counselors to help explain our commitment to diversity:

> Our commitment to excellence means that we will continue to admit students as individuals, based on their merits; especially what they have achieved academically. We also look at their character, their participation, their energy, curiosity, and determination as it contributes to the whole person profile of the applicant.
>
> It is also our goal to admit applicants who are willing to entertain the idea that tolerance, understanding and mutual respect are goals worthy of a person who has been truly educated.
>
> Diversity creates tolerance and mutual respect. It also creates opportunity to hear, and view directly, face to face, from people who believe and who have lived the experience. Formal academic study cannot always provide that same level of experience and understanding with others who are different from ourselves.
>
> Our admission guidelines continue to use a high standard of admission for all entering students. But

because there are still many more candidates that meet our competitive guidelines, than there are spaces available, our admission policies try to admit not only individuals, but also an entire entering class that can collectively add to the diversity and academic vitality of the University.

So as we look at applications this year, we will review the essay, extracurricular involvement and academic achievements to enhance our ability to identify these qualities in all our applicants.

Office of Undergraduate Admissions

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COLLEGE OF LITERATURE, SCIENCE AND THE ARTS GUIDELINES FOR ALL TERMS OF 2000

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I. ADMISSION OF FRESHMEN

A. DEFINITION OF A FRESHMAN APPLICANT: FTIAC (first time in any college).

A freshman is defined as an entering student who has never attended any college following high school graduation. This definition includes students enrolling in the fall term who take college classes as guest students in the summer immediately preceding the fall semester. The definition also applies to students who enter with advanced standing by earning college credit through Advanced Placement Examinations, or courses taken at a college prior to high school graduation.

All other students will be designated as transfer students (Type 4) with Level (1, 2, 3, 4) being determined by the amount of transferable

credit projected for the term of entry. This will include those freshman level students who attend college in the fall and apply for admission to LS&A for the winter semester. They will be coded as transfer students (Type 4) at the freshman level (Level 1) and be evaluated according to transfer guidelines for Winter *2000*

B. OVERVIEW OF ADMISSION POLICIES (First Review)

1. TERMS OF ADMISSION

Admission to LS&A will be highly selective for all four semesters of the academic calendar. *Admission* is granted to applicants with *very competitive* credentials from early fall to November 1 for winter semester, and until February 1 for spring, summer, and fall semesters.

Winter applicants who met competitive criteria based on the Fall *1999* guidelines, or who were previously admitted, did not accept admission, and did not enroll in another institution for the fall term, will be admitted through the November 1 equal consideration deadline.* All other applicants with lower credentials will be denied admission. *There will be no deferred group for the winter term.* (Note: It is necessary to delay for a final high school transcript if it has not been previously submitted. A decline in the senior year grades is cause to deny admission even if the student was admissible based on 10th and 11th year GPA.)

*Students with the same credentials who do enroll in another college for the fall

semester will be coded as transfer students and admitted if there was no decline in senior year grades.

Spring admissions standards require the same competitive criteria as for all other terms. Applications will be accepted through the February 1 equal consideration deadline. Students who do not meet the competitive guidelines will be denied admission. *There will be no deferred pool for spring semester.*

The *summer and fall group* of applicants whose credentials fall in the range designated as *qualified/non-competitive* will be *deferred* for a second review following the February 1 equal consideration deadline.

Summer and fall applicants whose credentials fall *below the guidelines set for deferred* applicants will be *denied* admission on the first review.

2. **ASSIGNED REVIEWER**

   a. Each high school is assigned to a counselor who will read all the LS&A applications from the school. A Selection Index will be calculated based on the student's accomplishments and the factors on the Selection Index Worksheet.

3. **GENERAL REQUIREMENTS**

   a. High School Graduation

   (1) *All* freshman students are required to earn a high school diploma (or GED equivalent for

older students) prior to enrolling in the College.

(2) Exceptions to the graduation requirement may be made for extremely gifted and brilliant students who meet YSEP standards and are admitted under those conditions. (Look in Table of Contents for YSEP location in guidelines)

(3) Home schooled students whose grades do not reflect a measure of accomplishment from participation in a typical classroom with other students, will have to provide additional evidence of preparation, such as earning scores on specific SAT II Subject exams at a level which will assure they are as competitively admissible as students who attend public or private high schools. Home schooled students will be assigned to OUA liaison, Marilyn McKinney.

b. ***Course Preparation.*** All students are expected to take a demanding college preparatory curriculum in 9th through 12th grades. Beginning with the freshman class entering in the Summer or Fall of 2000, the following minimum preparation is required for all students applying for admission to LS&A: English – 4 years, foreign language – 2 years (4 years recommended), mathematics – 3 years (through intermediate algebra), science – 2 years (3 years recommended), history and social

sciences – 3 years, and 5 additional courses to earn a total of 20 units of study.

c. ***Grade-Point Average***. Grades earned in academic courses taken during the sophomore and junior years will be used in the first review of the application. Senior fall semester grades will be a factor for students who are postponed (deferred) for March review

d. ***ACT/SAT I scores. (All SAT I scores reflect the Recentered Scale)***

(1) All freshman applicants are required to have their ACT/SAT I scores sent directly from the testing agencies.

(2) The highest set of scores will be used to make the admission decision.

(3) A list of applicants with new scores that reflect a higher test range will be run *after the receipt of December test tapes*. Counselors will update the S.I. to reflect the increase in test scores.

4. SELECTION INDEX

Admission is based on several factors that combine to produce a freshman class that provides a mixture of attributes and characteristics valued by the University. The process for building the class is found in the *Guidelines for the Calculation of a Selection Index 2000*. The guidelines are to be used to determine a S.I. number which will

be entered on the students record by the reviewing counselor. This Selection Index number will be the factor used to select students for admission, deferral, or denial at each phase of the review process.

* * *

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Procedures for Reviewing LS&A (including Residential College) and Engineering Freshman Applications for all Terms of 2000.

I. Peruse the application and compare information to the Applicant Profile for accuracy.

II. Review each segment of the application in relation to the Selection Index variables.

A. Grades: Does the GPA posted by data entry accurately reflect the grades on the high school transcript? Does consistency exist between he GPA and HSPR?

B. School Factor: Check the high school profile (if provided in the application) to determine if the "S" factor reflects the current characteristics of the school. If you need to make changes in the "S" factor, be sure you use the same information to evaluate all of the students from that school. If an updated profile comes later in the year after you have already started evaluating students and the statistics indicate a change in the "S" factor, continue to use the factor you have been using and make your changes for the following year.

C. Curriculum Factor: Look carefully at the student's course selections for 9th through 12th grades. Look for strength and rigor of curriculum in relation to number of honors, Advanced Placement and/or International Baccalaureate courses offered. Look for number of academics taken all four years and look at the trend of grades earned.

D. Test Scores: If the existing test scores are low and the student has indicated a future test

date, delay for the test scores. Do not enter the Selection Index until the new test scores arrive. If the student does not intend to retest, use existing test scores to evaluation the application.

Engineering applicants with less than a 19 ACT English or 480 SAT Verbal score or less than a 28 ACT Math or 640 SAT Math score must be referred to Steve Parsons or Sheri Samaha.

E. Residency: If there is reason to question a student's instate residency based on instructions from the Residency Classification Office (RCO), you must assume the student is a non-resident for admission purposes until determined otherwise by the RCO. When a determination is made, notification will be sent to the OUA and the application will be updated if a change in classification has been made. The application will be sent to the reviewing counselor to recalculate the SI and update the database. If the student was deferred under the non-resident guidelines in the initial Mass Action, re-evaluation of the application will occur at the next Mass Action. If the RCO grants residency status to the student beyond the equal consideration date of February 1, the application will be re-evaluated using the residency guidelines.

F. Alumni: Points are only given to direct family line of parents (stepparents), grandparents or siblings.

G. Essay: Look for outstanding content and creativity. Be comfortable that this is an essay that is the product of the student.

H. Outstanding accomplishments and achievements: The expectation is that students do participate in extracurricular activities and leadership

functions in high school. Points are to be given when the activities reflect recognition at state, regional and national levels.

I. Miscellaneous: Points are to be awarded for students who meet the specific qualifications outlined in the Selection Index Worksheet.

III. Selection Index Worksheet: Fill out the sections of the worksheet and calculate the SI. Refer to document "Counselor Instructions: for step-by-step instructions for entering the Selection Index on the database.

IV. Delay for Additional Information: If additional information is needed prior to finalizing the review of the application (additional test scores, fall grades, or other information the counselor wishes to receive), the counselor can add up the points in all appropriate categories of the SI, but cannot enter the SI on the database. The SI Rating Value must remain 0.00 on the Overall Rating panel and blank on the Application Evaluation panel until the application is ready for a decision or it will automatically and erroneously be included in the next Mass Action.

V. Review Flags: **Refer to separate document "Counselor Instructions" for step-by-step instructions on how to enter the Review Flag values on the database**. EWG will set an SI cutoff above which all applicants will be offered admission subject to the Review Flag = 3 Caution Review Pool procedure described in section C below. EWG will then direct Admissions to admit a certain number of applicants from the Review Pool, assembled as described below. For each Mass Action, the Admissions Office will choose the applicants to be admitted from the Review Pool through committee processes where the qualities and characteristics of those in

the Pool can be compared along a number of dimensions. This committee will also decide if an applicant chosen for the Pool should be recommended for admission to CSP or the Summer Bridge Program. As with the other components for our admission process, the overall goal is to admit a class of qualified students who best serve our educational mission both individually and as a group.

A. Review Flag = 0

This is the default value for the review flag, and indicates that there is not an unusual circumstance relevant to this application. The counselor does not have to enter this default value.

B. Review Flag = 1 Positive Review Pool

Counselors may set this review flag if the applicant meets the following three criteria: (1) is academically prepared to do the level of work required at Michigan; (2) possesses some other positive qualities and characteristics that would contribute to the freshman class as defined in items 1-7 below; and (3) has an SI as indicated below.

LS&A Resident: SI $\geq$ 80,
LS&A Non-Resident: SI $\geq$ 75,
Engineering Resident: SI $\geq$ 85,
Engineering Non-Resident: SI$\geq$80.

If the counselor decides an applicant should be assigned a Review Flag = 1, this flag must be set for all SI values equal to or greater than the Selection Indexes designated above because counselors will not know what the EWG SI threshold for admission will be when reviewing applications.

Assigning Review Flag = 1 requires counselor discretion and judgment. If there are particular circumstances where the counselor believes that a

student with an SI below the designated level should be included in the Positive Review Pool, he or she should consult with the LS&A or Engineering liaison before assigning the flag. Further evaluation will take place in the committee process. *Applicants flagged for the Review Pool will not necessarily be admitted.*

1. *Top of the Class*

a) LS&A and Residential College

(1) The counselor will set the Review Flag to "1" if the LS&A or RC applicant has the following credentials:

(a) Michigan Resident HSPR ≥ 98% ***or*** *Non-resident HSPR = 99%*

and

- no declining grades,
- 18 solid academic courses, including a strong senior year course load
- high ratings from the high school counselor.

OR

(b) Michigan Resident and Non-resident GPA ≥ 3.9

and

- no declining grades,

- 18 solid academic courses, including a strong senior year course load
- SAT 1 total ≥ 1380 or ACT Composite ≥ 31
- high ratings from the high school counselor.

(2) The Review Flag may also be set to "1" if the student resides in a county in Michigan other than Livingston, Macomb, Oakland, Washtenaw or Wayne and has all of the following:

- HSPR ≥ 95%
- GPA ≥ 3.7
- no declining grades
- 18 solid academic courses, including a strong senior year course load
- SAT 1 total ≥ 1270 or ACT composite ≥ 28
- high ratings from the high school counselor

b) Engineering

(1) The counselor will set the Review Flag to "1" if the Engineering applicant has all of the following:

- GPA ≥ 4.0
- no declining grades

- 18 solid academic courses, including one year of chemistry
- strong senior year course load
- SAT I math score ≥ 740 or ACT math score ≥ 32
- SAT I verbal score ≥ 640 or ACT English score ≥ 29
- high ratings from the high school counselor.

2. *Unique life experiences, challenges, circumstances, interests or talents*

3. *Disadvantaged background, e.g. socio-economic status, educated in a disadvantaged school setting*

4. *Underrepresented race or ethnicity or geography*

5. *Important connections to our University community, e.g. donor relations, faculty and staff relationships*

6. *Recruited Athletes*

7. *Applications received through "on-the-spot" admission program*

C. Review Flag = 3 Caution Review Pool

For an applicant whose SI does not capture some significant concern, the Review Flag should be set to "3" by the reviewing counselor. Written documentation regarding the reasons for the RF=3 is to be placed in the application. All RF=3 applications

will be reviewed by committee processes to determine the appropriate action. Examples of such concerns could include a pattern of declining grades, a less demanding curriculum, the senior year with three or less academic courses or counselor comments, or a positive response to question 35 on the application.

D. Other Review Flags Not Equal to 0, 1, or 3

The Mass Action SQR will add 10 to the Review Flag value every time the application is processed by the program. For example, a Top of the Class "1" who is admitted will have a Review Flag of "11" after the program is run. Counselors should not adjust Review Flags that have values greater than "3". If a counselor has an situation in which a Review Flag needs to be adjusted, please bring the application to the attention of MM or PH.

VI. Top Scholars: To expedite the admission of top scholars to the College of Literature, Science, and the Arts and to the College of Engineering so that each college may have access to the students in a timely manner for recruiting purposes, a team of designated readers will review all applications with credentials at or above a GPA of 3.8 and an SAT I of 1400 or ACT of 32 as quickly as the applications are ready for review. If admissible according to the EWG designated threshold, the applications will be processed through Mass Action on a weekly basis.

Office of Undergraduate Admissions

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I. ADMISSION OF FRESHMEN

A. DEFINITION OF A FRESHMAN APPLICANT: FTIAC (first time in any college). **A freshman is defined as an entering student who has never attended any college following high school graduation.** This definition includes students enrolling in the fall term who take college classes as guest students in the summer immediately preceding the fall semester. The definition also applies to students who enter with advanced standing by earning college credit through Advanced Placement Examinations, or courses taken at a college prior to high school graduation.

All other students will be designated as transfer students (Type 4) with Level (1, 2, 3, 4) being determined by the amount of transferable credit projected for the term of entry. This will include those freshman level students who attend college in the fall and apply for admission to LS&A for the winter semester. They will be coded as transfer students (Type 4) at the freshman level (Level 1) and be evaluated according to transfer guidelines for Winter *1999*

B. OVERVIEW OF ADMISSION POLICIES (First Review)

1. **TERMS OF ADMISSION**

Admission to LS&A will be highly selective for all four semesters of the academic calendar. *Admission* is granted to applicants with *very competitive* credentials from early fall to November 1 for winter semester, and until February 1 for spring, summer, and fall semesters.

Winter applicants who met competitive criteria based on the Fall *1998* guidelines, or who were previously admitted, did not accept admission, and did not enroll in another institution for the fall term, will be admitted on through the November 1 equal consideration deadline.* All other applicants with lower credentials will be denied admission. *There will be no deferred group for the winter term.* (Note: It is necessary to delay for a final high school transcript if it has not been previously submitted. A decline in the senior year grades is cause to deny admission even if the student was admissible based on 10th and 11th year GPA.)

*Students with the same credentials who do enroll in another college for the fall semester will be coded as transfer students and admitted if there was no decline in senior year grades.

Spring admissions standards require the same competitive criteria as for all other terms. Applications will be accepted through the February 1 equal consideration deadline. Students who do not meet the competitive guidelines will be denied admission. *There will be no deferred pool for spring semester.*

The *summer and fall group* of applicants whose credentials fall in the range designated as *qualified/non-competitive* will be *deferred* for a second review following the February 1 equal consideration deadline.

Summer and fall applicants whose credentials fall *below the guidelines set for deferred* applicants will be *denied* admission on the first review.

2. **ASSIGNED REVIEWER**

a. Each high school is assigned to a counselor who will read all the LS&A applications from the school. A Selection Index will be calculated based on the student's accomplishments and the factors on the Selection Index Worksheet.

3. **GENERAL REQUIREMENTS**

a. **High School Graduation.**

(1) *All* freshman students are required to earn a high school diploma (or GED equivalent for older students) prior to enrolling in the College.

(2) Exceptions to the graduation requirement may be made for extremely gifted and brilliant students who meet YSEP standards and are admitted under those

conditions. (Look in Table of Contents for YSEP location in guidelines)

(3) *Home schooled students whose grades do not reflect a measure of accomplishment from participation in a typical classroom with other students, will have to provide additional evidence of preparation, such as earning scores on specific SAT II Subject exams at a level which will assure they are as competitively admissible as students who attend public or private high schools. Home schooled students will be assigned to OUA liaison, Marilyn McKinney.*

b. ***Course Preparation.*** All students are expected to take a demanding college preparatory curriculum in 9th through 12th grades. The following minimum preparation is suggested for all student applying for admission to LS&A: English – 4 years, foreign language – 2 years (recommended 4 years), mathematics – 3 years (through intermediate algebra), science – 3 years (2 laboratory science courses), social studies – 3 years, and 5 additional courses to earn a total of 20 units of study.

c. ***Grade-Point Average***. Grades earned in academic courses taken during the sophomore and junior years will be used in the first review of the application. Senior fall semester grades will

be a factor for students who are deferred for March review

d. ***ACT/SAT I scores. (All SAT I scores reflect the Recentered Scale)***

(1) All freshman applicants are required to have their ACT/SAT I scores sent directly from the testing agencies.

(2) The highest set of scores will be used to make the admission decision.

(3) A list of applicants with new scores that reflect a higher test range will be run *after the receipt of December test tapes*. Counselors will update the S.I. to reflect the increase in test scores.

4. **SELECTION INDEX**

Admission is based on several factors that combine to produce a freshman class that provides a mixture of attributes and characteristics valued by the University. The process for building the class is found in the *Guidelines for the Calculation of a Selection Index 1999*. The guidelines are to be used to determine a S.I. number which will be entered on the students record by the reviewing counselor. This Selection Index number will be the factor used to select students for admission, deferral, or denial at each phase of the review process.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

JENNIFER GRATZ, *et al.*, Plaintiffs, v. LEE BOLLINGER, *et al.*, Defendants.	)	Civil Action No. 97-75231 Hon. Patrick J. Duggan Hon. Thomas A. Carlson

DEFENDANTS' SUPPLEMENTAL OBJECTIONS AND RESPONSE TO INTERROGATORY NUMBER ONE (1)

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure (the "Federal Rules"), Rule 26.1 of the Rules of the United States District Court for the Eastern District of Michigan (the "Local Rules"), Defendants Lee Bollinger, James J. Duderstadt, and the Regents of the University of Michigan, through their undersigned counsel, submit the following Supplemental Objections and Response to Interrogatory Number One (1) of Plaintiffs' Interrogatories to Defendants (Set I), served on Plaintiffs' counsel on April 7, 1998.

DEFINITIONS

Defendants hereby incorporate by reference their Definitions, as originally set forth in their responses to Plaintiffs' Interrogatories to Defendants (Set I).

SUPPLEMENTAL OBJECTIONS AND RESPONSE TO PLAINTIFFS' INTERROGATORY NUMBER ONE (1)

Defendants hereby incorporate by reference their General Objections, as originally set forth in their responses to Plaintiffs' Interrogatory to Defendants (Set I), as though fully set forth therein, and no response shall be construed to waive any of those General Objections.

***Interrogatory No. 1*: Describe in detail the process by which the LSA makes or made decisions to admit, delay, reject, or take other action on applications for admission to the LSA for each class year from 1990 to the present (including the prospective 1998 class).**

***Supplemental Objections and Response to Interrogatory No. 1*:** Since the time Defendants served their Response to Interrogatory Number One (1) of Plaintiffs' Interrogatories to Defendants (Set I), on April 7, 1998, the Office of Undergraduate Admissions ("OUA") process for admitting students to the College of Literature, Science and the Arts ("LSA") has changed in the following material respects:

First, the way in which admissions decisions are executed has changed. As under the previous OUA guidelines for LSA admissions, counselors review application materials and use their professional expertise to set the "Selection Index" score. Counselors also have the option of "flagging" an application depending on the counselor's judgment about the applicant's ability to succeed at the University and to contribute to the class.

An admissions counselor may flag an application if an applicant meets the following three criteria: (1) the admissions counselor has determined that the applicant is academically prepared to do the level of work required at the University; (2) the applicant possesses a quality or characteristic important to the University's composition of its freshman class (as set forth specifically in the guidelines): (a) they have a high class ranking (along with a certain threshold GPA and test score), (b) they have unique life experiences, challenges, circumstances, interests or talents, (c) they come from a disadvantaged background (*e.g.*, socioeconomic status, educated in a disadvantaged school setting), (d) they come from an underrepresented race or ethnicity or geography, (e) they are a recruited athlete, or (f) their application was received through the "on-the-spot" admission program; and (3) the applicant has a Selection Index score of greater than or equal to 80 if he or she is a Michigan resident, or a Selection Index score of greater than or equal to 75 if he or she is a non-Michigan resident. In addition, at the discretion of the Provost, an application may be flagged for further review. *See* UMA 159352-159356.

An admissions counselor may also flag an application if, notwithstanding an applicant's high Selection Index score, there is something in the file that suggests that the applicant may not be suitable for admission (*e.g.*, the applicant has a pattern of declining grades or disciplinary problems). Furthermore, in rare circumstances an admissions counselor may also flag an applicant with a Selection Index score below the designated levels if the counselor learns something from reviewing the entire file that suggests that the Selection Index score may not reflect the applicant's full promise or potential.

Both the SI score and any "flag" are recorded by the counselor in the admissions database. After counselor review, admissions decisions are generally executed in one of two ways: The Enrollment Working Group ("EWG") sets Selection Index parameters throughout the admissions season and based on these parameters an action – admit, defer or deny – is executed with respect to many applications. In addition, applications which have been flagged by a counselor (but not admitted based on the EWG parameters) are discussed by the Admissions Review Committee ("ARC"), which is comprised of members of OUA and the Office of the Provost. Each application submitted to ARC is reviewed and discussed by the members of ARC and a determination is made by the full committee as to whether the application should be admitted, deferred, or denied.

Second, OUA now may defer the applications of underrepresented minorities, in contrast to its prior practice of undertaking to make immediate decisions to admit or deny such applicants.

Third, OUA no longer admits any applicants through what was known as an "automatic admit" process without an extensive review of their entire admissions file. Instead, all applications are now reviewed by counselors and assigned a Selection Index score before an admissions decision is made.

Fourth, OUA has discontinued the use of "protected categories." This change was made notwithstanding the University's historical experience of receiving applications from minority groups later in the admissions cycle.

Defendants state that in addition to documents previously produced, additional documents from which a response to this interrogatory may be ascertained have

been produced to Plaintiffs and Defendant-Intervenors on February 7, 2000 and May 5, 2000. Pursuant to Rule 33(d) of the Federal Rules, Defendants refer Plaintiffs to those documents, including, without limitation, UMA 130380-130382, UMA 159288-159315, UMA 159316-159343, UMA 159344-159351, UMA 159352-159356, and UMA 159357-159362.

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[Certificate Of Service Omitted In Printing]

1998 GUIDELINES TRAINING
Tuesday, September 2, 1997

I. Selection Index Guidelines

A. History for change from 2-way Table to Linear Model. (anti-affirmative action climate)

1. 1995 & prior: separate guidelines for majority and minority (resident & nonresident separate)

2. 1996: separate guidelines collapsed onto same table (resident & nonresident separate)

3. 1997: one table, two lines, top majority, bottom diversity applicants (resident & nonresident separate)

B. 1998: Linear model called *Guidelines for the Calculation of a Selection Index*. One model for all schools and colleges except Engineering, second model for College of Engineering.

Goal: Admit the same class as if using old method.

C. Development of the model:

1. Random sample of 800 LSA applicants with first review decisions, tested additional 200 as sample with new Selection Index guidelines.

2. Determined weight of each variable, e.g. test scores, GPA1, "S" & "C" factors, geography, legacy, diversity.

3. Based on actions taken on 1997 guidelines, a linear model was developed using a 150 point Selection Index Scale.

4. Values were assigned to each variable (factor) with academics, (GPA, "S", "C") receiving 2/3 of the points, adding test scores resulted in73% of

the weight being academic. The remaining 27% is composed of factors valued by the University, i.e. geography (MI residents), alumni relations, essay, personal achievement, leadership and service, socioeconomically disadvantaged, underrepresented racial/ethnic minority, scholarship athletes, Director's discertion, and professional diversity.

D. Reviewing the Guidelines, factor by factor

E. Using the Selection Index Worksheet (overhead)

1. A S.I. Worksheet, with student's name, social security number, type, unit, and term will be inserted in every freshman application by the file clerks before applications are placed in counselors' buckets. (Yellow for all units except Engineering/blue for Engineering)
2. Test scores are printed on the Information Sheet.
3. GPA (formerly called GPA1) is recorded on left edge of page 1 of the application along with other coding that used to be at bottom of application.
4. School factor is determined by each counselor based on high school profiles and "S" formula.
5. Curriculum factor is determined by quality & quantity of student's classes and "C" formula.
6. Sub score 1 = points for academic factors in col. 1
7. Geography is residency factor, as well as under represented MI counties and underrepresented states.

8. Alumni factor recognizes family ties to UM.
9. Essay point can be achieved through exceptional essay.
10. Personal Achievement assigned for state, regional or national accomplishments.
11. Leadership & Service assigned for state, regional or national accomplishments.
12. Miscellaneous factor covers socio=economic disadvantaged, underrepresented racial/ethnic minority, underrepresented gender in profession, scholarship athletes, director's discretion.
13. Add points in Other Factors column and put sum of points in sub score box 2.
14. Add two subscores together to get Selection Index.

F. Translating Selection Index to action decisions. (**Overhead**)

1. Use (Unit Selection Index Action Chart to determine appropriate action to take on application.
2. LSA.
   a. Review S.I. Chart and appropriate actions to take.
   b. Do two or three example applications on overhead S.I. Worksheet with counselors deciding quality S.I. points and appropriate action to take.

G. Marking up the Application Folder (**Overhead**)

1. Transfer GPA and Selection Index number to application folder.

2. Enter CSP designation & initial if final action, otherwise do not mark in CSP designation.

3. Mark appropriate action in Action Column and appropriate letter in Letter Column.

4. Check markups for accuracy.

H. Automatic Decisions for LSA

1. All applicants with a 3.8 or higher GPA, ACT composite score of 27 or higher or SAT total score of 1200 or higher, and strong curriculum determined as 18 or more academic courses from 9th through 12th grades will be marked up for admission by designated data entry clerks.

2. Applications with above GPA and test scores, but with fewer than 18 academic courses will be reviewed by the counselors

3. Exceptions: To conform with the model's development based on 1997 process, all underrepresented minority and private/parochial school applications will be reviewed by appropriate counselor.

I. To monitor the accuracy of the decisions using the Selection Index model versus the 1997 guidelines, counselors should set aside any nonresident applications which are not admits with a GPA of 4.0/ACT of 24 or higher or SAT of 1090 or higher. Also set aside any nonresident with a GPA of 3.6 and ACT of 31 or higher or SAT of 1360 or higher that are not admissible according to the S.I. Chart.

2. Mark the decisions according to the 1998 LSA S.I. Chart and then give the the applications to MM with a note describing the problem. The

applications will be given to MM to copy before going to letter production.

3. We will carefully monitor the flow of decisions during this processing year to make sure we reach the target desired by the LSA Deans.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

JENNIFER GRATZ and PATRICK HAMACHER, for themselves and all others similarly situated,

Plaintiffs,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Defendants,

and

EBONY PATTERSON, RUBEN MARTINEZ, LAURENT CRENSHAW, KARLA R. WILLIAMS, LARRY BROWN, TIFFANY HALL, KRISTEN M.J. HARRIS, MICHAEL SMITH, KHYLA CRAINE, NYAH CARMICHAEL, SHANNA DUBOSE, EBONY DAVIS, NICOLE BREWER, KARLA HARLIN, BRIAN HARRIS, KATRINA GIPSON, CANDICE B.N. REYNOLDS, by and through their parents or guardians, DENISE PATTERSON, MOISE MARTINEZ, LARRY CRENSHAW, HARRY J. WILLIAMS, PATRICIA

Civil Action No. 97-75231
Hon. Patrick J. Duggan
Hon. Thomas A. Carlson

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed Feb. 26, 2001)

SWAN-BROWN, KAREN A. MCDONALD, LINDA A. HARRIS, DEANNA A. SMITH, ALICE BRENNAN, IVY RENE CHARMICHAEL, SARAH L. DUBOSE, INGER DAVIS, BARBARA DAWSON, ROY D. HARLIN, WYATT G. HARRIS, GEORGE C. GIPSON, SHAWN R. REYNOLDS, AND CITIZENS FOR AFFIRMATIVE ACTION'S PRESERVATION,

Defendant-Intervenors.

_____/

Plaintiffs Jennifer Gratz and Patrick Hamacher, for themselves and for the members of the class certified by the district court in its order dated December 23, 1998, hereby appeal to the United States Court of Appeals for the Sixth Circuit from (1) the Order of the district court filed on January 30, 2001, that granted defendants' motion for summary judgment and denied plaintiffs' request for injunctive relief and (2) the final judgment (pursuant to Fed. R. Civ. P. 54(b)) entered on February 9, 2001, dismissing plaintiffs' claims against defendants Duderstadt and Bollinger in their individual capacities on grounds of qualified immunity.

Dated: 2/23/01

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Nos. 01-0102/0104

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: LEE BOLLINGER, et al. Petitioners (01-0102).	)	
In re: JENNIFER GRATZ; PATRICK HAMACHER, Cross-Petitioners (01-0104).	)	ORDER (Filed Mar. 26, 2001)

Before: MARTIN, Chief Judge; DAUGHTREY and MOORE, Circuit Judges.

In this action, the plaintiffs challenge the admissions policy of the University of Michigan's College of Literature, Science and the Arts. The district court entered an opinion addressing pending motions in this action on December 13, 2000. Subsequently, the court granted the request of the plaintiffs and defendants to certify the following two issues for appeal:

> 1. Whether a public university has a compelling interest in achieving the educational benefits of a diverse student body that will justify the consideration of race as a factor in admissions, and
>
> 2. Whether the admissions systems employed by the University of Michigan College of Literature, Science and the Arts from 1995 until 2000 are properly designed to achieve that interest.

The defendants filed a timely petition for permission to appeal pursuant to 28 U.S.C. § 1292(b). Within seven

days, as calculated by the guidelines of Fed. R. App. P. 26, the plaintiffs filed an answer and cross-petition.

This court may in its discretion accept for immediate review an order of the district court certified for interlocutory appeal if: (1) the question involved is one of law; (2) the question is controlling; (3) there is substantial ground for a difference of opinion respecting the correctness of the district court's decision; and (4) an immediate appeal may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b); *see Cardwell v. Chesapeake & Ohio Ry. Co.*, 504 F.2d 444, 446 (6th Cir. 1974). Review under § 1292(b) should be sparingly granted and then only in exceptional cases. *Kraus v. Board of County Road Commissioners for Kent County*, 364 F.2d 919, 922 (6th Cir. 1966).

Upon consideration, the petition and cross-petition for permission to appeal hereby are **GRANTED**.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

Nos. 01-1333/1416/1418/1438/1447/1516

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JENNIFER GRATZ AND PATRICK HAMACHER FOR THEMSELVES AND ALL OTHER SIMILARLY SITUATED, Plaintiffs-Appellants (01-1333 and 01-1418), Plaintiffs-Appellees (01-1416), v. LEE BOLLINGER, ET AL., Defendants-Appellees (01-1333 and 01-1418) Defenadants-Appellants (01-1416), EBONY PATTERSON, ET AL., Defendants-Appellees (01-1333) (01-1416) Intervening Defendants-Appellees (01-1418) Intervening Defendants-Appellants (01-1438	) **ORDER**) (Filed Oct. 19, 2001)
BARBARA GRUTTER, Plaintiff-Appellee (01-1447 and 01-1516), v.	

LEE BOLLINGER, ET AL.,
Defendants-Appellants
(01-1447),

and

KIMBERLY JAMES, ET AL.,

Intervening Defendants-
Appellants (01-1516)

BEFORE: MARTIN, Chief Circuit Judge; BOGGS, SILER, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, and GILMAN, Circuit Judges

The plaintiffs in these consolidated appeals filed a petition seeking initial *en banc* review of the decisions of the two district courts before whom the cases were heard. The petition was referred to the three-judge panel to which the appeals had been assigned for oral argument on October 23, 2001.

The panel requested that all of the active judges of the court be polled to determine whether or not the petition should be granted and the appeals be presented in the first instance to the *en banc* court for argument and decision. A majority of the active judges voted to grant the petition; therefore

IT IS ORDERED that the petition for initial hearing *en banc* be, and it hereby is, GRANTED. It is FURTHER ORDERED the oral argument scheduled for October 23, 2001 is cancelled; oral argument to the *en banc* court

will be on Thursday, December 6, 2001, at 1:30 P.M., EST, in Cincinnati, Ohio.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JENNIFER GRATZ, *et al.*, Plaintiffs, v. LEE BOLLINGER, *et al.*, Defendants, and EBONY PATTERSON, *et al.*, Intervening Defendants.	)	Case No. ___

PETITION FOR PERMISSION TO APPEAL

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PETITION FOR PERMISSION TO APPEAL

The district court's order in this case, dated January 30, 2001, certified the following two issues for appeal pursuant to 28 U.S.C. § 1292(b): (1) whether a university's interest in realizing the educational benefits that flow from a racially and ethnically diverse student body is compelling and therefore justifies the consideration of race and ethnicity in admissions, and (2) in what manner and to what extent a university's properly designed admissions system may take race into account to achieve that end.[1]

On the merits, this case presents a challenge to the University of Michigan's consideration of race and ethnicity as one of many factors in making admissions decisions. The district court below held, based on "solid evidence" provided by the Defendants, that a university has a compelling interest in achieving the educational benefits of a racially and ethnically diverse student body, thereby recognizing the continuing vitality of *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978), and the correctness of the reasoning in Justice Powell's pivotal opinion in that case.[2] (*See* Ex. B at 21.) The district court also held that the admissions policies and practices in place at the University's College of Literature, Science, and the Arts ("LSA") from 1999 forward are narrowly tailored to achieve this compelling interest, (*see id.* at 39), while, because of certain discontinued features, the admissions

[1] A copy of the district court's Order, dated January 30, 2001, is attached as Exhibit A.

[2] A copy of the district court's Opinion, dated December 13, 2000, is attached as Exhibit B and is reported at 122 F. Supp. 2d 811 (E.D. Mich. 2000).

systems that were in place from 1995-1998 "cross that thin line from the permissible to the impermissible." (*Id.* at 31). Defendants believe that the district court correctly determined that the attainment of the educational benefits of diversity is a compelling interest and that LSA's admissions systems in place from 1999 forward are narrowly tailored to achieve that interest. Yet, Defendants respectfully disagree with the district court's ultimate conclusion that the 1995-1998 admissions systems fell on the unconstitutional side of the line.

Plaintiffs have represented that they would seek an interlocutory appeal of the portion of the district court's order declaring that achieving the educational benefits of diversity is a compelling interest and that the LSA admissions systems in place from 1999 forward are narrowly tailored to achieve that interest.[3] (*See* Ex. C.) Defendants understand that Plaintiffs intend to effectuate that appeal by filing a cross-petition on these issues within seven days of the filing of Defendants' petition, as provided by Fed. R. App. P. 5(b)(2). Therefore, *on the condition* that Plaintiffs do bring an interlocutory cross-appeal from the district court's January 30, 2001 Order, pursuant to 28 U.S.C. § 1292(b), *and* this Court agrees to hear that appeal, *then* Defendants seek permission, pursuant to 28 U.S.C. § 1292(b) and Fed. R App. P. 5, to appeal from the portion of the district court's order holding that LSA's 1995-1998 admissions systems are unconstitutional. In the event that

[3] A copy of the joint letter that the Plaintiffs and Defendants submitted to the district court, requesting that the district court certify its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) is attached as Exhibit C.

Plaintiffs fail to file such a cross-petition within seven days after Defendants file this petition, or that this Court declines to hear that appeal, then Defendants' petition should be deemed withdrawn.[4] However, in light of the singular importance of these issues and their significant consequences in this case and beyond, Defendants and Plaintiffs agree that this Court should accept *both* Defendants' Petition and Plaintiffs' cross-petition, pursuant to 28 U.S.C. § 1292(b), in order to address the important legal questions that govern how a university may consider race in admissions.

Since the Supreme Court held in *Bakke* that institutions of higher education could constitutionally consider race and ethnicity in making admissions decisions, nearly all of the major colleges and universities in this country – including the University of Michigan – have adopted admissions policies designed to achieve the educational benefits that flow from a racially and ethnically diverse student body. The Supreme Court has not revisited, nor even questioned, *Bakke*'s central holding. Nevertheless, Plaintiffs seek to overturn *Bakke* and to prevent colleges and universities from crafting their admissions policies to further the vital educational goal of realizing – for all students – the benefits of a racially and ethnically diverse student body.

[4] In the event that Plaintiffs file any other valid interlocutory appeal, over which this Court has and exercises jurisdiction, Defendants respectfully request that the Court grant this petition for permission to appeal pursuant to 28 U.S.C. § 1292(b), in conjunction with Plaintiffs' appeal.

"Whether it is constitutional for a public college or graduate school to use race or national origin as a factor in its admissions process is an issue of great national importance." *Texas v. Hopwood*, 518 U.S. 1033 (1996) (Ginsburg, J., joined by Souter, J., op. resp. den. pet. for cert.). This issue has been the subject of several high-profile lawsuits. Despite *Bakke*, judicial responses to these challenges have resulted in a patchwork of contradictory rulings on the central legal questions. Compare *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (rejecting diversity as a compelling interest in higher education and holding that only a narrow remedial rationale justifies the consideration of race in admissions) and *Johnson v. Board of Regents of the Univ. of Georgia*, 106 F. Supp. 2d 1362 (S.D. Ga. 2000) (holding that the university had failed to provide empirical evidence of the educational benefits of diversity and that those benefits were too amorphous to constitute a compelling interest) (appeal pending before the Eleventh Circuit) *with Smith v. Univ. of Washington Law Sch.*, 233 F.3d 1188 (9th Cir. 2000) (holding that the diversity rationale adopted by Justice Powell in *Bakke* is binding precedent as the narrowest ground in support of the judgment to permit the consideration of race in university admissions) (*sua sponte* consideration of rehearing *en banc* pending) and the decision below, *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 822 (E.D. Mich. 2000) (holding that achieving the educational benefits of diversity is a compelling interest, based on "solid" empirical evidence).

Interlocutory appeal of *all* the questions certified by the district court in this case is warranted. *See* 28 U.S.C. § 1292(b); Fed. R. App. P. 5. The district court's certification of its order is proper because the order presents controlling questions of law, upon which there are substantial grounds

for disagreement, and the resolution of these issues will materially advance not only this litigation, but also the clarity of the nation's jurisprudence on the consideration of race in admissions in higher education.

FACTUAL BACKGROUND

To assist this Court in understanding the nature of the controlling legal questions at issue in this case, as well as the district court's resolution of those questions, Defendants provide below a brief description of the "solid evidence" of the educational benefits of diversity, submitted by Defendants and relied upon by the district court, as well as a brief explanation of the operation of LSA's admissions systems from 1999 forward and from 1995-1998.

A. Procedural History.

On October 14, 1997, Plaintiffs Jennifer Gratz and Patrick Hamacher brought this action against Defendants, the Board of Regents of the University of Michigan and several individual University officials, alleging that the University's College of Literature, Science and the Arts had violated Plaintiffs' rights under Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the United States Constitution, through its consideration of race and ethnic origin as one of many factors in making admissions decisions. Plaintiffs sought compensatory and punitive damages, as well as declaratory and injunctive relief. (*See* Ex. B at 2.) This Court permitted a group of current and prospective minority undergraduate students to intervene at defendants. *See Grutter v. Bollinger*, 188

F.3d 394 (6th Cir. 1999) (reversing, on interlocutory appeal, the district courts' denial of intervention).

On December 23, 1998, the district court bifurcated the proceedings into a liability phase – which the court purported to limit to Plaintiffs' claims for injunctive and declaratory relief – and a damages phase. For the liability phase only, the district court certified an injunctive class, pursuant to Federal Rule of Civil Procedure 23(b)(2), of non-underrepresented minority students who applied for admission to LSA from 1995 forward, and who were denied admission. The district court specifically set aside the question of whether to certify a class for purposes of the damages phase[5] (*See* Ex. B at 2, 6.)

The district court issued its opinion on December 13, 2000, resolving the parties' cross-motions for summary judgment Concluding that the University's undisputed expert case, as well as the arguments advanced by *amici* who submitted briefs in support of the University's position, established the compelling nature of the significant educational benefits that flow from a racially and ethnically diverse student body, the district court granted Defendants' motion for summary judgment with respect to the admissions programs in effect from 1999 forward and denied Plaintiffs' request for an injunction. The district court also dismissed the claims against the individual defendants based on the doctrine of qualified immunity. In

[5] In light of new case law, Defendants requested relief from the class certification order. The district court denied the request. This Court consolidated Defendants' petition for permission to appeal under Rule 23(f) with a similar petition filed in *Grutter v. Bollinger*, and denied the petition as untimely.

addition, the district court granted Plaintiffs' motion for summary judgment with respect to the admissions programs in place from 1995-1998 because, the court concluded, the now-defunct policies were not narrowly tailored to achieve that compelling interest. On January 30, 2001, in response to a request by Plaintiffs and Defendants, (*see* Ex. C), the district court issued an order effectuating these holdings and certifying two questions for interlocutory appeal pursuant to 28 U.S.C. § 1292(b): (1) whether a public university has a compelling interest in achieving the educational benefits of a diverse student body that will justify the consideration of race as a factor in admissions; and (2) whether the admissions systems employed by LSA from 1995 forward are properly designed to achieve the educational benefits of a diverse student body.[6] (*See* Ex. A.)

B. The Educational Benefits of Diversity.

As the district court found, the University of Michigan has made an academic judgment that "diversity [is] an integral component" of its educational mission and that diversity "increase[s] the intellectual vitality of the University's] education, scholarship, service, and communal life." (Ex. B at 3.) In order to achieve the benefits that a diverse student body will provide for all students, the University seeks to compose a class of students of different racial, ethnic, cultural, socioeconomic, and geographical

[6] Defendants' petition is timely filed within the ten days allotted by 28 U.S.C. § 1292(b).

backgrounds, who bring with them a wide range of interests, achievements, experiences, and beliefs.

The University's determination that a diverse student body improves learning inside and outside the classroom for all students – minorities and nonminorities alike – comports with the consensus reached in the larger educational community. As the district court noted, many educational organizations, representing over 360 institutions of higher learning and at least 25 education-related groups, filed *amicus* briefs in support of the University in this case, extolling the educational benefits of a diverse student body.[7] Amicus briefs were also filed in support of the University's Position by the United States; the State of Ohio; the Attorney General of Michigan; General Motors Corporation; Steelcase, Inc., joined by 19 other global corporations; and the National Association of Social Workers. (*See id.* at 22 (listing briefs).)

The district court relied on the empirical evidence contained in Defendants' experts' reports to hold that achieving the educational benefits of a racially and ethnically diverse student body constitutes a compelling government

[7] *See* Ex. B at 21 (listing *amici*, including the American Council on Education and the Association of American Law Schools, National Association of State Universities and Land Grant Colleges, Committee on Institutional Cooperation (an academic consortium including Indiana University, Michigan State University, Northwestern University, The Ohio State University, Pennsylvania State University, Purdue University, the University of Chicago, the University of Illinois, the University of Iowa, the University of Michigan, the University of Minnesota, and the University of Wisconsin-Madison), and Wayne State University, together representing over 360 institutional members of the professional higher education community).

interest. (*See* Ex. B at 20.) The work of Defendants' nationally recognized experts in the fields of history, sociology, education, and psychology demonstrates that there is a direct and provable relationship between the significance of race in our society and the quality of education in a racially and ethnically diverse setting. Furthermore, these experts prove, with empirical research and data, *how* and *why* racial and ethnic diversity on campus enhances the academic skills and civic preparedness of *all* students by sharpening students' ability to think and analyze in more active and complex ways and preparing students to participate more fully in our pluralistic democracy. The district court concluded that Defendants "presented this Court with solid evidence regarding the educational benefits that flow from a racially and ethnically diverse student body." (*Id.*) The University's presentation and the district court's consideration of this extensive body of empirical evidence of the educational benefits of diversity set this case apart from other cases in which courts have concluded that diversity is not a compelling interest, based on a lack of empirical evidence of the educational benefits it produces. *See Johnson*, 106 F. Supp. 2d at 1371-75 (finding that the University justified diversity as a compelling interest "with syllogism and speculation" and "data no more quantifiable than [ ] years of teaching/administrative experience" and characterizing this as impermissible "circular, 'it is because I say so' logic").

Using national and Michigan student databases, Patricia Y. Gurin, a Professor of Psychology at the University of Michigan, has proven that a racially and ethnically diverse student body provides measurable benefits in at least two areas: academic learning and civic responsibility. Professor Gurin's research demonstrates that students

who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with other students showed the greatest engagement in active thinking processes, increase in intellectual motivation, and growth in intellectual and academic skills. Professor Gurin also shows empirically that students who learn and live in a racially and ethnically diverse environment are better equipped to understand and consider multiple perspectives, to deal with the conflicts that different perspectives may create, to appreciate how differences can be harnessed in pursuit of the common good, and to perceive commonalities amidst differences. (*See* Ex. B at 20-22.)

In light of the historical and sociological data contained in the expert reports of Professors Eric Foner, Albert Camarillo, and Thomas J. Sugrue, it should come as no surprise that education that takes place in a racially and ethnically diverse atmosphere benefits all students, minorities and non-minorities alike. Race is salient to how we live our lives: Americans of different races and ethnicities tend to live in separate communities, to be educated in largely segregated schools, and to go about their daily lives without meaningful contact with members of other groups. Indeed, in some areas, such as housing and elementary and secondary education, our society is as racially separate today as it was before *Brown v. Board of Education*, before the Civil Rights Act of 1964 and the Voting Rights Act of 1965, and before the *Bakke* decision. These segregative patterns are particularly strong in the State of Michigan.

The consequences of this persistent racial separation are enormous, creating a profound impact on students' experiences and perspectives. Most students enter college having had very few sustained interactions with individuals of

other races and ethnicities. This lack of meaningful contact fosters misconceptions and mistrust on all sides and affords little or no opportunity to disrupt the perpetuation of racial stereotypes, to discover unexpected commonalities, or to experience the richness of different racial and ethnic communities.

C. The LSA Admissions Process.

The University necessarily makes its admissions decisions against this backdrop of our diverse, but largely segregated, society, and in recognition of the reality of the consequences of this separation. Having reached the educational judgment that a racially and ethnically diverse student body is essential to its mission, the University of Michigan takes race and ethnic origin into account as a factor in making admissions decisions in order to enroll a student body with sufficient racial and ethnic diversity to yield these educational benefits.

Admission to the University is selective. Many more students apply each year than can be admitted. (*See* Ex. B at 3.) The University only admits applicants whom it believes are qualified. (*See id.* at 42.) Because a significant percentage of applicants are, indeed, qualified for admission, LSA has a talented and rich pool from which to compose a class. Of the large numbers of qualified students who apply to LSA each year, however, there is only a relatively small pool of minority applicants nationwide, and these students are heavily recruited by many selective colleges and universities. Accordingly, without considering race and ethnicity as a factor in admissions, LSA would see a precipitous drop in the numbers of minority students who enroll. (*See id.* at 37-39).

The Office of Undergraduate Admissions ("OUA") is responsible for processing, reviewing, and acting on all applications to LSA. Admissions counselors evaluate every application received through an individualized review. Each of the approximately 20 counselors is responsible for a geographic territory and reviews all applications from that territory. Applications from minority students are assigned to counselors responsible for the relevant geographic area, and are reviewed along with the applications of everyone else. Unlike the "two-track" admissions system that was rejected in *Bakke*, there is *no* separate assignment or review of minority applications, and there are no numerical quotas, goals, or targets for minority students. (*See id.* at 35.)

Admissions decisions are based on a review of many factors and cannot be reduced solely to grades and test scores. The counselors evaluate applications using a "selection index" worksheet, upon which counselors enter a numerical value for each of a number of academic and other factors. An applicant can receive points for the following "academic" factors: high school academic GPA, standardized test scores, strength of high school, and rigor of chosen curriculum. Counselors may also award points for: Michigan residency, underrepresented geographic status, alumni relationships, quality of the required personal essay, leadership and service (based on activities, work experience, and awards), and personal achievement (evidenced by persistence, character, commitment to high ideals, and level of awards). Applicants may also receive points for being socioeconomically disadvantaged, a

member of an underrepresented minority group,[8] from a predominantly minority high school (regardless of race), or a recruited athlete. (*See id.* at 32-33.)

After completing the individualized review and tallying the selection index score, a counselor decides whether or not to flag the application for consideration by an Admissions Review Committee ("ARC"), which was designed to permit debate and discussion on some of the more complex admissions decisions. A counselor may, in his or her discretion, choose to flag an application for ARC discussion if the applicant is academically prepared to do the level of work required at the University; has a selection index score that exceeds a certain level; and possesses a quality or characteristic important to the University's composition of its freshman class. These attributes include, among others, high class rank; unique life experiences, challenges, circumstances, interests or talents; socioeconomic disadvantage; underrepresented race, ethnicity, or geography; and connections to the University community. (*See id.* at 36.)

Counselors review applications as they receive them, and admissions decisions are made at staggered intervals throughout the admissions season. Admissions decisions are generally executed in one of two ways. First, parameters are set, by selection index score, that determine what

[8] The University of Michigan considers underrepresented minorities to be African-Americans, Hispanics, and Native Americans. Because the University receives a substantial pool of applications from Asian-American students, the University is able to achieve diversity with respect to such students without the conscious consideration of an applicant's status as an Asian-American in the admissions process.

admissions action – admit, defer, or deny – will be executed with respect to all applications that have received individualized counselor review at that point in the season. Periodically, these parameters are reviewed and adjusted to prevent over-enrollment and to pace the admissions process appropriately. Second, the ARC reviews and discusses applications that were flagged by the admissions counselor but turn out not to be admitted based on selection index score parameters. After discussion, the ARC decides whether to admit, deny, or defer the applicant.

The district court correctly held that this admissions system is narrowly tailored to achieve the educational benefits of diversity and comports with the principles of *Bakke* because it provides individualized review for every applicant, regardless of race; it does not isolate minority students from competition with non-minority students; and it does not prevent non-minority students from competing for every place in the class. In other words, race is considered as a permissible "plus" factor, consonant with Bakke's prescription. (*See* Ex. B at 32-37, 39.)

OUA continually reviews and evaluates its admissions policies and practices and modifies them when appropriate. Throughout the period relevant to this lawsuit, OUA has maintained its policy of considering race and ethnicity as one of many factors in making admissions decisions. However, the mechanics of *how* race and ethnicity are taken into account in the process have changed. (*See id.* at 31.)

For applications to LSA's entering class of fall 1997 and earlier, counselors used grids, rather than a point-based selection index, to guide them in making admissions

decisions. Each grid had a vertical axis with a score computed from high school academic GPA, quality of school, strength of curriculum, and other factors, and a horizontal axis with standardized test score ranges. Each cell on the grid contained various admission action options available to counselors. Michigan residency, alumni status, and underrepresented racial and ethnic status were accounted for in different grids, as a "plus" factor, rather than within one grid or along one axis of a grid. The University devised the selection index in 1997 to simplify this process. (*See id.* at 30, 43.)

The district court concluded that the grids, standing alone, did not necessarily cross the line that *Baake* draws between a constitutional admissions program and an unconstitutional one. (*See* Ex. B. at 43.) The district court did, however, identify two other features of LSA's prior admissions system that it did not believe passed constitutional muster: (1) the provision in the admissions guidelines that permitted OUA clerks to reject non-minority applicants based on low grades and test scores before those applicants' applications were evaluated by admissions counselors, (*see id.* at 42), and (2) the enrollment management technique, dubbed "protected seats," whereby the University projected and monitored application flow for certain categories of applicants (including underrepresented minorities) who have historically applied later in the admissions season. Given the demands of a rolling admissions system, the concept of protected seats was designed to allow the University to manage the admissions process to ensure that it could still consider the applications of attractive candidates who apply in the later stages of the process without over enrolling the class. (*See id.* at 40-41.) As the district court found, the University has

discontinued its use of the grids, "protected seats," and automatic acceptances and rejections. (*See id.* at 44.)

QUESTIONS PRESENTED

1. Whether a public university has a compelling interest in achieving the educational benefits of a diverse student body that will justify the consideration of race as a factor in admissions.

   We understand that Plaintiffs will seek permission to cross-appeal from the district court's decision that such an interest is compelling.

2. Whether the admissions systems employed by the University of Michigan College of Literature, Science and the Arts from 1995 forward are properly designed to achieve the educational benefits of a diverse student body.

   We understand that Plaintiffs will seek permission to cross-appeal from the district court's decision that the admissions systems employed by LSA from 1999 forward are constitutional.

   On the condition that Plaintiffs file such a cross-petition for permission to appeal on these two issues, and this Court agrees to hear that appeal – and Defendants agree that it should – then Defendants seek permission to appeal the district court's decision that the admissions systems employed by LSA from 1995-1998 are unconstitutional.

RELIEF SOUGHT

On the condition that Plaintiffs file a timely cross-petition for permission to appeal from the district court's January 30, 2001 Order, and that this Court takes that appeal, Defendants ask this Court to grant Defendants' petition in conjunction with Plaintiffs' cross-petition, pursuant to 28 U.S.C. § 1292(b) and Fed. R. App. P. 5. More specifically, Defendants ask this Court to affirm the district court's determination on the primary controlling question of law that achieving the educational benefits that flow from a racially and ethnically diverse student body is a compelling interest that justifies a university's consideration of race and ethnicity in admissions. Defendants also ask this Court to affirm the district court's determination that LSA's admissions systems from 1999 through the present are narrowly tailored to take race into account in the manner and to the extent necessary to achieve this goal. Finally, Defendants ask this Court to reverse the district court's grant of summary judgment in favor of Plaintiffs with respect to the LSA admissions programs in existence from 1995 to 1998, as those programs were also a permissible way to achieve the University's compelling interest in diversity.

Defendants' petition seeks relief only if this Court grants both parties' petitions for permission to appeal from the district court's January 30, 2001 Order, pursuant to 28 U.S.C. § 1292(b). If Plaintiffs do not file such a petition, or if this Court declines to grant that petition, then Defendants' petition seeks no relief and should be deemed withdrawn.[9]

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[9] *See supra* n.4.

REASONS WHY APPEAL SHOULD BE ALLOWED

In light of the national significance of the questions at stake in this case, the recent flurry of conflicting judicial activity in this area, and the conservation of judicial resources in this particular case, this Court should exercise its discretion, pursuant to 28 U.S.C. § 1292(b), to accept Defendants' petition, on the condition that Plaintiffs file and this Court accepts a cross-petition for permission to appeal from the January 30, 2001 Order. Under those circumstances – once all the questions certified by the district court are properly on appeal – this Court could then decide, without further delay, how an institution of higher education may constitutionally consider race and ethnicity in admissions.

Interlocutory appeal is appropriate because the district court has certified that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see also Mackey v. Milam*, 154 F.3d 648, 650 (6th Cir. 1998). Moreover, the issues at stake are vitally important to colleges and universities and their current and prospective students across the country. This case presents those issues squarely and comprehensively.

A. The District Court Properly Certified Its Order.

The district court has properly found that the statutory requisites of certification are present in this case, and the district court's determination is entitled to deference from this Court. *See Lerner v. Atlantic Richfield Co.*, 690

F.2d 203, 209 (Temp. Emer. Ct. App. 1982) (noting that in exercising its discretion to grant permission to appeal, the appellate court should "give great weight" to the district court's proper certification.

1. *Controlling Question of Law.*

The issues presented by the district court's certified order are "questions of law," as opposed to questions of fact, and "controlling," in that their resolution is likely to affect materially the outcome of the litigation. First, both the compelling interest question and the narrow tailoring question are legal questions. *See Majeske v. City of Chicago*, 218 F.3d 816, 820 (7th Cir. 2000). This is the case even though historical facts are relevant to the outcomes of these questions. As this Court has observed, "[d]eterminations which do no more than attach constitutional significance to historical facts are conclusions of law." *Bratton v. City of Detroit*, 704 F.2d 878, 899 (6th Cir. 1983), *modified on other grounds*, 712 F.2d 222 (6th Cir. 1983).

As the district court noted, the Defendants' empirical proof of the educational benefits of diversity was undisputed, and, in fact, conceded by the Plaintiffs, (*see* Ex. B at 8, 23), leaving the district court to decide only the legal question of whether the pursuit of those benefits constitutes a compelling interest under the strict scrutiny standard. Similarly, the facts surrounding the operation of the LSA admissions process were undisputed as well, (*see id.*), leaving the district court to decide the purely legal question of whether the admissions programs were narrowly tailored to achieve the University's compelling interest in obtaining the educational benefits of diversity.

See Majeske, 218 F.2d at 820 (observing that whether there is sufficient evidence to conclude that an interest is compelling and whether an affirmative action program is narrowly tailored are both legal questions); *Contractors Assoc. of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596 (3d Cir. 1996) (same); *Concrete Works of Colo., Inc. v. Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994) (same). Accordingly, the questions presented by the district court's order are questions of law, as required by § 1292(b).

Second, the two questions presented by the district court's certified order are controlling because they are necessary and sufficient to determine the constitutionality of the University's admissions process. Accordingly, those questions satisfy § 1292(b)'s requirement that their resolution "could materially affect the outcome of litigation in the district court." *Baker & Getty Fin. Servs., Inc. v. Nat'l Union Fire Ins. Co.*, 954 F.2d 1169, 1172 n.8 (6th Cir. 1992). The question of whether achieving the educational benefits of diversity constitutes a compelling interest is the central, threshold legal question in this case. That inquiry, together with the question of how a university may structure its admissions system to achieve such an interest will determine whether, and, if so, when, the University will ever have to defend against claims for damages by any plaintiffs (or be bound by injunction to alter their admissions policies). *See Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs. Inc.*, 86 F.3d 656 (7th Cir. 1996) (deciding that a question of law may, be deemed "controlling" for purposes of § 1292(b) if its resolution is quite likely to affect the further course of the litigation); *see also Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990) (observing that resolution of an

issue need not necessarily terminate an action in order to be "controlling" for purposes of § 1292(b)).

2. *Materially Advance the Ultimate Termination of the Litigation.*

Resolution of these two questions will materially advance the ultimate termination of this litigation because it will ensure that the trial of damages claims – if any trial is ever necessary – proceeds in a manner that maximizes judicial efficiency.

Because the district court bifurcated this action, creating a separate damages phase that has not yet commenced, the "ultimate termination" of this litigation would require a significant expenditure of judicial resources. To resolve the damages issues, the court would first have to consider whether to certify a class under Rule 23(b)(3). If certification were not appropriate, thousands of damages proceedings, all of them subject to the possibility of a jury trial via the Seventh Amendment, would have to be tried in the district court. Because under *Texas v. Lesage*, 528 U.S. 18 (1999), Defendants are not liable for damages if an applicant would not have been admitted under a race-blind admissions system, each damages proceeding would entail an individualized inquiry into the necessary antecedent question of whether that plaintiff would have been admitted.

3. *Substantial Ground for Difference of Opinion.*

The substantial ground for difference of opinion on these questions is clear from the fact that courts that have considered these issues have split, not only as to the

ultimate outcome, but also as to their reasoning. The Fifth Circuit is the only court of appeals to disregard Justice Powell's opinion in *Bakke* and hold that achieving the benefits of diversity cannot be a compelling state interest. *See Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). One district court has also followed the Fifth Circuit's lead, determining that an interest in diversity did not and could not rise to the level of a compelling interest because "the 'diversity' interest is so inherently formless and malleable that no plan can be narrowly tailored to fit it." *Johnson v. Board of Regents of the Univ. of Georgia*, 106 F. Supp. 2d 1362, 1374 (S.D. Ga. 2000) (finding that the University of Georgia, in offering only the testimony of its President, failed "to meaningfully show how [racial diversity] actually fosters educational benefits," and holding that "an interest in 'diversity' is amorphous at best" and has "no principled stopping point") (appeal pending before the Eleventh Circuit). (*Compare* Ex. B at 23-24.)

The Ninth Circuit split with the Fifth Circuit in resolving, on interlocutory appeal pursuant to 28 U.S.C. § 1292(b), the questions of "whether educational diversity is a compelling governmental interest that meets the requirement of 'strict scrutiny' for race-conscious measures under the Fourteenth Amendment to the United States Constitution" and "whether race may be considered only for remedial purposes." *Smith v. Univ. of Washington Law Sch.*, 233 F.3d 1188 (9th Cir. 2000). The Ninth Circuit held that the diversity rationale in Justice Powell's opinion is binding precedent as the narrowest ground in support of the judgment reversing the lower court's injunction banning the use of race in admissions. In this analysis, the Ninth Circuit's resolution of this question differs from the district court's resolution in this case, although both courts

ultimately concluded that achieving the educational benefits of diversity is a compelling interest.[10] (*See* Ex. B at 15.)

B. The Questions Present an Important National Issue.

Not only does the district court's order meet the statutory requirements for certification, but the national significance of these questions provides an additional reason that this Court should hear this appeal now. The fact that a question of law that is controlling in the present case also may be important to other cases – and to American higher education – is a factor to be considered in exercising the discretionary power to permit a § 1292(b) appeal, although it is not a necessary precondition. *See Klinghoffer*, 921 F.2d at 24 ("the impact that an appeal will have on other cases is a factor that [courts of appeals] may take into account in deciding whether to accept an appeal that has been properly certified").

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[10] In addition to the cases discussed above, the same legal questions are currently pending before Judge Bernard Friedman in the Eastern District of Michigan in *Grutter v. Bollinger*, Case No. 97-75928, trial of which is expected to conclude next week. This Court has twice before consolidated interlocutory appeals from that case and the instant case, concluding that the same or similar issues were presented in both. *See Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999) (consolidating appeals regarding intervention); Order, Nos. 00-0107/0109, (6th Cir., Sept. 26, 2000) (consolidating petitions for review of class certification orders).

CONCLUSION

For the foregoing reasons, if Plaintiffs file a timely cross-petition for permission to appeal from the district court's January 30, 2001 Order, pursuant to 28 U.S.C. § 1292(b), and this Court grants that petition, this Court should also grant Defendants' Petition for Permission to Appeal.

Respectfully submitted,

/s/ John H. Pickering

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Dated: February 9, 2001

[Certificate of Service Omitted In Printing]

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JENNIFER GRATZ and PATRICK HAMACHER, for themselves and all others similarly situated,

Plaintiffs,

v.

LEE BOLLINGER JAMES R. DUDERSTADT; THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Defendants,

and

EBONY PATTERSON; RUBEN MARTINEZ; LAURENT CRENSHAW; KARLA R. WILLIAMS; LARRY BROWN; TIFFANY HALL; KRISTEN M.J. HARRIS; MICHAEL SMITH; KHYLA CRAINE; NYAH CARMICHAEL; SHANNA DUBOSE; EBONY DAVIS; NICOLE BREWER; KARLA HARLIN; BRIAN HARRIS; KATRINA GIPSON; CANDICE B.N. REYNOLDS, by and through their parents or guardians; DENISE PATTERSON; MOISE MARTINEZ; LARRY CRENSHAW; HARRY J. WILLIAMS; PATRICIA SWAN-BROWN; KAREN A. McDONALD; LINDA A. HARRIS; DEANNA A. SMITH; ALICE

Temporary Case No. 01-102

PLAINTIFFS' CROSS-PETITION

BRENNAN; IVY RENE CHARMICHAEL; SARAH L. DUBOSE; INGER DAVIS; BARBARA DAWSON; ROY D. HARLIN; WYATT G. HARRIS; GEORGE C. GIPSON; SHAWN R. REYNOLDS; and CITIZENS FOR AFFIRMATIVE ACTION'S PRESERVATION,

Intervening Defendants.

Plaintiffs Jennifer Gratz and Patrick Hamacher, for themselves and on behalf of a class of other similarly situated applicants, submit this Cross-Petition to the Petition for Permission for Appeal filed by Defendants in this action.

Plaintiffs/Cross-Petitioners agree that this Court should exercise its discretion to consider this interlocutory appeal, although they specifically disagree with the extensive argumentation that Defendants chose to include in their Petition. By limiting their discussion to the issue now before the Court – whether to entertain this interlocutory appeal – Plaintiffs do not mean to acquiesce in or agree with the arguments on the merits included in Defendants' Petition.

The issues in this case are fairly straightforward: 1) is educational diversity a compelling state interest sufficient to justify race-based discrimination in admissions and, 2) if so, is the University of Michigan's admissions plan narrowly tailored to advance that interest. If this Court disagrees with the trial court on the first question, then the second question is moot, as liability is established. These are important questions, resolution of which will materially advance disposition of the case.

FACTS NECESSARY TO UNDERSTAND THE QUESTION PRESENTED

Procedural History

This requested discretionary appeal from the trial court's December 13, 2001, Summary Judgment Order is expressly authorized by the trial court in its January 30, 2001, Order certifying two issues for appeal pursuant to 28 U.S.C. § 1292(b). "Defendants"[1] have sought permission to appeal pursuant to that order, and the Plaintiffs agree that a discretionary appeal is appropriate.

Plaintiffs will also appeal the trial court's summary judgment order as a matter of right. This order denies injunctive relief to the plaintiffs, rendering it appealable as a matter of right pursuant to 28 U.S.C. § 1292(a)(1). Defendants, Petitioners here, have suggested that the order is not appealable as of right despite the clear language of the statute; discretionary review would be appropriate if the court were to take that view. Additionally, Judge Duggan entered an order dated February 9, 2001, certifying pursuant to FED. R. CIV. P. 54(b) that there was no just reason for delaying entry of judgment on the dismissals of Defendants Bollinger and Duderstadt. Plaintiffs will appeal the judgments subsequently entered by the clerk pursuant to these orders. Therefore, it is particularly important that the present discretionary appeal be allowed, in order (1) to economize the resources

[1] The Petition does not identify the specific parties seeking to appeal and uses a caption with the shorthand "et al." notation that does not identify them. Plaintiffs/Cross-Petitioners assume that all Defendants named as such in the trial court caption, the caption used in this pleading, seek to appeal.

of the parties and the court, and (2) to permit the appellate issues to be decided on their merits without complication by any appellate jurisdictional issues. By granting this appeal, this Court will have unquestionable and plenary jurisdiction over the issues now ripe for appellate review.

ARGUMENT

As the parties recognized in presenting a proposed certification order to the Court below, and as the Court below affirmed in signing it, the trial court's summary judgment order meets the requirements of 28 U.S.C. § 1292(b). That statute provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order; *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

FED. R. APP. P. 5(a)(3) expressly authorizes the court to enter an order, as was done here, certifying an earlier order for appeal. The petitioning defendants made a

timely petition for leave to appeal under 28 U.S.C. § 1292(b) and FED. R. APP. P. 5, and this Cross-Petition is expressly authorized by FED. R. APP. P. 5(b)(2).

There are generally deemed to be three requirements for granting a discretionary appeal under 28 U.S.C. § 1292(b): that the appeal presents a controlling question of law, that there is substantial disagreement on the answer to that controlling question, and that an appeal materially advances the termination of the litigation. As noted below, the first and third of these requirements are closely related. Because the order denying Plaintiffs' motion for partial summary judgment meets these three requirements, discretionary appellate review is appropriate.

1. ***Controlling Question Of Law.*** The questions identified by the district court are "controlling" because they will invariably affect the outcome of the case, and reversal would save time and effort in the district court. 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3930 (2d ed. 1996) ("the better view [is] that a question is controlling, even though its disposition might not lead to reversal on appeal, if interlocutory reversal might save time for the district court, and time and expense for the litigants"); *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319 (9th Cir. 1996) (issue need not be dispositive of entire case to be controlling; only necessary for significant lower court time and effort to be saved).

Judge Duggan's summary judgment order plainly rules upon "controlling questions" of law. Defendants' use of race in their admissions process is not remedial in nature. Therefore, unless "educational diversity" is a

"compelling governmental interest" sufficient to support the use of race in an admissions system, Defendants' admissions system violates the Constitution. Moreover, even if Defendants' purported interest in educational diversity does constitute a compelling governmental interest, which Plaintiffs contest, the extremely heavy weight placed on race by Defendants is unconstitutional unless it is narrowly tailored. Under these circumstances, proceeding with damages trials makes little sense because "controlling issues" of law remain unsettled.

2. *Substantial Grounds For Disagreement.* Whether "educational diversity" is a compelling governmental interest is a matter upon which courts have disagreed. *Compare* Trial Court Order and Opinion (Exs. A & B to Petition); *Smith v. University of Washington Law School*, 233 F.3d 1188 (9th Cir. 2000) *with Hopwood v. Texas*, 78 F.3d 932, 948 (5th Cir. 1996) (educational diversity not a compelling governmental interest); and *Johnson v. Board of Regents of the University System of Georgia*, 106 F. Supp. 2d 1362 (S.D. Ga. 2000). Other courts, without ruling on the issue, have recognized that the question is one upon which reasonable minds can disagree. *McNamara v. City of Chicago*, 138 F.3d 1219, 1222 (7th Cir. 1998) ("Whether [non-remedial] justifications are possible is unsettled"); *Wessmann v. Gittens*, 160 F.3d 790, 796 (1st Cir. 1998) (Court assumes *arguendo*, "but . . . do[es] not decide," that "some iterations of 'diversity' might be sufficiently compelling, in specific circumstances, to justify race-conscious actions").

Another fundamental issue to be resolved on this appeal relates to the trial court's decision that Defendants' admissions system for the years 1999 to the present was "narrowly tailored" to achieve what the trial court found to

be a compelling governmental interest in diversity. In reaching this result, the court erroneously failed to hold the University to its burden on this issue, or conduct the "searching" inquiry that strict scrutiny requires. This issue surrounding the burden of proof is important, and the trial court's erroneous ruling should be corrected before extensive further proceedings are undertaken.

The Supreme Court has repeatedly held that once a plaintiff establishes that governmental action was based on a suspect classification such as race, the government bears the burden of demonstrating that the classification is narrowly drawn to achieve a compelling government interest. *See, e.g., Miller v. Johnson*, 515 U.S. 900, 920 (1995) ("To satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling governmental interest."); *Bernal v. Fainter*, 467 U.S. 216, 227 (1984) ("To satisfy strict scrutiny, the State must show that [the challenged law] furthers a compelling state interest by the least restrictive means practically available."); *Plyler v. Doe*, 457 U.S. 202, 217 (1982) ("With respect to [suspect] classification, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification is precisely tailored to serve a compelling governmental interest."); *University of California Regents v. Bakke*, 438 U.S. 265, 305 (1978) ("We have held that in order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary to the accomplishment of its purpose or the safeguarding of its interests."); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973) ("[S]trict scrutiny means that the State's system is not entitled to the usual presumption of

validity, that the State rather than the complainants must carry a 'heavy burden of justification,' that the State must demonstrate that its [radical classification] has been structured with 'precision,' and is 'tailored' narrowly to serve legitimate objectives and that it has selected the 'less drastic means' for effectuating its objectives.").

Here, after essentially weighing evidence and finding as a matter of fact – and whether the program is narrowly tailored inherently requires assessment of the facts – the trial court found that minor changes to the University of Michigan's program in 1999 rendered it narrowly tailored. Courts have readily found, however, that similar programs in which race is considered are not narrowly tailored. *See, e.g., Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123, 130-33 (4th Cir. 1999); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 705-07 (4th Cir. 1999); *Wessmann v. Gittens*, 160 F.3d 790, 796-800 (1st Cir. 1998). Granting a discretionary appeal in this case will help resolve these areas of disagreement – for these litigants and for others.

3. ***The Appeal May Materially Advance The Termination Of The Litigation.*** Resolution of the questions identified by the district court may materially advance the termination of the litigation. In the event that this Court concludes that the trial court erroneously answered the identified questions, then Defendants' admissions system will be held unconstitutional, sparing the court below from conducting multiple trials under an erroneous legal standard. This requirement is closely connected to the "controlling question" requirement previously discussed. *See P.I.R.G. v. Hercules, Inc.*, 830 F. Supp. 1549, 1557 (D.N.J. 1993) ("The requirement that an appeal may materially advance the ultimate termination of the litigation is closely tied to the requirement that the order involve a controlling question of

law"), *quoting* 16 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 3930. Accordingly, for the same reasons (and by the same authorities) identified in that section, an appeal *may* materially advance the ultimate termination of the litigation. *See also, e.g., Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 203 (1996) (question of whether state, rather than federal, law applied to plaintiff's claims was reviewable under § 1292(b), requiring reversal of trial court's partial summary judgment for defendant); *Winstar Corp. v. United States*, 64 F.3d 1531, 1534 (Fed. Cir. 1995) (grants of partial summary judgment for plaintiffs on their breach of contract claims, where reversal would require claims to be prosecuted under the different standards and potentially different remedies of the Takings Clause, properly appealed pursuant to Section 1292(b)), *aff'd*, 518 U.S. 839 (1996).

CONCLUSION

For all the reasons set forth above, Plaintiffs respectfully request that this Court grant the Cross-Petition for leave to appeal.

Dated: February 22, 2001.

Respectfully submitted,

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Supreme Court of the United States

No. 02-516

Jennifer Gratz and Patrick Hamacher,

Petitioners

v.

Lee Bollinger, et al.

ORDER ALLOWING CERTIORARI, Filed December 2, 2002.

The petition herein for a writ of certiorari before judgment to the United States Court of Appeals for the Sixth Circuit is granted limited to Question 1 presented by the petition.

December 2, 2002

No. 02-516

(16)

Supreme Court, U.S.
FILED
JAN 16 2003

In The
Supreme Court of the United States

JENNIFER GRATZ AND PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Respondents,

and

EBONY PATTERSON, et al.,

Respondents.

On Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Sixth Circuit

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QUESTION PRESENTED

1. Does the University of Michigan's use of racial preferences in undergraduate admissions violate the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), or 42 U.S.C. § 1981?

PARTIES TO THE PROCEEDING

Petitioners are Jennifer Gratz and Patrick Hamacher. They were plaintiffs in the district court and appellants in the court of appeals. They bring this action on their own behalf and petitioner Hamacher also brings it on behalf of a certified class of similarly situated persons.

Respondents are Lee Bollinger, James J. Duderstadt, and The Board of Regents of the University of Michigan. They were defendants in the district court and appellees in the court of appeals.

The following additional respondents were defendant-intervenors in the district court and appellants in the court of appeals:

Ebony Patterson, Ruben Martinez, Laurent Crenshaw, Karla R. Williams, Larry Brown, Tiffany Hall, Kristen M.J. Harris, Michael Smith, Khyla Craine, Nyah Carmichael, Shanna Dubose, Ebony Davis, Nicole Brewer, Karla Harlin, Brian Harris, Katrina Gipson, Candice B.N. Reynolds, by and through their parents or guardians, Denise Patterson, Moises Martinez, Larry Crenshaw, Harry J. Williams, Patricia Swan-Brown, Karen A. McDonald, Linda A. Harris, Deanna A. Smith, Alice Brennan, Ivy Rene Carmichael, Sarah L. Dubose, Inger Davis, Barbara Dawson, Roy D. Harlin, Wyatt G. Harris, George C. Gipson, Shawn R. Reynolds, and Citizens for Affirmative Action's Preservation.

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OPINIONS BELOW

The opinion of the district court (Pet. App. 1a-55a)[1] denying petitioners' request for complete relief is reported at 122 F. Supp. 2d 811. The decision of the district court (Pet. App. 66a-90a) with respect to the arguments of the intervenor-respondents is reported at 135 F. Supp. 2d 790.

JURISDICTION

The district court entered its order on January 30, 2001, and a judgment on February 9, 2001. The case was docketed in the court of appeals as Nos. 01-1333, 01-1416, 01-1418, and 01-1438. Petitioners filed a petition for certiorari before judgment under this Court's Rule 11 on October 1, 2002. The Court granted the petition as to the first of the questions presented in the petition on December 2, 2002, reported at 123 S. Ct. 602. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Equal Protection Clause of Section 1 of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

2. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

---

[1] "Pet. App." refers to the appendix filed with the petition in this case.

3. 42 U.S.C. § 1981 states in pertinent part:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, . . . and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens. . . .

. . . .

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

STATEMENT OF THE CASE

I. Plaintiffs/Petitioners

Plaintiffs and petitioners Jennifer Gratz and Patrick Hamacher applied for admission to the respondent University of Michigan's College of Literature, Science & the Arts (hereinafter "University" or "LSA") in 1995 and 1997, respectively. Pet. App. 109a. Both Gratz and Hamacher were initially placed on a "wait-list" and were subsequently denied admission. *Id.*

Ms. Gratz applied with an adjusted grade point average of 3.8,[2] and an ACT score of 25. *Id.* at. 113a. She was notified by letter dated January 19, 1995, that the LSA had "delayed" a final decision on her application until early to mid-April. The letter also informed Gratz that her application was classified as "well qualified, but less competitive than the students who ha[d] been admitted on

[2] Upon receipt of an application, the University recalculated an applicant's high school grade point average based on the applicant's academic courses from tenth and eleventh grades, plus other factors. Pet. App. 111a-12a.

first review." Pet. App. 109a; App. 73. By letter dated April 24, 1995, the University wrote to Ms. Gratz that "all of the applications have now been reviewed and [the University] regret[s] to inform you that we are unable to offer you admission." Pet. App. 109a; App. 75. She accepted an offer for admission into the freshman class of another institution, the University of Michigan at Dearborn, where she enrolled in the fall of 1995 and graduated in 1999. Pet. App. 109a.

Patrick Hamacher applied in 1996 for admission into the fall 1997 freshman class of the LSA. *Id.* at 109a. He applied with an adjusted grade point average of 3.0, and an ACT score of 28. *Id.* at 115a. By letter dated November 19, 1996, the University informed Mr. Hamacher that it "must postpone" a decision on his application until "mid-April." Pet. App. 109a; App. 77. The letter stated further that "[a]lthough your academic credentials are in the qualified range, they are not at the level needed for first review admission" to the LSA. Pet. App. 109a; App. 77. On or about April 8, 1997, the University informed Mr. Hamacher that after further review, it was unable to offer him admission to the LSA. Pet. App. 109a-10a. He accepted admission into another institution, Michigan State University, where he enrolled in the fall of 1997 and graduated in 2001.

II. The University's Admissions Policies and Practices

The University admits that it uses race as a factor in making admissions decisions and that it is the recipient of federal funds. Pet. App. 108a-09a; App. 46. It justifies its use of race as a factor in the admissions process on one ground only: that it serves a "compelling interest in achieving diversity among its student body." Record 78, Cir. App. 314.[3] Admission to the University is selective,

[3] "Cir. App." refers to the Joint Appendix filed by the parties in the Sixth Circuit in this case.

meaning that many more students apply each year than can be admitted, and the University rejects many qualified applicants. Pet. App. 108a. The University has a policy, however, to admit all qualified applicants who are members of one of three select racial minority groups which are considered to be "underrepresented" on the campus: African Americans, Hispanics, and Native Americans. According to a 1995 document authored by the University:

> . . . [M]inority guidelines are set to admit all students who qualify and meet the standards set by the unit liaison with each academic unit, while majority guidelines are set to manager [sic] the number of admissions granted to satisfy the various targets set by the colleges and schools.
>
> . . . .
>
> Thus, the significant difference between our evaluation of underrepresented minority applicants and majority students is the difference between meeting qualifications to predict graduation rather than selecting qualified students one over another due to the large volume of the applicant pool.

App. 80-81.[4]

The University acknowledges that its consideration of race in the admissions process has the effect of admitting virtually every qualified applicant from any of the designated underrepresented minority groups. Pet. App. 111a; Record 78, Cir. App. 355-56. It generally defines a "qualified" applicant to be one who could be expected, on the basis of the information contained in his or her application, to achieve passing grades as a student in the school to which the applicant has applied for admission. Record 78, Cir. App. 331, 383-84.

[4] "App." refers to the Joint Appendix filed with petitioners' brief on the merits.

The University's Office of Undergraduate Admissions ("OUA") oversees and implements the LSA admissions process. OUA uses written guidelines in effect for each academic year. Pet. App. 110a. Admissions counselors are generally expected to make admissions decisions in accord with the guidelines, although there is some discretion to depart from them, and counselors are expected to discuss any departures with a supervisor. *Id.* at 110a; Record 78, Cir. App. 325, 326, 332, 353.

The guidelines for all the years at issue (1995-2000) vary somewhat because, after commencement of the litigation, the University made changes to them. Discussed below first are the guidelines that were in effect for freshman entering classes for 1995 to 1997, when the suit was filed. Following that is a discussion of the guidelines in effect for 1998 to 2000, when the motions for summary judgment were heard and decided. The parties stipulated that the changes in the guidelines over these years were changes in the "mechanics" only and that there was no substantive change in the University's consideration of race. Pet. App. 116a.

A. Admissions Guidelines for 1995-1997

Written guidelines for all LSA classes commencing in 1995, 1996, and 1997 have in common the use of grids or tables that are divided into cells representing different combinations of small ranges of adjusted high school grade point averages and scores on ACT or SAT tests. Pet. App. 112a, 115a. The grade point averages are adjusted first by clerical employees and second by admissions counselors. *Id.* at 111a-12a. The adjustments made by the admissions counselors are based on application of separate written "SCUGA" guidelines, which result in a score on a four-point scale ("GPA 2") that is represented in the tables for each year. The SCUGA guidelines call for addition or subtraction of points based on the quality of an applicant's high school ("S"), strength of curriculum ("C"), unusual circumstances ("U"),

geographic factors ("G"), and alumni relationships ("A"). *Id.* at 111a-12a.

Each cell in the Guidelines tables includes one or more possible actions for consideration by the admissions counselor reviewing an applicant's file. Generally, the guidelines call for action on an application under one of the following categories: admit, reject, delay (for more information), or postpone (wait-list). The guidelines for applicants in 1995 (which included Jennifer Gratz) have four *separate* tables, one for each of the following groups of applicants: in-state non-minority students; out-of-state non-minority students; in-state minority students; and out-of-state minority students. Pet. App. 112a; App. 121-24. For applicants in 1996 and 1997, there are two tables – one for in-state, and one for out-of-state applicants – with minority and non-minority action codes provided for *separately* in each of the individual cells. The top row of each cell represents the guidelines action for white or non-preferred-minority students, and the bottom rows are for "underrepresented" minority applicants and disadvantaged or other students designated as "underrepresented." App. 137-38, 153-54. The addition of a new "SCUGA" factor for underrepresented minority status in 1997 had another consequence: underrepresented minorities, *solely based on their race*, had one-half point (.5) added to their grade point average calculation used in the already discriminatory guidelines tables. App. 111-12.

The guidelines tables commonly call for different courses of action based on race for applicants whose credentials are in the same cell. Generally, the guidelines calling for admission are found in cells representing relatively higher combinations of adjusted grade points ("GPA 2" or "selection index") and test scores than in cells providing for delay, postpone, or rejection. The guidelines reflect that admissions decisions are generally more competitive for out-of-state than in-state applicants. The guidelines also establish that admissions decisions for whites and non-preferred minorities are generally more

selective (requiring higher GPA 2 and test scores for admission) than admission decisions for the "underrepresented" minority applicants. App. 121-24, 137-38, 153-54.[6]

Admissions data illustrate the consequences of the University's two-track admissions policies. Given comparable grades and test scores, the rates of admission for students from the "underrepresented" racial and ethnic groups are generally much higher than the rates for students from the disfavored racial and ethnic groups. In 1995, for example, students from the "underrepresented" minority groups whose grades and test scores placed them in the same cell as Jennifer Gratz (GPA of 3.80-3.99 and ACT of 24-26) had an admission rate of 100%. Record 79, Pl.Exh. GG, Cir. App. 590. For that same combination of grades and test scores a total of 378 "Not Underrepresented" students applied, while only 121 were offered admission. *Id.* The 1996 data convey similar information. Record 79, Pl.Exh. LL, Cir. App. 595; Record 79, Pl.Exh. MM, Cir. App. 596.

Under the 1995-1997 guidelines (and in 1998), the University admitted all qualified applicants from the "underrepresented" minority groups as soon as possible, without deferring or postponing (waitlisting) their applications. Pet. App. 114a-15a. Students from other racial groups, like Jennifer Gratz and Patrick Hamacher, could have their applications deferred or postponed. In a change initiated after commencement of the lawsuit, however, beginning with the 1999 entering class, the University abandoned its approach of "immediately" admitting all qualified "underrepresented" minority students. Instead, admissions counselors were permitted to "flag" for later consideration a file that fell into certain established classifications. *Id.* at 117a. One of those classifications consisted of qualified "underrepresented" minority students meeting a designated selection index score. *Id.*

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[6] In some cases, the guidelines called for automatic rejection based on low grades or test scores. "Underrepresented" minorities, however, were never rejected automatically. Pet. App. 46a.

For years 1995-1998, defendants also "reserved" or "protected" spaces in the class for members of certain groups of students, including students from one of the three "underrepresented" minority groups. *Id.* at 114a-15a. According to the University, "as applicants from a particular group are admitted over the course of the admissions season, the protected spaces reserved for that group are used." Record. 78, Pl.Exh. I, Cir. App. 319. If the pool of qualified applicants from these "underrepresented" minority groups never reached the number of "protected spaces," those slots "opened up" and could be filled by students who were not members of one of the "underrepresented" racial groups. Record 78, Pl.Exh. H, Cir. App. 310.

B. Admissions Guidelines for 1998-2000

The University dispensed with the grids after commencement of this lawsuit. The 1998 guidelines instead used a "selection index" calculated on a variety of factors and scored on a scale of up to 150 points. Pet. App. 33a; App. 173, 181-97. For example, the 1998 guidelines actions to be taken on an application are divided linearly as follows: 100 to 150 points (admit); 95-99 points (admit or postpone); 90-94 points (postpone or admit); 75-89 points (delay or postpone); 74 points and below (delay or reject). App. 173.

The factors used to calculate an applicant's "selection index" under the 1998 guidelines are similar to factors used in prior years. Up to 80 points can be based on high school grade point average (*e.g.*, 40 points for a 2.0 GPA; 60 points for a 3.0; and 80 points for a 4.0). App. 197. Up to 12 points, representing a perfect ACT/SAT score, can be earned for performance on either of the two standardized tests; up to 10 points for quality of school; from 8 to -4 points for strength or weakness of high school curriculum; 10 points for in-state residency; 4 points for alumni relationships; 1 point for an outstanding essay (changed to 3 points beginning in 1999); and 5 points for personal achievement or leadership on the national level. *Id.* Under a "miscellaneous" category, a flat 20 points are added for one of several factors, including an applicant's membership in an

"underrepresented" racial or ethnic minority group. Pet. App. 116a; App. 195, 197.

The University adopted the 1998 guidelines with the intent to admit and enroll the same composition of class as had been admitted and enrolled under the previous guidelines. Pet. App. 34a; App. 277. The change was not intended to increase or decrease the extent to which race and ethnicity was considered in the admissions process from prior years. Record 78, Pl.Exh. J, Cir. App. 339; Record 78, Pl.Exh. K, Cir. App. 365. The University continued to use the 150-point selection index system for years 1999 and 2000 (the year the district court heard the motions for summary judgment). Pet. App. 117a.

III. Proceedings Below

A. The District Court

Plaintiffs commenced this action in October 1997. The district court certified a class of plaintiffs, pursuant to Federal Rule of Civil Procedure 23(b)(2), in an opinion and order filed December 23, 1998. App. 52-71. It also agreed to bifurcate determination of liability and damages, with liability to be decided first. *Id.* at 71. The district court heard the parties' motions for summary judgment on November 16, 2000. In an opinion filed on December 13, 2000, and order filed on January 30, 2001, the district court granted plaintiffs' motion for summary judgment with respect to declaring the University's admissions system for years 1995-1998 unlawful, Pet. App. 3a; granted the University's motion for summary judgment with respect to defendants' 1999 and 2000 admissions systems and plaintiffs' claim for injunctive relief, *id.*, and granted the University's motion for summary judgment on plaintiffs' claims against the individual defendants asserted under 42 U.S.C. § 1983. *Id.* at 4a. In a separate opinion filed on February 26, 2001, *id.* at 66a-90a, the district court rejected the arguments of the intervenors for justifying the University's racial preferences.

In its December 13, 2000, opinion, the district court concluded that diversity was a compelling interest. *Id.* at 14a-32a. In explaining its reasoning, the district court stated that it did "not necessarily agree" with the Ninth Circuit's conclusion in *Smith v. University of Washington, Law Sch.*, 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001) that Justice Powell's analysis was the "narrowest" rationale for the holding of this Court by application of the analysis approved in *Marks v. United States*, 430 U.S. 188, 193 (1977). Pet. App. 17a. Nonetheless, the district court added that it "reache[d] the same ultimate conclusion as the Ninth Circuit, *i.e.*, that under [*Regents of University of California v. Bakke*, 438 U.S. 265 (1978)], diversity constitutes a compelling governmental interest in the context of higher education justifying the use of race as one factor in the admissions process, albeit through somewhat different reasoning." *Id.* at 17a.

The district court held that the admissions policies for years 1995-1998 were not narrowly tailored, *id.* at 43a-48a, but that the policies in effect in 1999 and 2000 (when the motions for summary judgment were argued) were narrowly tailored, *id.* at 34a-43a. It reached this bifurcated result by concluding that there were substantive differences in the policies for these two time periods. The conclusion contradicted the parties' stipulated fact that the substance of defendants' consideration of race had *not* changed over these years. *Id.* at 116a.

B. The Court of Appeals

All parties appealed some part of the district court's orders and judgments. The district court had entered an order dated January 30, 2001, which both effectuated the decisions made in the December 13, 2000, opinion and made the necessary findings pursuant to 28 U.S.C. § 1292(b). The University filed a petition, and plaintiffs filed a cross-petition, seeking permission to appeal from the January 30, 2001 order. The Sixth Circuit granted both requests for permission to appeal by order dated

March 26, 2001. The two appeals were docketed in the court of appeals as appeal numbers 01-1416 and 01-1418.

Plaintiffs also filed as a matter of right, pursuant to 28 U.S.C. § 1292(a), an appeal from the district court's summary judgment dismissing the plaintiff class's request for injunctive relief. In the same appeal, plaintiffs sought review as a matter of right, pursuant to 28 U.S.C. § 1291, of the district court's final judgment (for which it had directed entry pursuant to Rule 54(b)) dismissing their claims against the individual defendants in their individual capacities on grounds of "qualified immunity." This appeal was docketed as appeal number 01-1333.

A fourth appeal was filed by the intervenors with respect to the decision of the district court rejecting the intervenors' proffered justifications for the University's use of racial preferences in admissions. This appeal was docketed as appeal number 01-1438.

In May 2001, plaintiffs filed in the court of appeals a petition for initial hearing *en banc*, which was eventually granted on October 19, 2001, as was such a petition in *Grutter v. Bollinger*, 288 F.3d 732, 757 (6th Cir.), *cert. granted*, 123 S. Ct. 617 (2002) (No. 02-241). The order is contained in the appendix to plaintiffs' petition for writ of certiorari at Pet. App. 100a-102a, and is reported at 277 F.3d 803. The court of appeals heard argument separately on both cases on December 6, 2001. On May 14, 2002, the court of appeals issued its 5-4 decision in *Grutter v. Bollinger*. In the opinion, the court of appeals stated that it would separately render its decision in this case in a "forthcoming" opinion. *See Grutter v. Bollinger*, 288 F.3d at 735 n.2. On October 1, 2001, because no opinion had been issued in this case, plaintiffs petitioned the Court pursuant to Rule 11 for a writ of certiorari before judgment. That petition was granted on December 2, 2002 with respect to the Question Presented herein. App. 327.

SUMMARY OF ARGUMENT

The University has not met its heavy burden of justifying the racial preferences that it employs in student

admissions. The large, mechanical preferences given for all years at issue to members of specified racial or ethnic groups that the University deems to be "underrepresented" on the campus are not narrowly tailored to achieve a compelling purpose, or any purpose except racial balancing. Although the University purports to employ the preferences on the authority of Justice Powell's opinion in *Regents of University of California v. Bakke*, 438 U.S. 263 (1978), they cannot be upheld on that basis.

The automatic award of a fixed preference to every member of a specified racial or ethnic group is nothing like what Justice Powell approved in *Bakke*. Indeed, he rejected the systematic award of preferences, based solely on race or ethnicity, that the University's preferences entail. Justice Powell voted to strike down the quota system under consideration in *Bakke*. He made clear that there is more than one way to operate a quota, and the University's system is certainly the functional equivalent of one. This is true for all the multiple forms that the preferences have taken, both before and after commencement of the suit. Their common denominator is the maintenance of a race-based double standard in admissions. The purpose and effect of the University's policies is to admit all "qualified" members from the preferred minority groups, while requiring "qualified" applicants from all other groups to compete for the scarce places remaining in the class. These preferences are certainly more potent than those struck down in *Bakke*, in which many qualified minorities were rejected, and in which the preference was confined to disadvantaged members of the designated minority groups.

Similar considerations demonstrate that the University's preferences are unlawful in light of the factors that the Court's other precedents have considered important to the narrow-tailoring analysis. The preferences are of unlimited duration; the assumption that diversity of viewpoints and perspectives will be achieved by selecting students based on their race amounts to impermissible stereotyping; and race-neutral alternatives to the preferences have not been meaningfully considered.

While intellectual diversity can be obtained through race-neutral means, namely through looking for such diversity directly, rather than through using race as a proxy, an interest in diversity is neither a compelling state interest, nor one suited to narrowly-tailored means consistent with this Court's precedents. The Court did not recognize an interest in diversity as a compelling justification for racial preference in *Bakke*, as only Justice Powell endorsed it as such. His rationale, derived from principles of "academic freedom," finds no support in the Court's cases on that subject.

The Court's precedents subsequent to *Bakke* have in fact rejected some of the premises upon which Justice Powell's rationale would grant discretion to educational institutions to consider race in admissions. These precedents have established standards for judging whether an interest is compelling. They are standards that an interest in diversity cannot possibly pass. The interest has no principled limits, particularly when, as the University argues, the scope of the interest, and the types of diversity to be sought, are subject to the discretion and judgment of those who will employ the preferences. The interest is at least as amorphous and indefinite as other interests rejected as compelling, such as remedying the effects of societal discrimination or providing role models to children. This is so whether or not such interests also produce benefits, educational or otherwise.

The University's unbridled use of race and ethnicity in making admissions decisions belies its claim that it has relied on anything contained in *Bakke* to justify its preferences. It is settled law that race and ethnicity can be used only when necessary to achieve a compelling interest, and then only through narrowly-tailored means. As this and other litigated cases demonstrate, there is no principled, limited, workable way that race and ethnicity can be used to achieve an interest in diversity consistent with constitutional standards.

To justify the use of race and ethnicity as considerations in admissions on the basis that diversity is a compelling interest would be to make a substantial and dramatic break from this Court's articulated equal-protection principles. It would infringe on fundamental rights protected by the Fourteenth Amendment and the other civil rights statutes at issue here.

ARGUMENT

The University of Michigan's Use of Racial Preferences in Undergraduate Admissions Violates the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), and 42 U.S.C. § 1981.

> [R]acial discriminations imposed by law, or having the sanction or support of government, inevitably tend to undermine the foundations of a society dedicated to freedom, justice, and equality. The proposition that all men are created equal is not mere rhetoric. It implies a rule of law – an indispensable condition to a free society – under which all men stand equal and alike in the rights and opportunities secured to them by their government.
>
> **– Brief *Amicus Curiae* of the United States (1952)**[6]
>
> [R]ace is a defining characteristic of American life.
>
> **– Brief of the University of Michigan (1999)**[7]

[6] Brief *Amicus Curiae* of the United States (1952) filed in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), *quoted in* 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT 118 (Philip B. Kurland & Gerhard Casper eds. 1975).

[7] Record 81, Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment and Memorandum in Support of Defendants' Cross-Motion for Summary Judgment (May 3, 1999).

The issues framed by this case present two fundamentally different visions of our country and hold out opposing prospects for its future. One seeks to realize "[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505-06 (1989). The other is based on a view not only that "race matters,"[8] but also that race *should* matter in the government's treatment of individuals, now and indefinitely into the future. The "lesson of the great decisions" of this Court is to embrace the first of these visions and to resolutely repudiate the latter. *See* ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 133 (1975).[9] Petitioners return to this lesson in asking the Court to invalidate the University's program of racial preferences.

The University has repeatedly made the remarkable assertion that we are "as racially separate today as . . . before *Brown v. Board of Education*, the Civil Rights Act of 1964 and the Voting Rights Act of 1965."[10] Although the statement is certainly false, it should not be surprising that race continues to divide us when official government action tolerates, sponsors, and perpetuates enduring

[8] *See, e.g.*, "Questions and Answers about the Lawsuit Against the University of Michigan Law School," http://www.law.umich.edu/newsandinfo/lawsuit/qanda.htm.

[9] *See also* William Van Alstyne, *Rites of Passage: Race, The Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 797 (1979) ("This judicial resolve to remove the race line from our public life has been the most credible and admirable position for the Court steadfastly to maintain. . . . ").

[10] Final Brief of Appellees 36 (July 31, 2001).

division and different treatment based on race. To the extent that the University's pessimistic view that "your skin color determines . . . where you live, where you go to work, and with whom you work"[11] is true, it is a reason for government to rededicate itself to a commitment to the principle of non-discrimination. It is certainly *not* a reason or justification for government itself to make decisions about individuals because of their race or "skin color."

It is because racial and ethnic classifications "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943), that we can "tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons," *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995), and that the means employed must also be necessary, *i.e.*, "narrowly tailored" to achieve the compelling interest. *Id.*

Governmental commitment to the principle of non-discrimination does not mean that government is disabled from recognizing identified race discrimination and acting to remedy it. Accordingly, the Court has recognized a compelling interest in remedying such discrimination through narrowly-drawn means. *Id.* at 227; *J.A. Croson Co.*, 488 U.S. at 509. But that is an interest entirely different from one that values an individual more or less than another because of his or her race or ethnicity. The University does the latter when it uses race and ethnicity as factors in deciding who among the many individuals applying for admission receives one of the limited spaces in the class. It has never justified its racial preferences on the grounds of remedying past or present identified discrimination. *See* Pet. App. 74a. Instead, its stated purpose for considering race in the admissions process is

[11] Statement of current University of Michigan President Mary Sue Coleman, http://www.umich.edu/%7Enewsinfo/Releases/2002/Dec02/r120202.html#coleman.

the achievement of "diversity" in the composition of the class.

Inherent in the concept is the notion that one student will make a greater or lesser contribution to the class because of his or her race or ethnicity. If such a view is accepted, it must be because one can make certain legitimate and relevant assumptions about an individual based on racial and ethnic characteristics. This view should not be tolerated as a justification for racial preferences. *See Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 615 (1990) (O'Connor, J., dissenting) (noting that "the interest in diversity of viewpoints provides no legitimate, much less important, reason to employ race classifications *apart from generalizations impermissibly equating race with thoughts and behavior*") (emphasis added). *Cf. Miller v. Johnson,* 515 U.S. 900, 912 (1995) (noting that race-based assignment of voters may "embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts – their very worth as citizens – according to criterion barred to the Government by history and the Constitution") (quoting *Metro Broadcasting, Inc.*, 497 U.S. at 604 (opinion of O'Connor, J., dissenting)).

The interest in diversity that the University asserts in justification of its racial preferences is based on stereotypes. It looks to use race as a proxy for genuine intellectual diversity that can be found directly in the different outlooks, backgrounds, experiences, and talents of each unique individual. It is not an interest that the Court has ever recognized as a compelling governmental justification for racial preferences. The lone opinion of Justice Powell in *Regents of University of California v. Bakke,* 438 U.S. 265 (1978), did not establish for the Court a recognized compelling state interest in diversity. The Court's subsequent precedents furnish standards against which the claims for the diversity interest can be measured. What emerges from an analysis of these cases is the conclusion that diversity as a basis for employing racial preferences is simply too open-ended, ill-defined, and indefinite to constitute a compelling interest capable of supporting narrowly-tailored means. Because the interest in diversity

is not tied to remedying identified violations of the equality guarantee, it is limited only by the standardless discretion of educational institutions, each making its own choices about the kind of racial and ethnic mix, or diversity, that it desires. *See, e.g.*, *Grutter v. Bollinger*, 288 F.3d 732, 751 (6th Cir. 2002) (noting that "some degree of deference must be accorded to the educational judgment [of schools] in its determination of which groups to target").

The University's use of racial preferences is a case study in their dangers and the reasons why they cannot be constitutionally justified by an interest in diversity. The preferences treat applicants not as unique human beings, but instead as members of discrete racial and ethnic enclaves. Bare racial and ethnic status is enough to qualify or disqualify an applicant for substantially different treatment and outcomes in the admissions process.

Moreover, the University's actual use of racial preferences on a rationale never accepted by the Court as compelling does not remotely resemble the kind of consideration of race and ethnicity that Justice Powell endorsed in *Bakke*. Far from relying on Justice Powell's approach, the University has ignored and even repudiated it. In a number of respects, it operates the kind of "two-track" or "dual" admission system, *Bakke*, 438 U.S. at 315 (opinion of Powell, J.), that Justice Powell's analysis and the result in *Bakke* forbid. The means employed by the University also embody clear departures from principles laid down by the Court's more recent precedents.

Having failed to meet its heavy burden of proving that its use of racial preferences is narrowly tailored to achieving a compelling state interest, the University has violated plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment and Title VI, 42 U.S.C. § 2000d.[12]

[12] The Court has held that Title VI prohibits only that conduct prohibited by the Equal Protection Clause, so that the same strict-scrutiny analysis applies to plaintiffs' Title VI claims. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 285-86 (2001).

The University's preferences also violate plaintiffs' rights under 42 U.S.C. § 1981, which forbids discrimination on the basis of race in contracting, including contracts for educational services. *See* discussion *infra* at 49.

I. The University's Use of Racial Preferences Demonstrates Defiant Resistance to This Court's Precedents.

In defending its rigid, mechanical racial preferences on the asserted ground that they comport with Justice Powell's strictures on the use of race in admissions as set forth in his opinion in *Bakke*, the University in fact mocks that opinion. What Justice Powell *alone* wrote about academic freedom and diversity as justifications for the consideration of race in admissions processes, the University reads broadly as an endorsement by the Court. Yet what a *majority* actually decided with respect to the admissions program *struck down* in *Bakke*, the University treats as if the analysis was good for that case only. The means employed by the University through its use of racial preferences are manifestly unlawful under *Bakke* as well as the Court's subsequent precedents. *See, e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Because the University has the temerity to defend its egregious preferences on the basis of Justice Powell's opinion in *Bakke*, it is instructive to begin there.

A. In *Bakke*, the "special admissions program" of the University of California Medical School at Davis ("Davis") reserved 16% of the places in the first-year class for members of specified racial and ethnic minorities who were educationally or economically disadvantaged. *Bakke*, 438 U.S. at 275 (opinion of Powell, J.). Like the University's admissions system, the Davis program operated on a "rolling" admissions basis, *i.e.*, applications were acted on throughout the admissions season. *Id.* Also like the University, Davis reserved places in the class only for "qualified" members of the designated minority racial groups. Many more minority students applied for the program than there were available spaces, and most

minority applicants were rejected under both the special and regular admissions programs. *Id.* at 275-76 & n.5. The program was also "flexible" insofar as there was no "floor" or "ceiling" on the total number of minority applicants to be admitted. *Id.* at 288 n.26. That is, Davis did not use all the reserved seats for disadvantaged minority students if there was an insufficient number of such applicants who qualified. *Id.* Five Justices, including Justice Powell, held that the Davis program unlawfully considered race in the admissions process. *Id.* at 320 (opinion of Powell, J.); *id.* at 421 (opinion of Stevens, J., joined by Burger, C.J., Stewart, and Rehnquist, JJ.). Another group of five Justices, also including Justice Powell, reversed the judgment of the California Supreme Court enjoining Davis from using race under any circumstances. *Id.* at 320 (opinion of Powell, J.); *id.* at 326 (opinion of Brennan, J., joined by White, Marshall, and Blackmun, JJ.). No one theory, though, explained for what purposes race could be used.

Justice Powell's vote to invalidate the Davis program made for a majority since four other Justices in *Bakke* decided on different grounds that race could not be considered in the admissions process. Because Justice Powell's analysis allowed for some consideration of race, what is *prohibited* in the consideration of race under his analysis is prohibited by a majority of the Court in *Bakke*. This is so independent of any assessment about whether his articulation of *permissible* uses of race states a rationale for a holding of the Court on the basis of a differently constituted majority.

Although the Davis program involved the "reservation of a specified number" of spaces in the class for disadvantaged members of designated racial and ethnic minorities, Justice Powell's discussion of the *limitations* on the use of race was not confined to such programs. In approving of the use of race as a "plus" factor to achieve the kind of diversity that he believed was a legitimate goal, *id.* at 317, Justice Powell made clear that the kind of program he might approve was one in which the race or ethnicity of an applicant would be (in Justice Powell's formulation)

"weighed fairly and competitively" along with other factors. *Id.* at 318.

Justice Powell repeatedly made the point that in assembling a diverse or heterogenous student body, race or ethnicity was a factor that could be considered on an individualized, case-by-case basis, rather than in a systematic, generalized fashion. Thus, he reasoned that "race or ethnic background may be deemed a 'plus' in a *particular* applicant's file. . . . The file of a *particular* black applicant may be examined for his potential contribution to diversity without the factor of race being decisive." *Id.* at 317 (emphasis added).

While the Davis formal quota was unlawful under these principles, there are a number of ways in which the University's preferences are even more egregious than those of the Davis program. The University grants a large preference for race and ethnicity automatically and mechanically. The preference requires no showing other than membership in one of the preferred racial or ethnic groups. This is true for all years at issue. Thus, for example, in years 1995-1997, having a specified racial or ethnic identity (African American, Hispanic, or Native American) was alone sufficient ground for having admissions decisions made under written guidelines separate from, and generally less selective than, guidelines applicable to all other races and ethnicities. Beginning with the entering class in 1998, mere possession of the specified racial or ethnic status has been enough to entitle an applicant automatically to 20 points out of a total of 150 (with 95 to 100 points generally sufficient for admission). Thus, for example, two students who each earn 75 to 80 points before the consideration of race can expect to have dramatically different admissions outcomes *because of race* if only one of them is an "underrepresented" minority. The existence of a "two-track" system could not be more apparent.

The Davis program, in contrast, limited the preference, *i.e.*, eligibility for consideration in its special admissions program, to "economically and/or educationally

disadvantaged" members of the specified minority groups. *Id.* at 274 & n.4. Indeed, Justice Brennan and those Justices who joined his opinion, found it significant that Davis did not "equate minority status with disadvantage." *Id.* at 377 (opinion of Brennan, J.). The rote granting of the preference is also the antithesis of the "individualized," and "case-by-case" basis on which Justice Powell thought an institution could decide that "race or ethnic background may be deemed a 'plus' in a *particular* applicant's file." *Id.* at 317, 319 n.53 (opinion of Powell, J.) (emphasis added). Under its system of preferences, the University does not need to know *anything* about an applicant – not his or her background, interests, experiences, achievements, academic or other credentials – other than race and ethnicity before awarding the flat 20 points for those characteristics.[13] Hence, the University's racial and ethnic preferences are unlawful under *any* of the rationales articulated in *Bakke*.

Another respect in which the University's preferences are far more extensive and sweeping (and hence less narrowly tailored) than those invalidated in *Bakke* is that the purpose and effect of the University's preferences is to admit all "qualified" applicants from the designated racial and ethnic groups, while "qualified" students of all other races must compete for the limited seats in the class. App. 80-81; Pet. App. 46a. Like the formal quota in *Bakke*, the

[13] In its brief in the court of appeals, the University crystallized the nature of its systematic, rather than particularized, case-by-case, consideration of race: "To enroll meaningful numbers of minorities, *every* underrepresented minority receives a 'plus' for race." Final Brief of Appellees 55 n.32 (July 31, 2001) (emphasis added). The University has thus inverted the Constitution's "'command that the Government must treat citizens "as individuals, not 'as simply components of a racial . . . class.'"'" *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (quoting *Metro Broadcasting, Inc.*, 497 U.S. at 602 (O'Connor, J., dissenting) (quoting *Arizona Governing Comm. For Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1083 (1983))).

dual standard employed by the University insulates members of the preferred racial and ethnic groups from competition from members of the disfavored racial groups. If admissions standards are lowered for some racial and ethnic groups so that merely being "qualified" virtually assures admission, then in no true sense can it be said that these students compete for admission against *anyone*, much less against students from other racial and ethnic groups. In this feature, the University's preference can be said to constitute a form of a 100% quota, worse than the Davis quota, which was capped not by the total number of qualified minorities who applied, but by the 16 reserved spaces in the class. *See Metro Broadcasting, Inc.*, 497 U.S. at 630 (O'Connor, J., dissenting) ("There is no more rigid quota than a 100% set-aside.").

In the district court, the University sought to limit the prohibitions of *Bakke* to "fixed" or "rigid" quotas or programs in which "unqualified" students were admitted as a result of the preferences. Record 81, Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment and Memorandum in Support of Defendants' Cross-Motion for Summary Judgment 39-47 (May 3, 1999). Of course, *Bakke* did not even present the second issue for consideration; the program was struck down despite the fact that only "qualified" applicants were eligible for admission under the special admissions program. *Bakke*, 438 U.S. at 288-89 & n.26 (opinion of Powell, J.). The University's program of preferences is not saved, therefore, merely by establishing that it only admits "qualified" applicants through use of its preferences. This attribute becomes particularly meaningless in light of the highly competitive nature of the admissions program for all other students, for whom being merely "qualified" is not a sufficient condition for admission.

In trying to limit *Bakke* to prohibiting only "fixed" or "rigid" quotas, the University ignores what Justice Powell actually wrote. A system of racial preferences that "operate[d] as a cover for the functional equivalent of a quota" cannot withstand scrutiny. *Baake*, 438 U.S. at 318. This is the only result that makes any sense unless questions of

constitutional violations are to be reduced to an exercise in formalism. Among the things that Justice Powell condemned about the Davis quota was that it set up a race-based "two-track" or "dual admissions" program, in which "simple ethnic diversity" provided the criteria for the dividing line between the two systems. There is more than one way to accomplish those illegitimate objectives, and the University demonstrates that there are many.

The University's racial preferences are quite literally as well as functionally "two-track" or "dual." The University's employment of *separate* standards of admission for the "underrepresented" minorities and all other groups is the *sine qua non* of a dual system. It makes no difference whether the substantive separateness is reflected tangibly, as on separate pages of the race-based grids in use for 1995, or visually, as when the different guidelines were combined on the same page (1996-1997). The inherent separateness continued, moreover, with the adoption of the 150-point selection-index system beginning with the 1998 class. Indeed, the selection index was statistically designed by the University so that it "simply captured the same outcomes produced by the prior [grid] system." Record 81, Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment and Memorandum in Support of Defendants' Cross-Motion for Summary Judgment at 20 (May 3, 1999); *see also* Pet. App. 34a; App. 277. It would again be a triumph of form over substance to find a constitutionally significant distinction between the systems operated by Davis and the University in that the former accomplished its purposes through a separate admissions committee. Separate admissions committees are simply unnecessary when separate admissions standards are employed instead. For adherence to constitutional standards to turn on such manipulations would be pure farce. It is untenable, therefore, to conclude both that grids are impermissible and that the selection index derived from the grids is not.

Accordingly, the district court was certainly correct in concluding that the admissions systems for years 1995-1998 were impermissible. But it was wrong to imply that a

dispositive difference exists between those years and 1999 and 2000 because of the use in the earlier years of reserved seats and formally segregated waiting lists. Both are indeed egregious practices, which the University still steadfastly defends. By themselves, they would justify striking down the policies in effect during the years when they were employed. The changes in the 1999 and 2000 admissions program cannot, however, justify the district court's conclusion that those programs are lawful. The programs maintain the same rigid racial and ethnic categories for the preference as the earlier years. The award of preference through 20 points added for race and ethnicity is just as automatic and mechanical as when the same award of points was made in 1998 and when separate admissions outcomes were plotted on "grids" in 1995, 1996, and 1997. The large number of points awarded for racial and ethnic status has remained unchanged, and there have been no significant changes in relative size of the point-based preference. Thus, the 20-point award remains the equivalent of a full grade point on the scale, effectively transforming by University fiat a "B" student into an "A" student for purposes of the admissions decision. It is more than would be assigned to a student who achieved a *perfect* ACT or SAT score and who also received points for outstanding "personal achievement" or "leadership service." Whatever it means for race or ethnicity to be considered "competitively" or "weighed fairly" in the admissions process, *Bakke*, 438 U.S. at 318 (opinion of Powell, J.), it certainly cannot mean this.

The district court expressed the view that there was nothing wrong with the University's award of 20 points because points were awarded for other factors as well. Pet. App. 39a. The argument has no force for several reasons. It recognizes no limit on the size of the preference relative to other factors that receive points, thus nullifying whatever Justice Powell meant when he wrote about race and ethnicity being "weighed fairly" and "competitively." It also ignores the fact that the points in the selection index, including the 20 points for race, were chosen for a reason – to "admit the same class as if using [the] old [grid] method."

App. 277. The University has simply demonstrated what Justice Brennan accurately perceived:

> There is no sensible, and certainly no constitutional, distinction between, for example, *adding a set number of points* to the admission rating of disadvantaged minority applicants as an expression of the preference with the expectation that this will result in the admission of an approximately determined number of qualified minority applicants and setting a fixed number of places for such applicants as was done [at Davis].

Bakke, 438 U.S. at 378 (opinion of Brennan, J.) (emphasis added). Justice Powell implicitly acknowledged that circumstances could arise in which Justice Brennan's view was correct, *i.e.*, that a university "would operate" its admissions policy as a "cover for the functional equivalent of a quota system." *Id.* at 318 (opinion of Powell, J.). He just did not believe courts should assume that educational institutions would act in such a manner. In this case, the undisputed evidence *proves* that the University has so acted.

As Justice Powell explained, a "two-track" race-based system does not become legitimate by expanding it into a "multi-track program." *Id.* at 315. By the same reasoning, a point-based admissions system like the University's, which can effectively achieve the same results as a formal race quota, is no less effective as such merely because it awards points for other factors as well. So the University's large and statistically determined preference cannot be successfully defended on the ground that race is not the *only* factor that receives consideration.

Justice Powell described the Davis special admissions program as one impermissibly "focused *solely* on ethnic diversity." *Id.* Notably, he applied this description to the *special admissions program*, not to admissions as a whole. Moreover, he described it so even though the special admissions program was limited to *disadvantaged* minorities, and then only to those disadvantaged minorities who were "qualified," meaning Davis also paid some attention

to academic criteria, such as grades and test scores. Indeed, applications to the special admissions program were rated "in a fashion similar to that used by the regular committee," which considered the "candidate's overall grade point average, grade point average in science courses, scores on the Medical College Admissions Test (MCAT), letters of recommendation, extracurricular activities, and other *biographical* data." *Id.* at 274-75 (emphasis added).

Compared to the Davis special admissions program, the University's system of racial and ethnic preferences is no less focused "solely" on race and ethnicity. The University's racial and ethnic preferences are *purely* defined by race and ethnicity, and this is no less true simply because the University weighs other factors in the admission process, as did Davis, both for "underrepresented" minority applicants and all other students. Each among the multiplicity of these preferences employed over the years has been designed to achieve one thing only: "simple ethnic diversity." *Id.* at 315. This is true for the complete litany: the articulated double standard for "qualified" students from the designated minority groups versus "qualified" students from other groups; the grids; the half-point added on the basis of race to the grade point calculation in 1997; the "protected" spaces in the class, the segregated waiting lists, the 20-point selection-index award, and the eligibility on the basis of race and ethnicity for "flagging" in the wait-list pool. To Justice Powell, "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake . . . [which] the Constitution forbids." *Id.* at 307. The University's regime of preferences defined exclusively on the basis of race and ethnicity do just that.

B.1. The unlawfulness of the University's racial preferences for all years is manifest also when viewed in light of the traditional factors that this Court has looked to for assessing whether a program of racial preferences is narrowly tailored to achieve a compelling interest. *See, e.g., J.A. Croson Co.*, 488 U.S. at 507-08; *United States v.*

Paradise, 480 U.S. 149, 171 (1987). The preferences are of unlimited duration. The University has provided no termination date, and it offers no standards for judging when the preferences should come to an end. A consistent thread running throughout the Court's precedents on race-based means is the insistence that they be *temporary* departures from the rule of equal treatment. *See, e.g., J.A. Croson Co.*, 488 U.S. at 510 ("Proper findings . . . defin[ing] both the scope of the injury and the extent of the remedy . . . serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.").

Even for preferences subject to less exacting review than demanded for race-based classifications under the Equal Protection Clause, the Court has emphasized the importance of the temporary nature of the preferences. *See, e.g., United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979) (Title VII) ("Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance."); *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 618 (1987) (gender discrimination) ("[a]gency's express commitment to 'attain' a balanced work force" ensures that plan will be of limited duration). Because the University's preferences must satisfy the higher and most exacting standard imposed by the Fourteenth Amendment, it is manifest, *a fortiori*, that the absence of temporal limits for the University's racial and ethnic preferences is fatal to their constitutionality.

2. There is also no demonstrated relationship or closeness of fit of means to ends. Although the asserted purpose of the preferences is to achieve the purported educational benefits of diversity, nowhere has the University met its burden of demonstrating how much diversity is necessary to reach the "critical mass" that achieves those benefits, or how much of a preference (*e.g.*, how many points on the selection index) must be given to reach the undefined level of diversity or critical mass. Nowhere does the University demonstrate what the marginal

benefits of increased diversity are compared to what these benefits would be in a system that did not employ racial preferences. *See, e.g., Grutter v. Bollinger*, 288 F.3d at 803-08 (Boggs, J., dissenting). The absence of evidence on these points is not surprising given that the preferences cannot be said to be reasonably related to any goal other than maximizing the presence in the class (admitting virtually all "qualified" applicants) from the groups singled out for preferential treatment. The focus on the three groups deemed by the University to be "underrepresented" on the campus is indistinguishable from "outright racial balancing." *J.A. Croson Co.*, 488 U.S. at 507; *see also Wessmann v. Gittens*, 160 F.3d 790, 799 (1st Cir. 1998) (invalidating racial preferences in assignment of students to public middle schools) ("Underrepresentation is merely racial balancing in disguise – another way of suggesting that there may be optimal proportions for the representation of races and ethnic groups in institutions."); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 352 (D.C. Cir. 1998) (invalidating FCC regulations imposing race-based diversity obligations on license holders) ("The very term 'underrepresentation' necessarily implies that if such a situation exists, the station is behaving in a manner that falls short of the desired outcome.").

The poor fit of means to ends is also shown in the grant of preferences on mere showing of an applicant's racial or ethnic status, while the asserted benefits of the diversity objective are found in the background, experiences, and outlooks brought to the University by members of the "underrepresented" groups. The University uses race as a "proxy" for the "views that it believes to be underrepresented" in the student body. *Metro Broadcasting, Inc.*, 497 U.S. at 621 (O'Connor, J., dissenting). The preferences "directly equate race with belief and behavior, for they establish race as a necessary and sufficient condition for securing the preference." *Id.* at 618. The assumption that the students from particular racial and ethnic groups will bring to the school viewpoints, experiences, ideas, and perspectives that the University considers unique to

them merely on account of their membership in a racial or ethnic category is an offensive stereotype. The "corollary" to the University's notion of diversity "is plain: Individuals of unfavored racial and ethnic backgrounds are unlikely to possess the unique experiences and background that contribute to viewpoint diversity." *Id.* at 619.

3. A system of racial preferences like the University's that automatically and mechanically awards large preferences cannot plausibly by described as "flexible." *Paradise*, 480 U.S. at 171. The Eleventh Circuit reached the same conclusion in striking down on narrow-tailoring grounds similar preferences in effect at the University of Georgia. *See Johnson v. Board of Regents of University of Georgia*, 263 F.3d 1234, 1254-57 (11th Cir. 2001) ("This rigid, mechanical approach to considering race is itself incompatible with the need for flexibility in the admissions process.").

4. The University also failed in its burden of demonstrating that it has considered race-neutral alternatives. *Paradise*, 480 U.S. at 171. The district court accepted the University's arguments about why it should not have to employ race-neutral alternatives, Pet. App. 40a-43a, but failed to address whether it had given consideration to alternatives. For example, it relied on the opinions of one of the University's litigation experts, who testified about the experiences at the University of Texas. *Id.* at 41a-42a. This was hardly evidence sufficient to entitle the University to summary judgment on the consideration of race-neutral alternatives, with all reasonable inferences to be drawn in favor of plaintiffs, especially since the evidence was not even from those actually charged with formulating the admissions policies. Moreover, citing to the size of the applicant pool and differentials in test scores among racial groups, *id.* at 40a-41a, merely begs the question of whether the University has considered making changes to its admissions policies that achieve the diversity it seeks through race-neutral means.

5. Finally, the impact on parties is certainly great, *Paradise*, 480 U.S. at 171, as the race-based double standard in admissions acts to exclude many applicants because of their race. The harmful effect of the preferences is not mitigated, moreover, by an argument that removal of the preferences would have "only a small positive effect on . . . [the] probability of admission" for students from the disfavored races. The same was true in *Bakke*: invalidating the Davis program opened up only 16 spaces for the hundreds or more of competing applicants. *Bakke*, 438 U.S. at 273 & n.2.

II. "Academic Freedom" and "Diversity" Are Not Compelling Interests Justifying Racial Preferences.

A. Justice Powell's singular opinion in *Bakke* did not establish for the Court a rationale that interests in "academic freedom" or "diversity" are compelling ones justifying racial preferences in admissions. The joinder in Part V-C of his opinion by Justices Brennan, White, Marshall, and Blackmun did not make for such a majority because that part of the opinion says nothing about diversity or academic freedom. There is nothing remarkable, moreover, about the decision of those five Justices reversing the judgment of the state court's blanket prohibition of *any* consideration of race in admissions. Such a judgment and injunction was arguably too broad because race and ethnicity may constitutionally, at least, be considered to achieve a *compelling interest* through *narrowly-tailored* means. But Part V-C does not address what those compelling interests are, and the fractured opinions of the Court cannot support a conclusion that there was agreement among a majority of the Justices on what interests would be compelling.

The district court suggested that the conclusion that Justice Powell's diversity rationale had the endorsement of a majority of the Justices in *Bakke* can be supported by "Justice Brennan's silence" on the subject in his separate opinion. Pet. App. 18a. But this is not so. It is at least

equally likely that remaining silent, especially while also writing separately, indicates the opposite. In any event, surely a rationale for the Court can be reasonably deduced only from what the opinions of the Justices actually contain, not from speculation about what a Justice "would have embraced." *Id.* (quoting *Smith v. University of Washington Law School*, 233 F.3d 1188, 1200 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001)). What Justice Brennan's opinion contains is language indicating that his support for the use of race and ethnicity in admissions was tied to remedying the lingering effects of societal discrimination. *See Bakke*, 438 U.S. at 324-26, n.1 (opinion of Brennan, J.). Indeed, he defined the "central meaning" of the different opinions in the case to be that government "may take race into account . . . to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area." *Id.* at 325.

The principles articulated by this Court in *Marks v. United States*, 430 U.S. 188 (1977), cannot be used to divine a rationale for the constitutional consideration of race in the various *Bakke* opinions. The analyses of Justices Powell and Brennan are simply too different to find a common denominator between the diversity and remedial rationales.[14] The disagreement in the lower courts on whether the *Marks* analysis yields an answer on whether there is a majority rationale to be found in the *Bakke* opinions on the constitutional use of race is just further

[14] There is a common denominator in the two opinions on the remedial rationales for the consideration of race. Clearly, Justice Powell's rationale, tied to remedying identified discrimination, *Bakke*, 438 U.S. at 307 (opinion of Powell, J.), is narrower than Justice Brennan's rationale, which justifies the consideration of race to remedy societal discrimination, *id.* at 324-26 (opinion of Brennan, J.). Read in such a fashion, the opinions in *Bakke* are consistent with Court's subsequent precedents. *See, e.g., J.A. Croson Co.*, 488 U.S. at 504-06, 509.

evidence that it is "not useful" to pursue the analysis. *Nichols v. United States*, 511 U.S. 738 (1994). There are indications that the Court agrees. In *Adarand Constructors, Inc.*, 515 U.S. at 218, five members of the current Court agreed that "*Bakke* did not produce an opinion for the Court." The other four Justices joined in expressing the same sentiment in *Alexander v. Sandoval*, 532 U.S. 275, 308 n.15 (2001) (Stevens, J., dissenting, joined by Souter, Ginsburg, Breyer, JJ.) (noting that the five Justices in *Bakke* who voted to overturn the injunction imposed by the lower courts "divided over the application of the Equal Protection Clause – and by extension Title VI – to affirmative action cases" and that "[t]herefore, it is somewhat strange to treat the opinions of those five Justices in *Bakke* as constituting a majority for any particular substantive interpretation of Title VI").

What remains is the need to independently ascertain whether the rationale articulated by Justice Powell can support his conclusion that diversity is a compelling interest justifying racial preferences in admissions, and to determine whether the Court's subsequent precedents cast light on the issue. As discussed below, these modes of analyses demonstrate that the University's use of racial preferences cannot be justified on an interest in promoting "diversity."

B. Justice Powell articulated a compelling interest in diversity as an incident to a First Amendment right of academic freedom possessed by educational institutions. The issues at stake in the "academic freedom" cases cited by Justice Powell in support of his analysis in *Bakke*, however, had nothing to do with what criterion an educational institution might employ in selecting a student body. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), concerned a criminal contempt citation given to a professor who declined to answer questions about his classroom lectures and political affiliations propounded to him by the state's attorney general. Similarly, *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), involved a state statute requiring state-employed professors to sign oaths satisfying the state that a teacher employed by it was not a "subversive."

In both cases, the Court invalidated the action taken against the professors as impermissible intrusions on their First Amendment rights. The cases plainly implicated rights of *intellectual* freedom, and they contain testaments to the importance in a free society of keeping a commitment to the openness to ideas – to academic freedom – that is essential to the character of university communities.

It was to one of the concurring opinions in *Sweezy* that Justice Powell looked for some direct connection between that case and *Bakke*. Justice Frankfurter had quoted in *Sweezy* a statement authored by besieged proponents of the "open" universities of South Africa. Their statement identified the "four essential freedoms" of a university to be the right to "determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy*, 354 U.S. at 263 (opinion of Frankfurter, J., concurring in the result) (quoting THE OPEN UNIVERSITIES OF SOUTH AFRICA 10-12 (a statement of a conference of senior scholars from the University of Cape Town and the University of Witwaterstrand)).

It would be ironic and tragic if an eloquent statement intended as a plea against racial exclusion at university communities becomes instead a clarion call in service of the *opposite* proposition. None of the Court's precedents stand for the principle that "academic freedom" encompasses the right to give any consideration to race or ethnicity as a reason for admitting or excluding students. It is inherent in the "lesson of the great decisions of the Court," that the principle is an intolerable one. BICKEL, *supra*, at 133. Indeed, the actual outcomes in a number of the Court's cases constitute at least an implicit rejection of the notion that asserted "academic" justifications can make racial discrimination tolerable by educational institutions. *See, e.g., Runyon v. McCrary*, 427 U.S. 160, 173-75 (1976) (invalidating under 42 U.S.C. § 1981 the racially discriminatory admissions policies of private school); *Bob Jones Univ. v. United States*, 461 U.S. 574, 595 (1983) (upholding IRS revocation of tax-exempt status

of two universities based on their racially discriminatory policies). *Cf. University of Pennslyvania v. E.E.O.C.*, 493 U.S. 182, 197-202 (1990) (rejecting argument of university that its right to academic freedom protected from disclosure peer review materials relating to the tenure process for former faculty member who alleged discrimination on the basis of race and sex) ("In our view, petitioner's reliance on the so-called academic-freedom cases is somewhat misplaced. In those cases [*e.g., Sweezy* and *Keyishian*] government was attempting to control or direct the *content* of the speech engaged in by the university or those affiliated with it.").

Even if not expressly articulated as such, an interest in furnishing role models to minority children by employing minority teachers is a classic fit with the academic freedom model. It is an interest that directly implicates one of the "four essential freedoms" inherent in academic freedom: the right to determine "who may teach." *Sweezy*, 354 U.S. at 263 (opinion of Frankfurter, J., concurring in the result). The use of race as a factor in choosing role model teachers is unquestionably one made on asserted "academic grounds." *Id.* Teachers *teach,* and certainly the reason for offering a teacher as any kind of a role model is to produce some *educational benefit* for the students taught. Yet laudable as the interest is, it is not one that can be a compelling interest justifying racial preferences in the employment of teachers. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 266, 276 (1986) (plurality opinion) (rejecting role model theory); *id.* at 288 (opinion of O'Connor, J., concurring in part and concurring in the judgment) (rejecting role model theory). *See also J.A. Croson Co.*, 488 U.S. at 497-98 (holding that an interest in remedying lingering effects of societal discrimination had the same fatal defects as the "role model" theory employed in *Wygant*).

Grounding a right to practice race discrimination on "academic freedom" principles would have dangerous and far-reaching consequences. It entails opening the door to racial considerations in student admissions or faculty

appointments whenever doing so is based on the kind of "speculation, experiment, and creation," *Sweezy*, 354 U.S. at 263 (opinion of Frankfurter, J., concurring in the result), that is at the heart of academic inquiry and judgments. Any principled and genuine acceptance of academic freedom as an exception to the requirements of the Fourteenth Amendment would have to recognize that the number of ways in which race might be a factor in admissions is limited only by the number of academic theories that might today or someday justify such consideration. If it could be shown that an educational theory supported the education of individuals in racially homogenous groups, a seriously recognized compelling interest in academic freedom as a justification for racial preferences would logically have to permit policies designed to further that end. *See Grutter*, 288 F.3d at 805 n.37 (Boggs, J., dissenting) (noting that at the time of *Brown v. Board of Education* "there were certainly researchers with academic degrees who argued that segregated education would provide greater educational benefits for both races"); *id.* ("Questions have been raised as to the ability or desirability of school districts implementing all-black academies in order to improve educational performance.").[15]

It should be clear that academic freedom does not lose its status as an important freedom through adherence to the equality guarantee of the Fourteenth Amendment.[16]

[15] An academic freedom exception to the Fourteenth Amendment would also permit academic grounds to justify differential treatment on the basis of other invidious classifications. *See, e.g., United States v. Virginia*, 518 U.S. 515, 535 (1996) (state-supported school argued that interest in "diversity" of educational choices should permit all-male admissions policy).

[16] The first explicit mention of academic freedom in this Court's cases was by Justice Douglas in his dissenting opinion in *Adler v. Board of Education*, 342 U.S. 485, 508 (1952) (Douglas, J., dissenting). In that opinion and in subsequent ones that he either authored or joined in, very broad expression is given to the importance and scope of the right

(Continued on following page)

The range of factors that a university may constitutionally consider in selecting its students (or faculty) is virtually infinite. Particularly as academic freedom has been recognized as an *intellectual* freedom, there is no limit to the viewpoints, perspectives, ideas, character traits, talents, and experiences that a university might properly consider in assembling its community. But our Constitution places "no value" on race discrimination. *See Runyon*, 427 U.S. 761. It forbids it when practiced or sponsored by the states. Enforcement of the constitutional command that state-sponsored universities not discriminate on the basis of race or ethnicity in student admissions does not impair any genuine interest in academic freedom. But a rule that would recognize the right of educational institutions to consider race and ethnicity in the exercise of academic freedom would vitiate the "core purpose" of the Fourteenth Amendment. *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

C. Although the Court has not since *Bakke* directly addressed whether diversity can be a compelling interest, its precedents demonstrate why it is not one. The Court already has rejected significant parts of Justice Powell's

of academic freedom. *See, e.g., Whitehill v. Elkins*, 389 U.S. 54, 59-60 (1967); *Wieman v. Updegraff*, 344 U.S. 183, 196-97 (1952) (opinion of Frankfurter, J., joined by Douglas, J., concurring in the judgment); *Presidents Council District 25 v. Community Sch. Bd.*, 409 U.S. 998, 999-1000 (1972) (opinion of Douglas, J., dissenting to denial of petition for certiorari). Yet it is instructive that Justice Douglas wrote powerfully about the evils of racial considerations in the university admissions process. *See DeFunis v. Odegaard*, 416 U.S. 312, 333-34 (1974) (Douglas, J., dissenting from the Court's decision to remand the case on mootness grounds) ("Once race is a starting point educators and courts are immediately embroiled in competing claims of different racial and ethnic groups that would make difficult, manageable standards consistent with the Equal Protection Clause."); *id.* at 334 ("Minorities in our midst who are to serve actively in our public affairs should be chosen on talent and character alone, not on cultural orientation or leanings.").

analysis. Justice Powell did not view the difference between a "plus" system and a "set aside" system as simply the difference between a race-conscious system that is narrowly tailored and one that is not. Rather, he concluded that "a facial intent to discriminate" does not "exist[ ] in an admissions program where race or ethnic background is simply one element – to be weighed fairly against other elements – in the selection process." *Bakke*, 438 U.S. at 318 (opinion of Powell, J.). In such a system, "good faith would be presumed," *id.* at 318-19, there would be "a presumption of legality and legitimate educational purpose," *id.* at 319 n.53, and "there is no warrant for judicial interference in the academic process," *id.*

The absence of an intent to discriminate when race is used as a factor is inconsistent with modern equal protection analysis. This Court has made clear that the consideration of race, even if considered along with other factors, constitutes the kind of intentional discrimination that requires strict scrutiny. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 265 (1989) (O'Connor, J., concurring in the judgment) ("This Court's decisions under the Equal Protection Clause have long recognized that whatever the final outcome of a decisional process, the inclusion of race or sex as a consideration within it harms both society and the individual."). Surely a system like the University's, which gives a set number of points to applicants for being members of an "underrepresented" minority but also gives points to applicants for other characteristics, reflects an "intent to discriminate" as that term is now used in equal protection jurisprudence. It treats similarly-situated applicants from different races differently. *See also Johnson v. Board of Regents of Univ. of Georgia*, 263 F.3d 1234, 1249 (11th Cir. 2001) (invalidating as unconstitutional an undergraduate admissions system that granted a fixed number of points for race and ethnicity and other factors).

So, too, the presumption of good faith that Justice Powell attributed to school administrators is simply inconsistent with the notion that strict scrutiny must be applied to the use of race. One of strict scrutiny's key

features is "skepticism," *Adarand Constructors, Inc.*, 515 U.S. at 223-24, *i.e.*, the bedrock proposition that all official actions that treat a person differently on account of race or ethnicity are inherently suspect. Even the University here has conceded throughout the course of this litigation that "strict scrutiny" applies to its consideration of race. While it has asked for deference to its judgment from the courts, based upon Justice Powell's words, that deference simply cannot be reconciled with strict scrutiny. *See id.* at 236 (strict scrutiny requires a "detailed examination, both as to ends and as to means"); *id.* (strict scrutiny requires "the most searching judicial inquiry"). *See also J.A. Croson Co.*, 488 U.S. at 500 ("Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice."); *id.* at 493 (opinion of O'Connor, J.) ("Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.").

When the strict-scrutiny analysis employed by the Court's precedents in other contexts is applied to the rationale asserted by the University, it becomes clear that an interest in diversity cannot be a compelling one justifying racial preferences in student admissions. Like the role model theory in *Wygant*, an interest in diversity has "no logical stopping point." *Wygant*, 476 U.S. at 275 (plurality opinion). Because it bears no relationship to *any* remedial interest, there are no principled limits on its scope or duration. Tied instead (as the University urges) to the academic discretion and judgments of those who will impose the classifications, a recognized compelling interest in promoting diversity is limited only by the different kinds of racial diversity that educational institutions might seek to achieve. On such a footing, the interest is one that is not subject to any objective, uniform standards, and the preferences effectively become immune from meaningful judicial review. Its recognition would set loose a "potentially far-reaching principle disturbingly at odds

with our traditional equal protection doctrine." *Metro Broadcasting, Inc.*, 497 U.S. at 613 (O'Connor, J., dissenting).

Measuring the logical consequences of a recognized compelling interest in diversity demonstrates why it is that "[m]odern equal protection doctrine has recognized only one [compelling] interest [for racial classifications]: remedying the effects of racial discrimination." *Id.* at 612. An interest in diversity "is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications." *Id.* Moreover, the test of time has proven the essential truth of the proposition that "[u]nless they are strictly reserved for remedial settings, [racial classifications] may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *J.A. Croson Co.*, 488 U.S. at 493 (opinion of O'Connor, J.).

It is no satisfactory answer to the foregoing objections to argue that promoting diversity will produce "educational benefits". It certainly can be assumed that remedying the lingering effects of societal discrimination would produce benefits both in the educational system and throughout society generally. As discussed above, a "role model" theory for assigning teachers is premised precisely on the ground that it would produce educational benefits. *See Wygant*, 476 U.S. at 315 (Stevens, J., dissenting) ("In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty."). But the reasons that make those interests not "compelling" ones for purposes of justifying racial classifications are the same kinds of reasons that preclude a determination that "diversity" is a compelling interest. *See also Grutter*, 288 F.3d at 788-95 (Boggs, J., dissenting) (discussing and dismissing the claim that the purported educational benefits of diversity make it a compelling interest).

The University's articulation of the diversity rationale throughout this case reveals how malleable the interest is. The University often defends the interest on the basis that

it is an antidote for the lingering effects of societal discrimination. Hence, it points to patterns of segregation in housing, and elementary and secondary education, for example, as justification for race-based admissions at the university level. *See, e.g.*, Final Brief of Appellees 36 (July 30, 2001). At oral argument on the motions for summary judgment, the University's counsel made explicit reference to the "educational challenge" presented by "segregation" in various areas of society. Record 204, Tr. 34-35, Cir. App. 4163-64. The University and some of its *amici* have also touted diversity for the benefits accruing to students *after* they have graduated from college. These arguments demonstrate that there is no principle that confines the interest to the education context. If accepted as compelling, an interest in diversity could become a justification for using race to treat people differently in many walks of life.

D. 1. In the lower courts, the University has argued that in the intervening years since *Bakke* was decided, it has become accepted as "settled law" that diversity is a compelling interest in educational admissions and that colleges and universities generally have relied and acted accordingly on this proposition in considering race and ethnicity in admissions. *See* Final Brief of Appellees 2 (July 31, 2001). The argument is false for several reasons. First, it is a question-begging exercise that tries to assign *stare decisis* effect to a case not by analyzing what the case actually decided, but instead by accepting *one* view of how *some* have interpreted it.

Second, this Court has never given *stare decisis* effect, much less "extra" *stare decisis* effect, to the views of one Justice not joined by any other member of the Court. As already discussed, *see* discussion *supra* at 32-33, all nine current Justices (the majority in the 1995 decision in *Adarand v. Pena* and the dissenters in *Alexander v. Sandoval*) have recognized that there was no coherent rule supporting the use of race in college admissions emerging from *Bakke*. From the outset, both courts and academics have questioned whether Justice Powell's discussion of "academic freedom" and "diversity" in *Bakke* was binding

precedent. *Peters v. Moses*, 613 F. Supp. 1328, 1335 (W.D. Va. 1985) ("I do not believe that Justice Powell's concurring opinion represents the court's opinion in *Bakke* with regard to this matter."); Drew S. Days, III, *Minority Access to Higher Education in the Post*-Bakke *Era*, 55 U. COLO. L. REV. 491, 492 (1984) (noting that "no other Justice joined in [Justice Powell's] opinion" and "there was no opinion of the Court . . . ").

Third, a question of law can hardly be said to be considered "settled" when the lower courts are riven with disagreement on it. *See* Pet. 21-22 (discussing cases in which courts have disagreed on *Bakke* and the status of Justice Powell's opinion, or have expressed reservations, skepticism, or uncertainty about whether an interest in diversity can justify racial preferences).

Fourth, as already discussed, *see* discussion *supra* at 37-39, Justice Powell's *Bakke* opinion has already been superseded in significant ways. Accordingly, the fundamental doctrinal foundations upon which his analysis stood – that explicit racial considerations could be considered "facially nondiscriminatory" and that certain governmental actors are entitled to deference when using race – has been eroded to the point where it has been, at least implicitly, "left . . . behind as a mere survivor of obsolete constitutional thinking." *Planned Parenthood v. Casey*, 505 U.S. 833, 857 (1992).

In light of all the foregoing, surely our nation's leading colleges and universities, employing able in-house counsel and outstanding constitutional scholars, could not have been deluded into believing that whether diversity is a compelling interest justifying racial preferences in admissions was a matter free from doubt.

2. Apart from whether any reliance was justified, it is also far from accurate to say that the University has "relied" on Justice Powell's articulated formulation for the proper consideration of race and ethnicity in admissions. A viewing of the facts in this and other reported cases arising in similar contexts leads to the conclusion that Justice Powell's opinion has been used instead as a cover

to employ all manner of potent racial preferences. Many educational institutions seem to act as if simply describing their admissions programs in language employed by Justice Powell (*e.g.*, "racial or ethnic origin is but a single though important element" considered in achieving diversity, or race and ethnicity are just a "plus" factor in the process, *Bakke*, 438 U.S. at 315, 317 (opinion of Powell, J.)), is enough to immunize them from successful attack. Thus, in this case alone, the University invokes the usual words to defend admissions policies that have at various times employed reserved seats, racially segregated waiting lists, guidelines on admission that on their face call for different admission outcomes based on race and ethnicity, and automatic assignment on the basis of race of a large enough number of fixed points to accomplish what the discriminatory grids formerly did.

The University of Georgia has used Justice Powell's formulations to defend its undergraduate admissions systems, which contain similarities to the one at issue here. As recently as 1990-1995, the University of Georgia had an undergraduate admissions policy that had certain minimum qualifications (relating to SAT scores and high school GPA) that differed depending upon whether the applicant was black or non-black. *See Wooden v. Board of Regents of Univ. of Georgia*, 247 F.3d 1262, 1265 (11th Cir. 2001); *Johnson v. Board of Regents of Univ. of Georgia*, 263 F.3d 1234, 1240 (11th Cir. 2001). It changed the system in 1995 to one where, at the second stage of the appraisal process (after the admission and rejection of candidates based solely on academic characteristics), applicants mechanically received .5 points for self-designating as non-caucasian and .25 points for being male (with a score below 5 being sufficient for admission). *Johnson*, 263 F.3d at 1241 (noting that the files were not read at the second stage, but processed based upon data requested by the application form). Not surprisingly, these admissions systems were found to be unlawful by the Eleventh Circuit. *Id.* at 1254-64.

Prior to 1992, and prior to being sued, the University of Texas Law School had a system that placed applicants

in one of three categories: presumptive admit, presumptive deny, and discretionary zone. The standards applied to African Americans and Mexican Americans for placement in these categories were dramatically lower than for all other candidates, to the point where the presumptive admit standard for those preferred races was lower than the presumptive deny standard for the non-preferred candidates (primarily whites, Asians, and other Hispanics). The law school color-coded the application files to reflect the applicant's race, reviewed the applications of preferred race candidates with a separate minority admissions subcommittee, and maintained waiting lists segregated by race. Texas defended all of these practices as legitimate under Justice Powell's rationale in *Bakke*. *See Hopwood v. Texas*, 78 F.3d 932, 935-38 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996); *id.* at 963; *id.* at 966 (Weiner, J., concurring) (finding the system "virtually indistinguishable from quotas").

In "relying" on Justice Powell's opinion for support of their racial preferences, sometimes universities do not even take care to ensure that precise forms found *illegal* in *Bakke* are not copied. The University of Washington School of Law successfully invoked Justice Powell's words to defend a system in effect in 1994 whereby all students with certain "index scores" (composites of LSAT scores and GPA) were sent to an admissions committee for comparative evaluation with other files; but minority candidates were evaluated separately by the Admissions Coordinator. *Smith v. University of Washington, Law School*, Civ. No. C97-335Z, slip op. at 18 (W.D. Wash. June 5, 2002). In the case pending before this Court involving the University of Michigan's Law School, the law school until 1992 had a program of racial preferences called, like Davis, a "special admissions program." On its face, the policy had a "goal" or "target" of enrolling 10-12% of the class from designated racial and ethnic minority groups ("Black, Chicano, Native American, and mainland Puerto Rican"). In defending its admissions policies under a subsequent written policy adopted in 1992, the law school clearly has sought to

disown the "special admissions program," which it operated long after *Bakke* had been decided. *See* Final Reply Brief of Appellants 26 & n.11 (vehemently arguing against the assertion of the plaintiff in that case that the policy adopted in 1992 incorporated prior policies; "the 1992 policy eliminated the Law School's previous policies"), filed in *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir.), *cert. granted*, 123 S. Ct. 617 (2002) (No. 02-241).

Elementary and secondary schools have also invoked Justice Powell's analysis to defend large racial preferences in the assignment of students to schools. The City of Boston used a formal set-aside (as always, obligingly called "flexible") to allocate seats on the basis of race and ethnicity to the popular "Boston Latin School." *Wessmann v. Gittens*, 160 F.3d 790, 793-94 (1st Cir. 1998); *id.* at 800 (holding policy unconstitutional because it effectively foreclosed competition for some seats based solely on race or ethnicity). The Arlington County Virginia School Board used a statistically weighted lottery to make school assignments on the basis of race. *See Tuttle v. Arlington Cty. Sch. Bd.*, 195 F.3d 698, 701-03 (4th Cir. 1999); *id.* at 705 (holding systems unconstitutional on narrow-tailoring grounds). The Montgomery County Maryland Public Schools devised a "diversity profile," with assignment of students into one of several formal "categories" determined by racial and ethnic characteristics. *Eisenberg v. Montgomery County Public Schools*, 197 F.3d 123, 126-27 (4th Cir. 1999); *id.* at 131-34 (holding preferences unconstitutional on narrow-tailoring grounds).

The cases discussed above are confined only to those that have been litigated, where discovery has allowed the hidden to be revealed in a manner that is not otherwise "immediately apparent to the public," *Bakke*, 438 U.S. at 379 (opinion of Brennan, J.), when an educational institution states generally that its use of race and ethnicity in admissions is designed to achieve "diversity" in the manner approved by Justice Powell. But it should be clear that educational institutions have run unrestrained with the use of racial preferences purported to implement only what Justice Powell authorized. This is not reliance. It is

licentiousness. In the manner that educational institutions like the University have applied their racial preferences, Justice Powell's rationale is not even recognizable.

The emphasis on race (and, at the University of Georgia, gender) in these policies demonstrates also that *intellectual* diversity is hardly their goal. Indeed, when writing for journals and law reviews, many academics candidly admit that their school's interest in diversity is primarily to avoid legal challenge. Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 34 (2002) ("many of affirmative action's more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds"); *id.* at 28 ("even today when defenders of affirmative action use diversity rhetoric in order to avoid legal pitfalls, the heart of the case for affirmative action is unquestionably its capacity to remedy the current effects of past discrimination"); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 471 (1997) ("Everyone knows that in most cases a true diversity of perspectives and backgrounds is not really being pursued. (Why no preferences for fundamentalist Christians or for neo-Nazis?)"); Kent Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CAL. L. REV. 87, 122 (1979) ("I have yet to find a professional academic who believes the primary motivation for preferential admission has been to promote diversity in the student body for the better education of all the students. . . . "); Samuel Issacharoff, *Law and Misdirection in the Debate over Affirmative Action*, 2002 U. CHI. LEGAL F. 11, 18 (2002) ("I have never heard the term seriously engaged on behalf of a Republican, a fundamentalist Christian, or a Muslim."); Alan M. Dershowitz & Laura Hanft, *Affirmative Action And The Harvard College Diversity-Discretion Model: Paradigm Or Pretext*, 1 CARDOZO L. REV. 379, 407 (1979) ("The raison d'etre for race-specific affirmative action programs has simply never been diversity for the sake of education. The checkered history of 'diversity' demonstrates that it was designed largely as a cover to achieve other legally, morally, and politically

controversial goals. In recent years, it has been invoked – especially by professional schools – as a clever post facto justification for increasing the number of minority group students in the student body.").

The use of diversity or academic freedom as a legal rationale suggests that colleges and universities have "relied" on Justice Powell's opinion only in the sense that they have "relied" on it as a defense when they are sued (and none too successfully at that). In fact, the use of "diversity" as a rationalization has led to the diminution of integrity in our institutions before the nation and even before this Court. *See* Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 OHIO ST. L. J. 669, 675 n.14 (1998) ("I remain embarrassed by the claim, not of my authoring but with my name attached nonetheless, that appeared in our reply brief in support of certiorari in *Hopwood* . . . [that] argued that race operated as simply one of many criteria that went into a selection process – a claim that could not be substantiated by the record and did not comport with the reality of how affirmative action works.").

Ultimately, what history and the cases bear out is that there is no workable way to employ Justice Powell's framework for the consideration of race and ethnicity in educational admissions. To say that race may be "weighed fairly" or considered "competitively" is to say that there is no real standard at all because it is tied only to the subjective interpretations of those who employ it as the measure for what is permissible. Although not unambiguously set forth in his opinion, a common understanding of Justice Powell's analysis is that race may be used in a modest or "tie-breaking" way. *See, e.g., Grutter*, 288 F.3d at 817-18 (Gilman, J., dissenting). That common understanding simply does not reflect reality. *See* Issacharoff, 59 OHIO ST. L. J. at 676 ("*Bakke* had an unrealistic sense of the extent to which race-consciousness is required even to achieve the Harvard minimum floor of minority representation."). So too, at one time it was even suggested that a program for considering race in the manner suggested by Justice

Powell "contain[ed] the seed of its own termination." *Metro Broadcasting, Inc.*, 497 U.S. at 596 (referring to the "Harvard admissions program discussed in *Bakke*"). At this juncture in our history, what is all too clear is that the opposite is true. To permit race to be used as a reason for achieving diversity is much more likely to forever "delay the time when race will become a truly irrelevant, or at least insignificant, factor." *Adarand Constructors, Inc.*, 515 U.S. at 229.

III. The Interests Proffered by the Intervenors Cannot Justify the University's Racial Preferences.

The district court correctly rejected the separate arguments of the intervenors offered in support of the University's racial preferences. These interests are remedial ones that the district court correctly concluded did not motivate the preferences. Pet. App. 72a-76a. For that reason alone, they could not be compelling interests justifying the preferences. *See, e.g., Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996). Moreover, the intervenors did not point to any identified discrimination by the University as a basis for imposing racial preferences. Instead, they relied on a generalized history or accounts of incidents or circumstances unrelated to admissions policies or practices, many of them remote in time, sometimes dating back decades or longer. Pet. App. 76a-81a. The history evoked by the intervenors is indistinguishable from societal discrimination, which the district court was right to conclude could not justify the racial preferences. *Id.* at 84a-85a. The same is true with respect to intervenors' contentions regarding an alleged hostile racial climate on campus. *Id.* at 85a-86a.

Finally, the intervenors have sought to justify the preferences on the basis of other allegedly discriminatory criteria used by the University in admissions. They made no effort to explain how the preferences for race were related to compensating for other factors considered in the admissions

process, and it is not surprising that they would bear no such relationship, since the University did not devise the preferences on this basis. Moreover, as the district court concluded, if the University employs criteria actually having a discriminatory impact on members of some racial or ethnic groups, the narrowly-tailored remedy is the removal of the discriminatory criteria, not the addition of a suspect racial classification. *Id.* at 88a. The use of racial preference would not diminish liability in any event for other discriminatory criteria. *Connecticut v. Teal*, 457 U.S. 440 (1982).

IV. The University's Preferences Violate 42 U.S.C. § 1981.

Petitioners' proof that the University has engaged in intentional discrimination also establishes a violation of 42 U.S.C. § 1981. *See General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 383-91 (1982). Although its text, written in the aftermath of the Civil War, suggests that only non-whites are its intended beneficiaries, the Court has held that the statute prohibits discrimination against whites to the same extent as others. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295-96 (1976). Under § 1981(c), the statute's substantive rights are protected from impairment under color of state authority.

A contract for educational services is a "contract" for purposes of § 1981. *Runyon v. McCrary*, 427 U.S. 160, 172 (1976). The racial discrimination practiced by the Law School in admissions is a "classic violation of § 1981." *Id.*

The University does not offer admission on an "equal basis" to members of all races. *Id.* On the contrary, as the district court found and the foregoing discussion elaborates, the Law School applies different standards in admission based on race and ethnicity. Section 1981 contains no exceptions to its rule of nondiscrimination. It does not provide, for example, that claimed interests in "diversity" or "academic freedom" excuse unequal treatment on the basis of race under the statute. Indeed, the Court has

specifically rejected a number of asserted defenses to the statute based on the exercise of constitutional rights. *Id.* at 175-79 (rejecting defenses based on the First Amendment rights of freedom of association, parental rights under the Due Process Clause of the Fourteenth Amendment, and the right of privacy). *See also* discussion *supra* at 34.

CONCLUSION

For the foregoing reasons, petitioners respectfully request this Court to reverse the judgment entered in favor of the University respondents on petitioners' claims for violations of the Equal Protection Clause, Title VI, and 42 U.S.C. § 1981, and to direct entry of judgment on liability in favor of petitioners on those claims and to remand the case with further proceedings consistent with this Court's opinion.

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IN THE

Supreme Court of the United States

JENNIFER GRATZ AND PATRICK HAMACHER,
PETITIONERS,
v.
LEE BOLLINGER, *et al.*,
RESPONDENTS,
and
EBONY PATTERSON, *et al.*,
RESPONDENTS.

On Writ Of Certiorari Before Judgment To The United States Court of Appeals for the Sixth Circuit

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United States v. New York Telephone Co.,
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Cases (continued):

Washington v. Lambert,
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Washington v. Seattle Sch. Dist. No. 1,
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Watson v. Fort Worth Bank & Trust,
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Wessmann v. Gittens,
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Other Authorities:

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Bakke's Fate, 43 UCLA L. Rev. 1745,
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William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (1998) 32, 41, 42, 48

Brief of Equal Employment Advisory Council as *Amicus Curiae* in Support of Neither Party, *Grutter v. Bollinger* (No. 02-241) 42

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Other Authorities (continued):

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Brief in Opposition to Certiorari, *Patterson v. Gratz* (No. 02-571) 5

Stephanie Cahill, *Skirting the "Race Quota" Label,* ABA Journal *eReport* (Jan. 24, 2003), *available at* http://www.abanet.org/journal/ereport/j24affirm.html 48-49

Michael A. Fletcher, *Race Neutral Plans Have Limits in Aiding Diversity, Experts Say,* Wash. Post, Jan. 17, 2003 48

Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity,"* 1993 Wis. L. Rev. 105, 140 (1993) 41, 46

Guidelines for Eliminating Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex, and Handicap in Vocational Education Programs, Appendix B to Part 100, 34 C.F.R., § IV.K 25

TABLE OF AUTHORITIES (continued)

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Other Authorities (continued):

Hearing of the Senate Judiciary Comm. on the Nomination of Clarence Thomas to the Supreme Court, 102nd Cong. 260 (1991) 39

Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Exp;eriences*, The Civil Rights Project, Harvard University (February 2003), *available at* http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.php 47

Investigative Guidance, 59 Fed. Reg. 11448 (Mar. 10, 1994) 27

Anthony Kennedy, *The Voice of Thurgood Marshall,* 44 Stan. L. Rev. 1221 (1992) 39

Deseriee A. Kennedy, *Consumer Discrimination: The Limitations of Federal Civil Rights Protection,* 66 Mo. L. Rev. 275 (2001) 40

Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate,* 99 Harv. L. Rev. 1327 (1986) 2

Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test,* 33 Harv. C.R.-C.L. L. Rev. 381 (1998) 36, 41

TABLE OF AUTHORITIES (continued)

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Other Authorities (continued):

Patricia Marin & Edgar K. Lee, *Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida*, The Civil Rights Project, Harvard University (February 2003), available at http://www.civilrightsproject.harvard.edu/research/affirmativeaction/florida.php 47

Pacific Legal Foundation, *Quotas in UC Admissions Aggressively Challenged, available at* http://www.pacificlegal.org/ view_PLFCaseDetail.asp?iID=181&sSubIndex=Operation+End+Bias+%2D+%2D+Enforcing+California%27s+Proposition+209&iParentID=8&sParentName=Securing+Individual+Rights 49

Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11448 (Mar. 10, 1994) 27

Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 Stan. L. Rev. 1217 (1992) 39

Scholars' Reply to Professor Fried, 99 Yale L.J. 163, 166 (1989) 33

TABLE OF AUTHORITIES (continued)

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Other Authorities (continued):

Elliot Spitzer, *The New York City Police Department's "Stop and Frisk" Practices*, 1999 N.Y. Att'y Gen. Rep. 40

Maria Tienda, *Closing the Gap?: Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action* (Jan. 21, 2003), *available at* http://www.texastop10.princeton.edu/publications/tienda012103.pdf 48

Peter Verniero, *Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling*, 1999 N.J. Att'y Gen. Rep. 40

Juan Williams, *A Question of Fairness*, Atlantic Monthly, Feb. 1987 39

Juan Williams, *Thurgood Marshall: American Revolutionary*, (1998) 39

U.S. Commission on Civil Rights, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education*, available at http://www.usccr.gov/ 46, 48

Note on Citations to the Record

Citations to "Pet. App." refer to the appendix filed with the petition in this case; "Cir. App." refers to the Joint Appendix filed by the parties in the Sixth Circuit in this case; "J.A." refers to the Joint Appendix filed with petitioners' brief on the merits in this case. One expert report was not reproduced in the Joint Appendix below but was attached to the Final Reply Brief of Intervenors in the Sixth Circuit; it is cited as "Silver & Rudolph."

STATEMENT OF THE CASE

A. Introduction

This litigation is the current embodiment of the oldest and most central problem in the history of our Republic — the issue of race. Although it is facially about the consideration of race and ethnicity in college and university admissions, it is at bottom a cleverly constructed assault on the ability of public (and, by extension, private) institutions to do anything voluntarily about continued racial inequality throughout the United States.

Plaintiffs mount a seductive argument, juxtaposing "[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement," *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505-06 (1989), against the view they incorrectly attribute to proponents of affirmative action: that "race matters" for its own sake and should matter permanently. In so doing, Plaintiffs confuse means with ends, claiming for themselves the moral and constitutional high ground while ascribing to their adversaries the legacy of segregationists who pursued policies and practices of racial exclusion. They equate race-consciousness in pursuit of diversity and racial integration with racism, based upon a false syllogism; while race-consciousness is a necessary predicate for racism, it does not follow that all race consciousness is racist.

Without ever openly referring to the phrase from Justice Harlan's famous dissent in *Plessy v. Ferguson*, 63 U.S. 537, 559 (1896), Plaintiffs ask this Court to write the term "color-blind" into the Constitution. It is more than a little ironic that Plaintiffs rest their argument on *Brown v. Board of Educ.*, 347 U.S. 483 (1954), which overturned *Plessy* upon consideration of historical developments since the earlier case was decided, *see* 347 U.S. at 492-93, because Plaintiffs' approach steadfastly

ignores both history and reality:

> In the forties, fifties and early sixties, against the backdrop of laws that used racial distinctions to exclude Negroes from opportunities available to white citizens, it seemed that racial subjugation could be overcome by mandating the application of race-blind law. . . . The opponents of affirmative action have stripped the historical context from the demand for race-blind law. They have fashioned this demand into a new totem and insist on deference to it no matter what its effects upon the very group the fourteenth amendment was created to protect. *Brown* and its progeny do not stand for the abstract principle that [all] governmental distinctions based on race are unconstitutional. Rather, those great cases, forged by the gritty particularities of the struggle against white racism, stand for the proposition that the Constitution prohibits any arrangements imposing racial subjugation — whether such arrangements are ostensibly race-neutral or even ostensibly race-blind.[1]

The "color-blind Constitution" has never been the law. "This Court never has held that race-conscious state decisionmaking is impermissible in *all* circumstances." *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (emphasis in original). Instead, the Court has required a strict and "searching judicial inquiry," *Croson*, 488 U.S. at 493, to determine whether a governmental "decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects" upon a racial group, *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979) (footnotes and citation omitted).

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[1]Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1335-36 (1986) (emphasis in original) (footnotes omitted).

> [T]he purpose of strict scrutiny is to "smoke out" *illegitimate* uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Croson, 488 U.S. at 493 (emphasis added).

Measured by those standards, the race-conscious admissions program at the University of Michigan is both necessary and constitutionally appropriate, for two closely related reasons. *First*, there is a history of past and present discrimination at the University the effects of which continue to be felt today. For understandable reasons,[2] the University is reluctant to acknowledge that history, but Intervenors (whom Plaintiffs ignore in their presentation to this Court) have placed it in the record and argue its significance in this Brief. *Second* — and informed by that history but not dependent upon it — there are powerful educational and civic values that support the University's efforts to assemble a student body that is diverse in many ways, including, specifically, that is racially and ethnically diverse. The University focuses on this justification, and Intervenors join in its arguments and offer additional observations on the compelling interest of diversity as well.

Our Nation undeniably has made significant progress during the last fifty years in attacking the centuries-old legacy of slavery and segregation. That progress has not occurred serendipitously. Nor has it occurred solely as a result of adjudicated findings, or admissions, of discrimination. Much of it has occurred because a consensus has developed that there is a national interest of the highest order in dismantling the

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[2]*See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 274, 291 (1986) (O'Connor, J., concurring).

effects of American *apartheid*, and in turning our Nation's diversity into a strength, rather than a liability. While we can point proudly to the progress made, we cannot yet claim to have arrived at a time when we can abandon our efforts and lay down the burden of race, sanguine in the knowledge that the playing field is at last level, and that we have broken the link between present-day status of those disadvantaged because of race and the genesis of that disadvantage.

Intervenors share the dream of a nation in which race does not matter but submit that it will not become reality by disabling our society from addressing the persisting, continued salience that race still has today. Race remains a significant force in American life today not because of affirmative actions implemented since *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978), but because of past and present discrimination against people of color, that both demands remedy and requires conscious attention. If governments may not take voluntary actions to dissipate the effects of past or present discrimination, as the history at the University of Michigan and other schools show, even the most respected institutions in our society are likely to revert to separate and segregated status. It would be both the ultimate irony and the ultimate tragedy if this Court were to provide the impetus for a return to a racially separate-and-unequal reality in the name of ending race discrimination.

B. Factual Background

Plaintiffs (Petitioners here) applied to the University of Michigan for admission as undergraduates in 1995 and 1997, respectively. During those years and continuing to the present,[3] the University has considered race as one of many factors in making admissions decisions. The trial court granted

[3]The record below closed with the 2000 school year; the 2000 admissions process has since continued in use without material change.

Plaintiffs' motion for summary judgment as to the years 1995-1998, finding the admissions process during those years unconstitutional (Pet. App. 54a, 57a). However, in the order under review the trial court found no constitutional violation as to the 1999 and 2000 school years and accordingly denied Plaintiffs' request for injunctive relief (*id.* at 57a-58a).[4]

1. The disproportionate adverse impact of the University's current selection criteria on minority applicants

The University of Michigan undergraduate program receives 13,500 applications and enrolls approximately 4000 students. (Pet. App. 4a.) No one is admitted unless the University first determines that the applicant is qualified.[5] There are no quotas, numerical targets or goals for enrollment of students from

[4]The district court also granted summary judgment against Patterson Intervenors (Respondents here), rejecting our argument that the University was justified in considering race in its admissions policy in order to remedy the effects of past and present discrimination. Cir. App. 137-40. On December 2, 2002, this Court denied review of this judgment in *Patterson v. Gratz*, No. 02-571. However, as Plaintiffs conceded in that case, Intervenors are entitled as respondents in the instant matter to argue their remedial justifications in support of the district court's order denying Plaintiffs' request for an injunction. Brief in Opposition to Certiorari at 4, *Patterson v. Gratz* (No. 02-571); *see also infra* at 18.

If the Court upholds the order below based on Intervenors' arguments, it would necessarily have to reverse the district court's summary judgment against Intervenors. Should the Court rely on the University's diversity arguments to sustain the district court's order denying the injunction, it should vacate the judgment against Intervenors as moot.

[5]A "qualified" applicant is one who is expected to achieve passing grades if admitted (Cir. App. 384 [Tr. pp. 37, 39-40]). For purposes of the summary judgment motions under review here, Plaintiffs stipulated that they "assume[d that]" "all of the students admitted to the University are qualified to attend the University" (Cir. App. 4095), including minority students whose race or ethnicity resulted in their being awarded additional points on the selection index described *infra*.

underrepresented minority groups ("UMS"); there is no separate review of applications from such students. Pet. App. 34a-35a, 38a; Cir. App. 1482B.

Although each applicant is considered for admission based upon a flexible, individualized review (see J.A. 223), the admissions staff utilizes a "selection index" to aid in achieving consistency. An applicant's high school grade-point average (GPA) is first adjusted to remove, *inter alia*, non-academic courses. Admissions counselors then assign a range of points to each applicant, up to a total of 150 points, for various factors, including the adjusted GPA (up to 80 points for a 4.0 average), the applicant's score on a standardized test (usually the SAT or ACT) (up to 12 points), and other factors known by the acronym "SCUGA"[6] (J.A. 223-25). Almost 90% of all 1995 applicants had their scores adjusted upward during the SCUGA process.[7]

[6]In the acronym, "S" refers to characteristics of the applicant's high school; "C" to the curriculum taken by the student; "U" to "unusual" factors about the applicant (see discussion in text *infra*); "G" to the geographic residence of the applicant; and "A" to an applicant's familial relationship to an alumnus/a of the University (J.A. 84-93, 94-103, 104-114) (Guidelines – SCUGA for 1995, 1996 and 1997, respectively). Commencing in 1998, the "SCUGA" system was replaced with a Selection Index using a modified scale and grouping the factors into a different set of categories. The "S" and "C" factors were placed in the "Academic" grouping, and the "G" and "A" factors, along with other criteria originally within the "U" factor (some also being modified slightly) into the "Other Factors" category (see J.A. 182-97). The same set of criteria, except for one minor modification (points awarded for quality of essay changed from one to up to three) were carried forward in 2000 (see J.A. 223-241). For the sake of simplicity, we describe the salient characteristics of the admissions process as reflected in the 2000 Guidelines for calculating the index.

[7]Final Expert Witness Report of Jacob Silver, Ph.D. & James Rudolph, Ph.D. ["Silver & Rudolph"], at 19. (All of the intervenors' expert reports cited in this section were unrebutted by the other parties.)

The S, C, G, and A factors disproportionately reduce the selection index points awarded to UMS applicants. For example, an applicant will receive up to 10 "S" factor points based in part upon the number of Advanced Placement courses offered at his/her high school (whether or not the applicant took those courses) (J.A. 226). Because "Black and Latino students . . . are more likely to attend [Michigan public] schools that offer fewer such [courses]" (Cir. App. 3481),[8] UMS applicants far less frequently receive "S" points than non-UMS applicants.[9] Moreover, the availability of AP courses directly affects the number of points awarded to applicants based on their performance on standardized tests such as the SAT or ACT, because students who take AP courses tend to have higher scores (Cir. App. 3478-79). Finally, UMS applicants also receive fewer "C" points for taking such courses (see J.A. 229-30) since they are disproportionately unavailable in the public high schools they attend (Cir. App. 3477, 3480).

While all Michigan resident applicants are awarded ten points, those from designated northern counties and small communities in the state receive an *additional* six points (J.A. 232-33). Most of these applicants are non-UMS, because there are very few minority students ["Less than 1 percent of Blacks"] in those counties (Cir. App. 3482; *id.* at 3495-97). In 1995, 7.2% of non-UMS applicants get the additional "G" points, compared to only 1.5% of UMS students. (Silver & Rudolph at 17-18.)

Finally, the "A" factor gives four extra points to the children

[8]38% of African-American students are in schools that offer no such courses, while only 4% of Michigan's white students are enrolled in such public schools (Cir. App. 3480).

[9]35.1% of UMS applicants get one or more "S" points, compared to 50.8% of non-UMS applicants; 11.4% of UMS applicants received two or more "S" points in 1995 compared to 22.4% of non-UMS applicants (Silver & Rudolph at 16).

of alumni; "UMS [applicants] have consistently constituted seven to nine percent less than non-UMS [applicants] who received A-factor points in 1995 through 1997" (Silver & Rudolph, at 18).

The "U" or "Other" category is the only grouping under which race is taken into account: from 1998 forward, a UMS applicant receives 20 points. However, non-minority applicants can also receive 20 points within that same grouping, based on socio-economic disadvantage, the receipt of an athletic scholarship, or as awarded by the Provost in his discretion (see J.A. 241). (An applicant may receive only one award of 20 points for any of these reasons.) (J.A. 231.)

There is no evidence in this record that most — if any — of the SCUGA factors measure an applicant's potential to complete a course of study or are necessary to the University's ability to provide educational services: From 1995 to 1997, for instance, the University's own guidelines stated that "In reality, only the 'C' factor should be added to the GPA" (J.A. 84, 94, 104). Moreover, as noted above, an applicant's ability to earn "C" points, as well as "S" points, reflects what AP courses Michigan public schools have made available at the applicant's school as much as the student's own initiative.

Intervenors' unrebutted evidence showed, however, that (in 1995 and 1997, the years for which data were analyzed), those same SCUGA factors, taken as a whole, "disproportionately benefitt[ed] non-UMS applicants as a group [and] . . . correspondingly disadvantag[ed] UMS applicants as a group"[10]

[10]The "G" and "A" factors (reflecting birth and residence, matters determined almost exclusively by parents, not students) also disproportionately disadvantage UMS applicants. See *infra* p. 22. The University's 2000 SCUGA Guidelines explain that the "G" factor points for students from northern Michigan counties is intended to provide an "appropriate representation of students" from all counties since Michigan is a "public institution supported by the citizens of Michigan" and that the alumni preference is designed to recognize "the continuing service and support" provided by alumni to the University (J.A. 232-33).

— and that "the combined SCUGA increment outweigh[ed] UMS/race as a determinant of admission" (Silver & Rudolph at 19-20) .

2. The University's history of discrimination

Aside from discrimination in the current admissions process, Intervenors presented substantial and uncontroverted evidence that during its entire 185-year history, the University has repeatedly engaged in racially discriminatory and exclusionary practices against UMS students on its campus, the effects of which, to this day, are manifested in their continued underrepresentation on campus and in the University's reputation for discriminatory behavior. These practices included the operation of segregated housing and activities on campus; refusal to take meaningful steps to recruit, enroll, and retain minority students; and deliberate indifference to a campus climate marked by racial hostility and racist actions by University students and even staff. Through the years, the University minimized or sidestepped criticism of its discriminatory practices by the federal government, state legislators, the Regents of the University, civil rights organizations, and its own faculty and students (Cir. App. 2261-83). Only after a series of student protests, led mostly by the few African-American and Latino students on campus, did the University take small steps to recruit and admit a greater number of qualified students of color. However, the University has failed, even in the face of renewed student complaints, to take effective action to end the numerous discriminatory and racially hostile practices that continue to occur on campus. We sketch the history briefly.[11]

The University was founded in 1817. However, it was not

[11] See Cir. App. 2262-2383 (Expert Report of James D. Anderson).

until 1868 that the first African-American students were enrolled. (Cir. App. 2265). The school segregated its own campus housing, and allowed students of color to be excluded from fraternities and sororities into the 1960's. Despite calls in 1949 by the Michigan Civil Rights Congress and again in 1952 by the campus Committee on Student Affairs to alter discriminatory by-laws of campus organizations, University President Harlan Hatcher and other officials flatly refused to do so (Cir. App. 2266), leaving University-recognized organizations free to continue their discriminatory practices with implicit or explicit University sanction.

The University also resisted dismantling segregation in its own housing units. As late as 1958, for example, it decided to continue to "respect the wishes of a student who said that he or she did not wish to live with a student of another race" in a school dormitory (Cir. App. 2268).[12] The University treated foreign students in a markedly different fashion, relying on a "Michigan tradition that segregation of foreign students by nationality is undesirable and that contact with American students is mutually beneficial" to justify the full integration of foreign students into campus life and policies giving them priority over African-American students in both admissions and housing (Cir. App. 2270).

In May, 1963, against this backdrop of exclusion and discrimination, the University established the Ad Hoc Advisory Committee on the Negro in Higher Education (Cir. App. 2274), and the following year that Committee announced the University of Michigan's first "mandate" — the Opportunity Program — described as an effort to recruit and admit "socially disadvantaged" students to the school. While minority

[12]In a letter to the Vice President for Student Affairs, Regent George E. Palmer wrote at the time that "[t]he image the Board of Governors is creating for the incoming freshman, I am afraid, is that we do not care about his racial prejudices." (Cir. App. 2269).

enrollment increased to some degree [13] in the years immediately following, students of color still faced apathy at best, and often active resistance, to their presence at the University[14] and were still excluded from campus activities and university social traditions. (Cir. App. 2274-75, 2276, 3768).

In 1970, intense dissatisfaction with the University's failure to address campus racism and to increase minority enrollment culminated in a series of student strikes. In February of 1970, a student group, which called itself Black Action Movement (BAM), pressed the Regents and the University administration for a substantial increase in African American enrollment, as well as for increased financial aid so that African-American and Latino students, disproportionately poor, could enroll, once admitted. (Cir. App. 2278-80). The proposal won support from many, including then-Governor William Milliken and the Michigan Senate Advisory Committee for University Affairs. However, Universi y administrators rejected it. It was not until after the students went on "strike" that the University finally agreed to pursue limited admissions and recruitment efforts (*id.* at 2284-85), only to abandon them in 1973 (*id.* at 2289).[15]

[13]In 1954, there were fewer than 200 African Americans attending the University. By 1966, 400 Black students were enrolled, still representing only 1.2 per cent of the total student population of about 32,000. At the same time, nearly 55 per cent of Detroit's 300,000 elementary and secondary school students were African American. (Cir. App. 2265.) In 1960, there were fewer than 50 Latino and Native American undergraduate students combined. *Id.* By 1968, these numbers had increased only to 73 "Spanish" and "American Indian" students (*id.* at 2276).

[14]In a typical example, a prospective African-American applicant walked into the admissions office to request admissions materials but was told by a counselor, without any review of her transcript or qualifications, that she was better suited for community college. Not surprisingly, the applicant concluded that the recommendation was based solely upon her skin color (Cir. App. 3743-46, 3748).

[15]After the strikes, African Americans increased from 3.5 percent of all

During the 1970's, the University experienced widespread and well-publicized racial incidents in campus dormitories that prompted complaints of dehumanizing treatment of African-American students (*id.* at 2293). Numerous investigations, including one conducted by the University, identified racism on the part of University staff as one factor contributing to the tensions (*id.* at 2294-96). The University did little to rectify the situation. Consequently, African-American enrollment at Michigan began to plummet, falling to 4.9 per cent between 1973 and 1983 — its lowest level since 1970 (*id.* at 2291-92).

In 1975, Michigan students of color responded by organizing "BAM II." They requested increased support services for minority students and an effective institutional effort to address the persistent negative racial climate on campus; University President Robben Fleming refused both requests (*id.* at 2298-99). With the University continuing to tolerate acts of discrimination and with no minority recruitment and admissions effort in place, minority enrollment and retention rates continued to decline: between 1976 and 1985, the number of African-American undergraduates at the University declined by a full 34 per cent.[16]

When, in 1980, University sociology professor Walter Allen conducted a study of undergraduates at Michigan, he noted that 85 per cent of African-American students surveyed reported that they had experienced severe racial isolation on campus and racial discrimination by their peers, administrators or professors (*id.* at 2312-13). These findings were included in a report to the University Regents and were repeated when the study was

students in 1970 to 6.8 percent in 1972. Students with Spanish surnames increased from 0.2 percent in 1970 to 0.6 percent in 1972. (Cir. App. 2286).

[16](Cir. App. 3885 [Niara Surdakasa, Report on Minorities, Handicappers and Women in Michigan's Colleges and Universities, State Superintendent's Special Advisory Committee (1986]).

summarized in the Michigan undergraduate school's magazine, in which Allen stressed the need for a critical mass of African-American students and faculty to protect the students from the harshness of racial discrimination and isolation on campus. (*id.* at 2311).[17]

Highly publicized racist incidents continued to occur on campus, however, *see, e.g., id.* at 3759-61, 2320-29, and were considered in a hearing before the Michigan State Legislature at which University officials discussed the challenges of dealing with the hostile climate on campus (*see id.* at 2328). A University investigation into the incidents concluded (*id.* at 2324-25) that the problems extended beyond other students, that "[i]n the classroom students of color encounter instructors who make openly racist comments, inside and outside of class; those persons are the colleagues of faculty of color and the supervisors of staff . . . ."

Soon after these incidents occurred, in 1988 Provost James Duderstadt announced plans for a new initiative. Duderstadt unveiled the "Michigan Mandate," an effort that sought to increase the number of students and faculty of color, to provide "equal opportunity" and "equal access to all educational resources to students from under-represented racial and ethnic" groups (*id.* at 1378-79), to remedy institutional racism on campus (*id.* at 1383), and to promote a more racially and ethnically diverse campus to prepare students for an increasing multicultural world (*id.* at 1376). The Mandate itself acknowledged the "prejudice, bigotry, discrimination and even racism" on the Michigan campus, as well as its goals of "remov[ing] institutional barriers to full participation in the life and leadership of [the] institution" (*id.* at 1390).

[17]The findings of Allen's study were also echoed in a report issued by Associate Vice President of Academic Affairs Niara Sudarkasa in 1986. (Cir. App. 2320-22).

3. The current negative racial environment

Although implementation of the Michigan Mandate over the last 15 years represents a substantial and continuing change in the University's attitude toward minority students and applicants, it has not in a single generation eradicated the hostile attitudes entrenched by prior discriminatory conduct and indifference. The evidence shows that UMS students continue to be subjected to racially hostile actions and remain significantly isolated.[18] As in previous years, the campus has been plagued by targeted racist actions against African-American and Latino students, including racist graffiti on the hallways of campus buildings and in dorm rooms; racially derogatory remarks and epithets (see, *e.g.*, Cir. App. 3777-79); and racist literature and lettering placed on campus buildings (*id.* at 2393). Discriminatory treatment of UMS students at the hands of University police is also regarded as endemic at the undergraduate college (see *id.* at 2409-10, 3740-41, 3752-53).

A negative racial climate affects minority academic performance, and places limits upon the informal learning, networking, and interacting that takes place with their peers outside the classroom — in dormitories and in extracurricular activities (*id.* at 2422). A negative racial climate tolerated and maintained over several decades — also deters other African-Americans and Latinos from enrolling (*id.* at 2389-91). A study conducted by the University in 1988 revealed that the primary concern expressed by more than one-third of the African Americans and Latinos who chose not to apply as undergraduates was racism on campus (*id.* at 3833, 3840).

Summary of Argument

Intervenors have introduced substantial and undisputed evidence of a history of discrimination at the University of

[18]The negative climate is summarized in the expert reports of Dr. Joe Feagin and Dr. Walter Allen; *see* Cir. App. 2405-12, 2424-28 2472-73.

Michigan the effects of which are still manifest on campus today. This evidence includes, *inter alia*, expert analyses demonstrating the adverse impact upon minority applicants of many of the components of the "selection index" used by staff in the admissions process (if not counterbalanced by the consideration of race as one factor among others), and the longstanding pattern of discrimination and inattention toward students of color at the University.

This showing of both past and present discrimination distinguishes this case from *Bakke* and satisfies the constitutional requirements that this Court has enunciated to justify a race-conscious admissions policy. It is of no legal significance that the University itself has not advanced this ground to sustain its program, because to do so would require admissions against interest that could expose the University to significant liability. In these circumstances, it suffices that the necessary showing is made by some party on the record, as was the case here.

The history of discrimination at the University also strengthens the separate diversity justification that the University advances, and which Intervenors also support. There is a strong public policy, often given effect by this Court, of encouraging voluntary efforts on the part of both public and private actors to redress prior discriminatory conduct.

As the trial court found, the record abounds with support for the proposition that diversity on college and university campuses brings substantial benefits to the entire community and thus rises to the level of a compelling governmental interest. It can hardly be questioned that the enrollment of a diverse student body at institutions of higher learning advances a plethora of interests important to our democratic society. Diversity furthers the purposes of equal protection under the Fourteenth Amendment by recognizing the value of racially and

ethnically integrated environments. It is also consistent with the academic freedoms accorded to universities to determine their own selection processes, which is recognized as a special concern to the First Amendment. The University's admissions policy is thus consistent with *Bakke*, which should be reaffirmed,

Plaintiffs fail to comprehend the value and purpose of diversity. They are gravely mistaken that diversity is predicated upon racial stereotypes and stigmas. The diversity rationale does not assume that students of color (or any students, for that matter) think alike, or will suffer a stigmatic injury because they are admitted through a process that takes race into account as one factor. To state that there is an African-American or Latino experience does not mean that all African Americans or Latinos think alike. Diversity in higher educational settings refutes rather than reinforces such assumptions, and is particularly important today, when most of the students admitted to the University of Michigan have attended largely segregated schools before their admission, and their college experience may be the only chance to learn and interact in a racially integrated environment.

Finally, the University's admissions program is narrowly tailored. It furthers the interests of diversity and is sufficiently flexible that the particular qualifications of each applicant are considered. The record is clear that academic qualifications are by far the most important criteria in making admissions decisions. Race is only one of many factors considered in the process. Despite arguments to the contrary by the United States, race-neutral alternatives to the University's present admissions program do not exist, and in particular the percentage plan approach advocated by the federal government would not function in Michigan (and, early studies show, may be flawed in other parts of the country where it has been implemented).

ARGUMENT

I. Intervenors' Showing Of Past And Present Discriminatory Actions By The University Both Provides A Remedial Basis To Sustain Its Race-Conscious Admissions Policy And Also Strengthens The Diversity Rationale Articulated By The University For That Policy

The court below sustained the University of Michigan's race-conscious undergraduate admissions policy on the basis of the "diversity" rationale enunciated by Justice Powell in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Intervenors agree with that ruling and join the University of Michigan in defending it. See *infra* Argument II. It bears notice, however, that in *Bakke* itself, the Court reached that rationale because the record before it contained no "judicial, legislative, or [appropriate] administrative findings of constitutional or statutory violations," *id.* at 307 (opinion of Powell, J., announcing the judgment of the Court).

This case is different from *Bakke*. Intervenors *did* introduce substantial evidence of various discriminatory actions by the University, based upon which the court below could have made the appropriate findings that would fully justify, on remedial grounds, the University's admissions process.[19] This evidence is especially significant in light of cases decided since *Bakke*, which establish that race-conscious actions are constitutionally permitted not only when there are "judicial, legislative, or administrative findings of constitutional or statutory violations" but also when a public actor can show a "strong basis in evidence for its conclusion that remedial action was necessary,"

[19]Indeed, intervention was granted explicitly because, the Sixth Circuit found, "the University is unlikely to present evidence of past discrimination by the University itself or of the disparate impact of some current admissions criteria, and . . . these may be important and relevant factors in determining the legality of a race-conscious admissions policy," *Grutter v. Bollinger*, 188 F.3d 394, 401 (6th Cir. 1999).

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989). The "strong basis in evidence" standard does not require a prior adjudicative or legislative finding, or a contemporaneous judicial finding of unlawful discrimination, *see Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 290-93 (1986) (O'Connor, J., concurring in the judgment). A showing of a *prima facie* case is sufficient, *see Croson*, 488 U.S. at 500.

Although the court below rejected Intervenors' contentions that a remedial justification provided an independent basis for the University's admissions policies, this Court is free to affirm an appealed decision on any ground which finds support in the record, regardless of the ground upon which the trial court relied.[20] Plaintiffs' position is that Intervenors' evidence is irrelevant because the University did not adopt it nor claim that it adopted the admissions policy for any remedial purpose. We urge the Court to reject that position.

It is understandable that the University has not advanced a remedial justification for its actions. To call attention to current inequities in its admissions policies, to past discrimination or the perpetuation of past discrimination on its part, or even discrimination by other governmental actors, would require the University to point the finger at itself (or its "parent"), potentially harming its reputation and placing it at risk of legal liability to others, including minority students. *Cf. Wygant*, 476 U.S. at 291 (O'Connor, J., concurring in the judgment) (noting that public employers might be "trapped between the competing

[20] *See Whitley v. Albers*, 475 U.S. 312, 326 (1986) ("respondent correctly observes that any ground properly raised below may be urged as a basis for affirmance of the Court of Appeals' decision"); *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977) ("prevailing party may defend a judgment on any ground which the law and the record permit"); *Langnes v. Green*, 282 U.S. 531, 538-39 (1931) (appellee may, without filing a cross-appeal, advance any theory in support of the judgment that is supported by the record, whether it was ignored by the court below or flatly rejected).

hazards of liability to minorities if affirmative action is *not* taken . . . and liability to nonminorities if affirmative action *is* taken") (emphasis in original). Even to make a showing of a "strong basis in evidence" in these areas carries the same risks.

Although the "strong basis in evidence" formulation announced in *Wygant* and *Croson* was intended to mitigate the disincentive for governmental agencies to assess their past actions and take steps voluntarily to redress any discrimination they identified, potential liability still strongly deters public bodies from themselves articulating remedial objectives because of the legal significance of making out a *prima facie* case.[21] This Court should therefore reject the conclusion below (Pet. App. 72a-76a) that a public body's reluctance to identify its own past discriminatory conduct prevents a court from recognizing a remedial justification for race-conscious action based upon a showing *by another party* of the public body's past discrimination. *Cf. Croson*, 488 U.S. at 492 (holding that a public agency may take race-conscious steps to avoid perpetuating discrimination caused by other public or private entities).

In *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 729

[21] *See, e.g., Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000) ("a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated"); *id.* at 143 ("once the defendant meets its burden of production . . . the trier of fact may still consider the evidence establishing the plaintiff's *prima facie* case 'and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual'" (*quoting Texas Dep't of Comty. Affairs v. Burdine*, 450 U.S. 248, 255 (1981)); *In re Employment Discrimination Litig.*, 198 F.3d 1305, 1321-22 (11th Cir. 1999) ("If, after a '*prima facie*' demonstration of discriminatory impact, the employer cannot demonstrate that the challenged practice is a job related business necessity, what explanation can there be for the employer's continued use of the discriminatory practice other than that some invidious purpose is probably at work?").

(1982), the Court rejected the state's claimed remedial justification for operating a nursing school restricted to women, noting that the state "ha[d] made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field when the MUW School of Nursing opened its door or that women currently are deprived of such opportunities." *See United States v. Virginia*, 518 U.S. 515, 533-34 (1996). In neither *Hogan* nor *Virginia*, however, were there intervenors who presented evidence that would establish the factual basis for a claim of remedial justification. Where, as here, that showing is made by intervenors, it would seem to exalt form over substance to mandate that it be disregarded.

In arguing for that result, Plaintiffs would have this Court ignore the history of discrimination at the University of Michigan, which they disparagingly label "societal discrimination" that is not actionable, Pet. Br. at 48. (*But see* Brief of NAACP Legal Defense & Educational Fund, Inc. and the American Civil Liberties Union as *Amici Curiae*, *Grutter v. Bollinger*, No. 02-241, at ___.) Upon a closer review the Court will conclude that unlike the evidence in *Bakke* concerning the University of California at Davis medical school, there is, in fact, a history of past — and ongoing — discrimination at the University of Michigan that justifies, on remedial grounds, its race-conscious admissions policies.

A. The University's Consideration Of Race Is Necessary To Counteract Other Factors In Its Admissions Process That Have An Unjustified Adverse Impact On Minority Applicants

No party disputes that key components of the University's admissions criteria work to the systematic disadvantage of African-American, Latino, and other UMS applicants. The "S," "C," "G," and "A" factors unfairly disadvantage such applicants

because they assign points that increase a candidate's chances of admission on the basis of characteristics that are unrelated to an applicant's individual achievement or potential — but which are disproportionately possessed by non-UMS, applicants. Because there is a "strong basis in evidence" to believe that the University's admissions process, if it did not balance out the adverse impact of these factors on UMS applicants by considering racial or ethnic background, would violate regulations promulgated pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, the University has a compelling interest in maintaining its current admissions process.

1. The "S," "C," "G," and "A" factors have an unjustified disproportionate adverse impact on UMS applicants to the University

The unrebutted record evidence, summarized *supra* pp. 6-9, establishes the discriminatory impact of the school, curriculum, geography and alumni SCUGA factors on UMS applicants.

First, because UMS applicants disproportionately attend highly segregated[22] Michigan public schools that have relatively low numbers of honors and AP courses, average SAT scores and college-going rates, the use of the "S" (School) factor places them at an unfair disadvantage. Graduates of these schools who seek admission to the University necessarily are awarded few or no "S" factor points (Cir. App. 3478-79; Silver & Rudolph, at 16, Table 16).

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[22] *See, e.g.*, Cir. App. 1951-52, 1964, 1970-76, 1981-91 (Expert Report of Thomas Sugrue, documenting systemic discrimination that has resulted in Michigan's having among the highest rates of school and residential segregation in the nation); Brief of NAACP Legal Defense & Educational Fund, Inc. and the American Civil Liberties Union as *Amici Curiae*, *Grutter v. Bollinger* (No. 02-241) at 6-13, 14-16.

The "C" (Curriculum) factor, which assigns more points to applicants who have taken more AP, Honors and similar courses, has a like effect. By virtue of the fact that they overwhelmingly are assigned to schools that offer few or none of these courses (especially when compared to offerings in schools in predominantly non-UMS suburban districts), UMS applicants are disproportionately unable to benefit from this factor even if they are achieving at the highest levels at the schools they do attend (Cir. App. 3477, 3480).

The "G" (Geography) and "A" (Alumni) factors also have a similar impact. The "G" factor awards points to applicants who reside in overwhelmingly white areas of one of the most residentially segregated states in the country (Cir. App. 3482; see also *supra* note 22). The "A" factor operates as a "grandfather clause" because it is tied to the University's racially exclusive past.[23] See Cir. App. 3672 (from 1995-98, admission rates for applicants entitled to "A" points were higher than rates for applicants without relatives who graduated from Michigan); *id.* at 3481 (UMS applicants admitted to the University are mainly first-generation college goers); *id.* at 1998 (Census tables showing black/white differences in college attendance and completion in Michigan, 1960-1990); *id.* at 3671 (between 1995 and 1998, more than 75% of white applicants had an alumnus/a relative, compared to only 4% of UMS applicants).

Significantly, these SCUGA factors reward educational *advantage*, far more than individual *merit*. The University itself has recognized that, with the limited exception of the "C"

[23]*See Meredith v. Fair*, 298 F.2d 696, 701 (5th Cir. 1962) ("We hold that the University's requirement that each candidate for admission furnish alumni certificates is a denial of equal protection of the laws, in its application to Negro candidates. It is a heavy burden on qualified Negro students, because of their race. It is no burden on qualified white students.").

factor, the SCUGA factors are not measures of a Michigan UMS applicant's initiative or academic achievement. See J.A. 84, 94, 104 ("In reality, only the 'C' factor should be added to the GPA."); *id.* at 232 ("G" points awarded to insure "appropriate representation of students from Michigan" since University is "public institution supported by the citizens of Michigan"); *id.* at 233 ("A" points "recognize the continuing service and support provided to the University" by alumni).

Nor is there any evidence that these individual characteristics, or the school characteristics captured by the "S" factor, determine or predict any level of individual performance — including likelihood of completing the program of study — at the University.[24] Moreover, any potential educational justification for use of the "S" or "C" factor alone could not conceivably extend to the triple disadvantage suffered by UMS applicants. Because these students find themselves assigned to mostly segregated schools with disproportionately few AP or Honors courses, their standardized test scores are likely on average to be lower (resulting in fewer points in the selection index), and they will not receive similar "S" or "C" point awards as students in predominantly white Michigan schools that offer more of these courses. As one of Intervenors' expert witnesses noted, UMS applicants are subject to these obstacles to admission even when they have "fully engage[d] the educational offerings made available to them and perform[ed] at a level of excellence" (Cir. App. 3478) .

2. The University has a compelling remedial interest in counteracting the individually and combined discriminatory effect of its SCUGA factors

[24]While the University determines a school's quality for "S" factor purposes in part by computing the average SAT score of test-takers at an applicant's high school there is reason to question whether this is an appropriate use of the SAT. See Expert Report of Claude Steele, Cir. App. 1928-30 (discussing limitation of use of SATs).

The highly disparate impact of the "S," "C," "G," and "A," factors, as well as of the SCUGA factors in combination (see Silver & Rudolph, at 19-20), justify race-conscious remedial action by the University because there is a "strong basis in evidence" for anticipating that the use of such criteria alone would constitute a violation of regulations promulgated to enforce Title VI. Those regulations prohibit entities receiving federal funds (such as the University) from using standards or criteria that have a racially discriminatory effect. *See* 34 C.F.R. § 100.3(b)(2) (2002).[25] An institution violates these regulations by maintaining a practice that has a statistically significant disparate impact on a particular racial or ethnic group that cannot be shown to be educationally necessary. *See, e.g., Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988); *Board of Educ. v. Harris*, 444 U.S. 130, 151 (1979).

The evidence previously summarized, which was uncontroverted, demonstrates beyond peradventure that: *first*, in the absence of the inclusion of race as a consideration within the "U" component, the "SCUGA factors" singly and in combination would result non-UMS applicants receiving highly disproportionate numbers of selection index points compared to UMS applicants — and *second*, that neither plaintiffs nor the University has articulated a credible or legally sufficient educational justification for such an admissions system (which is, in fact, the system Plaintiffs wish to impose

[25]That regulation provides: "A recipient . . . may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the *effect* of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin." 34 C.F.R. § 100.3(b)(2) (emphasis added). The Court has held that while Title VI prohibits only intentional discrimination, these regulations prohibit actions that have an unjustified adverse impact. *See Alexander v. Choate*, 469 U.S. 287, 293 (1985) (discussing *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983)).

upon the University through this litigation).[26]

Michigan's interest in avoiding non-compliance with its Title VI obligations, as it has been able to do by considering race along with other factors in the SCUGA calculations, is surely compelling. Nothing in this Court's jurisprudence suggests that the University must choose between foregoing the use of economically or politically advantageous criteria (such as the "G" and "A" factors) and admitting applicants by lottery, on the one hand, or operating a largely segregated educational program that replicates the high levels of segregation and isolation that characterize public education in grades K-12 throughout the State, on the other. *Cf. Stuart v. Roache*, 951 F.2d 446, 452-56 (1st Cir. 1991) (approving consent decree authorizing race-conscious relief to offset disparate impact produced by earlier use of examinations whose validity was challenged in lawsuit).

B. The University's Historic Discrimination Continues To Affect UMS Enrollment And To Perpetuate A Hostile Racial Climate On Campus

As noted *supra* pp. 11-14, the long-continued pattern of discrimination and indifference toward UMS students and applicants by the University caused minority enrollment to decline and deterred qualified minority high school students from applying. *Cf. Teamsters v. United States*, 431 U.S. 324, 365-66 (1977) (recognizing that company's reputation for

[26]An acceptable justification must be *necessary* to the educational program, not just related to it in some way. *See* Guidelines for Eliminating Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex, and Handicap in Vocational Education Programs, Appendix B to Part 100, 34 C.F.R., § IV.K.(admissions criteria with impact of excluding individuals protected against discrimination by statute must be "validated as essential to *participation* in a given program . . . . Examples of admissions criteria that must meet this test are past academic performance . . . high school diplomas and standardized tests . . . .") (emphasis added).

discrimination may deter minority class members from applying for jobs). Substantial evidence in the record documents this phenomenon. For instance, in 1966 the Defense Department conducted an investigation into the University's compliance with Title VI of the 1964 Civil Rights Act. The Department's report reflected Michigan's reputation as a university "basically for rich white students" and noted that "[t]he minimal number of negroes (*sic*) on the University faculty is a detriment to the public image of the University" (Cir. App. 2270-71).[27] Similarly, the University's long and consistent refusal and failure, until implementation of the Michigan Mandate, to take any serious actions to condemn and reduce racially hostile acts by its own staff and by student peers entrenched perceptions and the climate of antagonism against UMS students on the campus, because that refusal and failure conveyed University officials' implicit endorsement of that climate.[28]

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[27] *See also, e.g.*, Cir. App. 2332-33 (citing 1989 affidavit of Interim University President Robben Fleming stating that extensive racial harassment on campus had led to dramatic declines in minority enrollment), 2346-67 (citing various internal University reports and studies) 2328-29 (Expert Report of Dr. Anderson), 2389-91 (Expert Report of Dr. Feagin), 3769-72 (Stephens deposition), 3382 (Test Score Senders Study).

[28] This Court has held educational authorities or employers responsible for racial or gender harassment by supervisors or peers when they fail to respond to complaints by the victims of these actions. *See Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 290 (1998) (school district is not liable for sexual harassment of student by principal unless official with authority to take corrective action received actual notice of harassment but failed, with deliberate indifference, to do so); *Faragher v. City of Boca Raton*, 524 U.S. 775, 806-08 (1998) (employer's damage liability for supervisor's sexual harassment of employee, in absence of tangible adverse employment action against employee, is subject to affirmative defense that employer took reasonable precautions to prevent harassment and employee unreasonably failed to use that mechanism to avoid harm); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 646-47 (1999) (adopting "deliberate indifference" standard of *Gebser* as basis for school district liability for peer sexual harassment of student that occurs in school during school hours when perpetrator is subject to district's disciplinary control); *Monteiro v. Temple Union High Sch. Dist.*, 158 F.3d 1022, 1033-34 (9th Cir. 1998) (reversing dismissal of claim that school district violated Title VI when it failed to respond to student's complaint of peer racial harassment); *see also* Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11448 (Mar. 10, 1994) (outlining liability of educational institutions for maintaining hostile educational environment). *Cf. Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 457 (1979) ("Each instance of a failure or refusal to fulfill th[e] affirmat9ve duty [to dismantle the former dual system] continues the violation of the Fourteenth Amendment").

The University's interest in eliminating these continuing effects of its own past policies and conduct, as it has sought to do in part through its admissions policy, *see infra* p. 45, is compelling. To the extent that the current campus climate can be regarded as the product of discriminatory actions and attitudes of others — such as non-UMS students — the University is entitled to maintain a properly tailored race-conscious admissions system in order to avoid reinforcing or perpetuating that discrimination, even discrimination by private parties. *Croson*, 488 U.S. at 491-92.

C. The History Of The University's Past And Present Conduct With Discriminatory Impact Should Inform The Court's Consideration Of The Diversity Rationale For Its Current Admissions Procedures

We have argued above that but for the University's explicit consideration of race as one factor among others, the educationally unnecessary disparate adverse impact of the remainder of its admissions procedures and the depressingly persistent discriminatory acts of University officials, resulting from deliberate decision, willful indifference, or mere apathy, justify Michigan's current race-conscious admissions system under the standards of this Court's rulings in *Wygant* and *Croson*. These matters are equally relevant to the Court's consideration of the alternative diversity rationale urged by the

University, accepted by the court below, and approved in this Court's ruling in *Bakke* (to which we turn in the next section).

At least in this case, the constitutionality of the diversity rationale cannot be adjudicated in the abstract, as if the conditions of underrepresentation, isolation and hostility toward minority students that have plagued the University to this day had no relationship to traceable, official conduct. That is the essence of Justice Powell's rejection of "societal discrimination" as an adequate underpinning for the University of California's two-track admissions scheme involved in *Bakke*.[29] As Justice Powell's opinion itself recognized, however, the "societal discrimination" rationale was proffered by California entirely distinct from and disconnected from, any recognition of its own discriminatory conduct, which it never even purported to acknowledge. 438 U.S. at 309-10. Justice Powell's analysis of the diversity rationale proffered by California was also made without any reference to prior discrimination, *id.* at 311-20.

Today, Plaintiffs and their *amici* have directly attacked the *Bakke* ruling and seek to have this Court overturn it. In considering their arguments, it is critical to realize that nothing in Justice Powell's opinion can be read to indicate that the

[29]There are persuasive bases to disagree with Justice Powell's assessment, as the dissenters in *Bakke* did, 438 U.S. at 324, 328-55, 362-73 (opinion of Brennan, White, Marshall & Blackmun, JJ.). *See* Brief of NAACP Legal Defense & Educational Fund, Inc. as *Amici Curiae*, *Grutter v. Bollinger* (No. 02-241). Our point here, however, is that the Court need not resolve that debate in this litigation, because the record evidence demonstrates that the University's prior discriminatory conduct contributes significantly to the current lack of diversity that would prevail in the absence of its race-conscious admissions process. Ignoring that record in assessing the depth and adequacy of the University's interest in achieving diversity today would do more than just blink reality; it would transform constitutional adjudication into a sterile, ahistorical exercise to a degree without any precedent in this Court's jurisprudence.

Court would not have taken account of a record of past discrimination by California that contributed to the isolation and lack of diversity that the Medical School was seeking to alter in deciding that case, if there had been such a record.

We believe that the presence of such evidence would have been considered and relied upon by the *Bakke* Court in upholding the diversity arguments. Whether that is right or wrong, the issue is an open one for *this* Court. The strong tradition of encouraging voluntary efforts to redress past discriminatory conduct, on the part of both private actors[30] and public entities,[31] should not be abandoned in this case. In weighing the diversity rationale, the Court should take account of the strong impetus and justification that Michigan's historical and current discriminatory conduct provides for its efforts to achieve diversity.

II. Diversity Is A Compelling Governmental Interest Sufficient To Support The University Of Michigan's Race-Conscious Admissions Policy

The University presented in the record a wealth of specific data from among the most respected researchers in the country that establishes the value of diversity. That record demonstrates beyond any doubt that a racially diverse campus provides a better education, both in and out of the classroom, than an all-white campus. The evidence further shows that the experience of attending a racially diverse collegiate institution brings measurable benefits to all segments of our society. Based upon this evidence and upon their own experience, a widely varied group of *amici* are submitting briefs testifying to the need to

[30]*See, e.g., United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

[31]*See Croson*, 488 U.S. at 492 (opinion of O'Connor, J., Rehnquist, C.J. and White, J.), 519 (opinion of Kennedy, J.), 528 (opinion of Marshall, Brennan & Blackmun, JJ.).

preserve racial diversity in higher education.

Intervenors share the belief that achieving a diverse student body is a compelling governmental interest that fully justifies the University's race-conscious admissions policy, and we join in the arguments set out in its Brief, presenting only some additional considerations here.

A. *Bakke* Compels Rejection Of Plaintiffs' Proposed Interpretation Of The Fourteenth Amendment

1. A majority of the Court in *Bakke* would have sustained the University of Michigan's admissions program

It requires no resort to the interpretive principles of *Marks v. United States*, 430 U.S. 188 (1977) to conclude that a majority of the *Bakke* Court would find the admissions program at the University of Michigan to be supported by a "compelling" governmental interest. For Justice Powell, "the attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education," *Bakke*, 438 U.S. at 311-12. The four Justices who subscribed to the opinion authored by Justice Brennan "agree[d] with Mr. Justice Powell that a plan like the "Harvard" plan [citation omitted] is constitutional under our approach, *at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination*," *Id.* at 326 n.1 [emphasis added]. For the reasons given *supra* § I (and especially as explained in § I.C.), the condition set forth in the italicized language from Justice Brennan's opinion is unquestionably satisfied in this case.

2. *Bakke* and other decisions support the conclusion that diversity is a compelling governmental interest

Plaintiffs urge the Court to adopt a narrow reading of the

Fourteenth Amendment that would limit consideration of race only to remedy documented instances of discrimination against identified individuals, claiming that this is the proper reading of the Court's seminal ruling in *Bakke*, upon which public and private institutions (educational and other) have relied for a quarter of a century. Such an approach extends far beyond *Bakke* and subsequent opinions and should be rejected.

In *Bakke* itself, the Court vacated the California Supreme Court's injunction and reversed that portion of its judgment holding that the Davis medical school could not constitutionally consider race in any manner in its admissions process. Specifically, in a portion of his opinion, which four other Justices joined, Justice Powell held that the California Supreme Court judgment forbidding any consideration of race in state higher education admissions impermissibly "failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Bakke*, 438 U.S. at 320; *see id.* at 325-26 (opinion of Brennan, White, Marshall & Blackmun, JJ.). Thus the Court left the door open for the University of California to establish race-conscious programs in the future. *See id.* at 324-26.

The *Bakke* Court's reversal of this portion of the judgment of the California Supreme Court has not been disturbed in subsequent opinions, which have been read by both this Court and by lower courts and educational institutions as an indication that the Constitution permits sufficient "breathing room" for a properly constructed affirmative action plan.[32] While there have

[32] In *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), for example, Justice Brennan's majority opinion cited *Bakke* for the proposition that "'a diverse student body' contributing to 'a robust exchange of ideas' is a 'constitutionally permissible goal' on which race-conscious university admissions programs may be predicated." *Id.* at 568 (quoting *Bakke*, 438 U.S. at 311-13). Although the Court's decision in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), overruled *Metro Broadcasting* on the

obviously been developments in the Court's equal protection jurisprudence since *Bakke*, the Court has never returned to the subject of university admissions, nor has it "indicated that Justice Powell's approach has lost its vitality in that unique niche of our society," *Smith v. University of Washington Law Sch.*, 233 F.3d 1188, 1200 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001).

3. *Bakke* should be reaffirmed

A "terrible price would [be] paid" for overruling *Bakke* now. *Planned Parenthood v. Casey*, 505 U.S. 833, 864 (1992). The price would be paid by public and private educational institutions throughout the United States that have relied on *Bakke* to enable them to diversify the ranks of higher education. *See, e.g.*, William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* ("Bowen & Bok") 8, 252-53 (1998) (citing Association of American Universities' unanimous statement affirming educational value of diversity); Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1769 (1996) ("An entire generation of Americans has been schooled under *Bakke*-style affirmative action, with the explicit blessing of — indeed, following a how-to-do-it manual from — U.S. Reports."); *Scholars' Reply to Professor Fried*, 99 YALE L.J. 163, 166 (1989) ("thousands of public educational institutions, attempting to provide a more diverse group of students and faculty, have, of their own volition, followed Justice Powell's direction . . . to consider minority status as one among many relevant factors").

separate issue of whether a lower level of constitutional scrutiny applies to racial preferences enacted by Congress, *see* 515 U.S. at 227-35, *Adarand* did not involve (and the Court did not reject) the proposition that institutions of higher education have a compelling interest in obtaining the educational benefits of a diverse student body. *See id.* at 257-58 (Stevens, J., dissenting). *See also Wygant*, 476 U.S. at 286 (O'Connor, J., concurring) (citing Justice Powell's opinion in *Bakke*, "although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of education, to support the use of racial considerations in furthering that interest"); *Wessmann v. Gittens*, 160 F.3d 790, 796 (1st Cir. 1998) (precedential value of Justice Powell's *Bakke* opinion should not be disturbed, especially where various individual justices have "from time to time . . . written approvingly of ethnic diversity in comparable settings").

The price would also be paid by the Court itself. We are "only a generation or so removed from the legally enforced segregation which was used to discriminatorily deny African Americans and other minorities access to education." *Grutter v. Bollinger*, 288 F.3d 732, 764 (6th Cir.) (Clay, J., concurring), *cert. granted*, 123 S. Ct. 617 (2002). The pillars of *Brown* and *Bakke* have stood tall enough to allow colleges and universities to afford educational opportunity for a generation to those who have historically been subject to discrimination. To overrule a watershed decision like *Bakke* and its approval of narrowly tailored race-conscious admissions policies "would subvert the Court's legitimacy beyond any serious question." *Casey*, 505 U.S. at 867. It is therefore imperative that the Court adhere to the essence of *Bakke*.

B. Diverse Enrollments In Institutions Of Higher Education Further A Wide Variety Of Interests Important To Democratic Societies Such As Ours

The concept of diversity reflects values that lie at the core of a democratic society, as well as fundamental American constitutional principles.[33] For this reason, governmental actions that foster or preserve diversity unquestionably serve "compelling interests."

The very notion of representative democracy encompasses full and equal participation in the common governance of

[33] Of course, even the United States Constitution was textually inconsistent with democratic values until modified to include the 13th, 14th and 15th Amendments.

society by the members of a variegated *polis*. Thus, for instance, this Court has long recognized voting to be among the most basic rights deserving of constitutional protection. *E.g.*, *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) ("The right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights"). The Court has also given constitutional protection to the opportunity for all citizens — and even non-citizens — to become equipped, through education, with the basic tools and skills necessary to participate in civic affairs. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 222 (1982) and cases cited; *id.* at 234 (Blackmun, J., concurring) ("denial of an education . . . places [the individual] at a permanent political disadvantage"). Exclusion from public institutions, or from the opportunity to communicate and associate with other members of the *polis* are, therefore, deeply inconsistent with basic American constitutional values, *see, e.g., Terry v. Adams*, 345 U.S. 461 (1953) ("Jaybird" primary); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (gerrymander excluding African Americans from eligibility to vote for Tuskegee, Alabama city government), even if they are supported by the majority of the electorate, *see Lucas v. Forty-Fourth Gen'l Assembly of Colorado*, 377 U.S. 713 (1964).[34]

[34]Plaintiffs suggest that the failure to offer each of them admission to the University constitutes the same sort of "exclusion" as was involved in these cases, because it occurred in the context of an admissions process in which race was one among many factors taken into consideration. While there is reason to question whether race had anything to do with plaintiffs' rejection, see *infra* p. 44 n.42 & accompanying text, there is a more significant distinction. The individualized determination to decline to offer admission to specific white applicants did not make the University an exclusive preserve for UMS students. To the contrary, undergraduate enrollment at the University remains heavily white. No one who visited the Michigan campus today would conclude that white applicants as a group were excluded from enrollment at the school. Plaintiffs' facile analogy trivializes the important constitutional principles upon which they seek to rely.

These general principles have been given widespread application in a variety of circumstances, such as those involving the rights of candidates to communicate effectively with the members of the *polis*. *E.g., Buckley v. Valeo*, 424 U.S. 1 (1976). Most significant for the present matter, the Court long ago discerned that in a modern society, an equal or effective educational opportunity cannot be provided within a democracy to a minority in a setting that is isolated from contact with members of the majority and the future leadership of the *polis*. *Sweatt v. Painter*, 339 U.S. 629, 634 (1950):

> The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.

Against this background, Plaintiffs' contention that actions to achieve diverse student enrollments in public institutions of higher education do not serve compelling governmental interests is nothing short of astonishing.

1. Diversity furthers the purposes of the Fourteenth Amendment

The goal of diversity is of particular importance to Intervenors, who are members of minority groups that historically have been subjected to official prejudice and subordination, because its adoption and effectuation by governmental entities today gives credibility and meaning to the very different aspirations that we today profess as a nation. Diversity is the opposite of the enforced isolation that produced

"discrete and insular minorities," precluded from protecting their interests in the political process, whom this Court suggested in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938), were in need of special judicial solicitude. As this Court has recognized, in a multi-racial society, diversity is integration.

Underlying the rationale in *Sweatt* and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950) is the notion that there is value in racially and ethnically integrated settings. The Court understood, in those cases, that the "intellectual commingling of students" — specifically in a racially integrated (and thus racially diverse) setting — aids the institution's students in the "pursuit of effective" education. *McLaurin*, 399 U.S. at 641. The Court also recognized that forbidding African-American students from attending white law schools harmed them because of the specific role that racial segregation played in limiting educational opportunity for minorities. *Sweatt*, 339 U.S. at 634. An integrated educational setting served to promote the mandates of equal protection by providing minority students access to the resources and prestige that accompany attendance at established, competitive schools.

The same holds true for a diverse educational setting. By definition, an institution cannot be racially diverse if it is racially segregated. The added component of diversity, however, is that its benefits flow not only to students suffering the effects of discrimination, but to all students in the institution. See *infra* pp. 38-43. Because diversity furthers the constitutional value of equal protection, it is compelling. *See* Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381, 382, 417 (1998) (placing diversity rationale "squarely within the existing norms of equal protection doctrine" and concluding that "promoting educational diversity is fundamental to the task of maintaining

a democratic political system").

2. Diversity furthers important First Amendment interests

In *Bakke*, Justice Powell found that the interest in a diverse student body "clearly is a constitutionally permissible goal for an institution of higher education." *Bakke*, 438 U.S. at 311-12. He noted that "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." *Id.* at 312. Recognizing that one of the "essential freedoms" of a university is to select "who may be admitted to study," *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the result), Justice Powell further observed that the national commitment to safeguarding academic freedoms, is "a special concern of the First Amendment." *Bakke*, 438 U.S. at 312 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). These academic freedoms include the ability of the university to do two things in the context of diversity. First, the university may design a student body that best reflects the academic vigor of the institution and that would best contribute to a "robust exchange of ideas." *Id.*[35] Second, the university may take measures to admit the individuals of its choosing consistent with its design. Indeed, the invocation of the First

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[35]In numerous settings, courts have recognized the instrumental value of diversity. *See, e.g., Wittmer v. Peters*, 87 F.3d 916, 918 (7th Cir. 1996) (finding that a correctional boot camp's mission of pacification and reformation of its population was a compelling interest justifying the consideration of race in staff appointments); *Hunter ex rel. Brandt v. Regents of the Univ. of Cal.*, 190 F.3d 1061, 1064 n.6 (9th Cir. 1999) (holding that the "operation of a research-oriented elementary school dedicated to improving the quality of education in urban public schools" is a sufficiently compelling interest); *see also United States v. Ovalle*, 136 F.3d 1092, 1107 (6th Cir. 1998) (recognizing the important, thus compelling, interest of a jury pool's reflecting the diversity of the community).

Amendment in this way presents a "countervailing" constitutional principle to the Fourteenth Amendment. *Bakke*, 438 U.S. at 313. Therefore, notions of academic freedom, ensconced as they are in the First Amendment, render diversity an interest "of *paramount* importance," in the fulfillment of a university's educational mission, and thus sufficiently compelling to justify the competitive consideration of race to achieve that mission. *Id.* (emphasis added).

C. Plaintiffs Profoundly Misunderstand Or Misrepresent The Value And Purposes Of Diversity Within Educational Institutions

Plaintiffs contend that diversity depends upon and fosters racial stereotyping, and that the only diversity that could be considered compelling is "intellectual diversity." They posit a binary choice between "intellectual diversity" and "racial diversity" that is both false and a misrepresentation of the analysis set forth in Justice Powell's opinion in *Bakke*.

Justice Powell concluded that it was constitutional for a university to consider "a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.* at 315. According to Justice Powell, a student "with a particular background — whether it be ethnic, geographic, culturally advantaged, or disadvantaged — may bring . . . experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity." *Id.* at 314. This is a specific recognition that students of differing racial and ethnic background bring to a university a diversity of experiences, outlooks, and ideas, and that all of these factors (and not just one's intellectual views) are constitutive elements of academic diversity.

Implicit in both *Bakke* and *Sweatt* is the proposition that race and ethnicity can indeed influence one's "experiences, outlooks,

and ideas." This diversity is not compelling simply because it ensures different viewpoints on intellectual arguments in the classroom. It is instead compelling, in part, because it ensures that students are exposed to peers with different experiences that inform their education, both in the classroom and in extracurricular activities, in dorm rooms, and in other places that are a critical part of the college experience.

To assert that people of different races have a common experiential base, or more particularly that people from racial and ethnic minorities have a different experiential base than people who are white is hardly a novel proposition. For example, both Justice Marshall and Justice Thomas have spoken movingly about the importance of race in shaping them as people, though the views each has expressed on many issues may be different.[36] Other Justices have spoken of the effect on the Court of simply having African-American Justices.[37]

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[36] *See e.g.*, Juan Williams, *A Question of Fairness*, ATLANTIC MONTHLY, Feb. 1987 at 70; *Hearing of the Senate Judiciary Comm. on the Nomination of Clarence Thomas to the Supreme Court*, 102nd Cong. 260 (1991). As noted in the *amici* brief filed by current law students at accredited American law schools in *Grutter*, "Justice Thomas' recent remarks concerning the meaning of cross-burning may not be shared by all African-Americans, [but] they were uniquely powerful because of the fact that he grew up as an African-American in the rural, segregated South." Brief of 13,000+Current Law Students At Accredited American Law Schools As *Amici Curiae* In Support Of Respondents, *Grutter v. Bollinger* (No. 02-241) at 4 (citing transcript of oral argument in *Virginia v. Black*, No. 01-1107 (Dec. 11, 2002) at 21-23).

[37] For example, Justice Scalia said, "Marshall could be a persuasive force by just sitting there. . . . He wouldn't have had to open his mouth to affect the nature of the conference and how seriously the conference would take matters of race." Juan Williams, *Thurgood Marshall: American Revolutionary*, 388-89 (1998); *see also* Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217 (1992); Anthony Kennedy, *The Voice of Thurgood Marshall*, 44 STAN. L. REV. 1221 (1992).

The recent national debate over racial profiling has also illustrated the different experiential base of people from racial and ethnic minorities. There is considerable evidence that many police departments stop African-American or Latino motorists more often (all other factors being equal) than they do white motorists, that African-American or Latino shoppers are more often followed by security guards, and that Latinos are more often stopped by immigration officials.[38]

Not all African Americans or Latinos will have each of these experiences. Not all will draw the same conclusions about the existence or the validity of such practices. However, every African American or Latino will have to consider this phenomenon, recognizing that there is a possibility that he or she will be subject to it. That consideration will have a different quality than the identical consideration of a white American. In short, African-American and Latino people have different experiences than their white counterparts precisely because of the powerful role that race continues to play in this country. These experiences are, in part, historical and, in part, continue

[38]*See, e.g.*, Peter Verniero, *Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling*, 1999 N.J. ATT'Y GEN. REP. 27 ("[T]he overwhelming majority of searches (77.2%) involved black or Hispanic persons."); Elliot Spitzer, *The New York City Police Department's "Stop and Frisk" Practices*, 1999 N.Y. ATT'Y GEN. REP. 94-95 (finding that blacks comprise 25.6% of New York's population, but 50.6% of all persons stopped were black; Hispanics comprise 23.7% of New York's population, but 33% of all persons stopped were Hispanic; whites comprise 43.4% of the City's population but only 12.9% of all persons stopped); *See also Grutter v. Bollinger*, 288 F.3d 732, 764-65 (6th Cir. 2002) (Clay, J., concurring); *United States v. Montero-Camargo*, 208 F.3d 1122, 1131-32 (9th Cir.) (*en banc*), *cert. denied sub nom. Sanchez-Guillen v. United States*, 531 U.S. 889 (2000); *Washington v. Lambert*, 98 F.3d 1181, 1188 (9th Cir. 1996); Deseriee A. Kennedy, *Consumer Discrimination: The Limitations of Federal Civil Rights Protection*, 66 Mo. L. Rev. 275 (2001) (describing differential treatment experienced by numerous minority shoppers).

today.[39]

A prime benefit of racial diversity on college campuses is to make the point that, notwithstanding common *or* different experiences, not all African Americans, or Latinos, or white persons, think alike.[40] As one commentator has noted, "the diversity rationale contemplates that educational benefits flow from both interracial and *intra*-racial diversity." Goodwin Liu, *supra*, 33 HARV. C.R.-C.L. L. REV. AT 426.[41] Diversity thus

[39]See Cir. App. 1946-2043 (Expert Report of Thomas Sugrue); *id.* at 1523-70 (Expert Report of Albert Camarillo: *id.* at 1571-1647 (Expert Report of Eric Foner); *Georgia v. McCollum*, 505 U.S. 42, 68 (1992) (O'Connor, J., dissenting) ("It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence."); *id.* at 69 (recognizing "a world where the outcome of a minority defendant's trial may turn on the misconceptions or biases of white jurors"); *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972) ("[W]e are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race . . . [Their] exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented."); *Grutter*, 288 F.3d at 764 ("Notwithstanding the fact that the black applicant may be similarly situated financially to the affluent white candidates, this black applicant may very well bring to the student body life experiences rich in the African-American traditions emulating the struggle the black race has endured in order for the black applicant even to have the opportunities and privileges to learn.") (Clay, J., concurring).

[40]*See* Bowen & Bok, at 280 ("The black student with high grades from Andover may challenge the stereotypes of many classmates just as much as the black student from the South Bronx."); Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity,"* 1993 WIS. L. REV. 105, 140 (1993) ("although race is a proxy for a different experience in this society, it does not necessarily create an ethnic conglomerate with a monolithic viewpoint about that experience. Nor does it create one essential experience based on color.").

[41]*See also* Amar & Katyal, *Bakke's Fate*, 43 UCLA L. Rev. at 1763 n.87 (noting that "Justice Powell's *Bakke* Appendix pointedly quoted

works to *reduce*, not *reinforce*, the stereotyping that remains all too common in our nation today given the high levels of segregation and isolation in housing and pre-collegiate education. See Brief of NAACP Legal Defense & Educational Fund, Inc. and the American Civil Liberties Union as *Amici Curiae*, *Grutter v. Bollinger* (No. 02-241), at 13-17; Brief of Equal Employment Advisory Council as *Amicus Curiae* in Support of Neither Party, *Grutter v. Bollinger* (No. 02-241).

It can hardly be disputed that "[p]eople do not learn very much when they are surrounded only by the likes of themselves." Cir. App. 1501; *see also* Bok & Bowen at 229 ("The four years spent at a residential college have long offered a time and a place for extensive interaction around the clock. When one considers the natural tendency on the part of students to associate with (and especially to live with) individuals like oneself, it is likely that many students encounter a wider range of people in college than they will ever see again on such an intimate, day-by-day basis."). Since most of the students admitted to the University of Michigan have not attended racially integrated primary and secondary schools, Cir. App. at 1985-89, their University experience may be the only "opportunity to disrupt an insidious cycle of lifetime segregation," Cir. App. at 1681.

Ultimately, as the Court has observed: "Attending an ethnically diverse school may help . . . prepar[e] minority children 'for citizenship in our pluralistic society,' while, we may hope, teaching members of the racial majority 'to live in harmony and mutual respect' with children of minority heritage." *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472-73 (1982) (citations omitted). It is not too much to pose the following question: "If a far-flung democratic republic as

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Harvard's recognition of the importance of intra- as well as inter-racial diversity") (citing *Bakke*, 438 U.S. at 324) (appendix to the opinion of Powell, J.).

diverse — and at times divided — as [early twenty-first] century America is to survive and flourish, it must cultivate some common spaces where citizens from every corner of society can come together to learn how others live, how others think, how others feel. If not in public universities, where? If not in young adulthood, when?" Amar & Katyal, *Bakke's Fate*, 43 UCLA L. Rev. at 1749.

III. The University's Race-Conscious Admissions Process Is Narrowly Tailored

A. The University's Plus-Factor Admissions Program Furthers Diversity, Is Flexible, And Does Not Insulate Individual Applicants From Comparison With Others

The admissions program sustained below is narrowly tailored because it is necessary to further the asserted compelling interest; it flexibly considers race; and it does not pose an undue burden on non-beneficiaries. It thus comports with the criteria articulated by Justice Powell, who suggested that, in evaluating the scope of a race-conscious admissions program, a court should consider (1) whether the manner of considering race under the admissions program furthers the asserted diversity interest; (2) whether the program insulates individual applicants from comparison with all other applicants for the available seats; and (3) whether the program is sufficiently flexible to consider all elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration. *Bakke*, 438 U.S. at 315-17. *See also Croson*, 488 U.S. at 489, 504-10 (discussing narrow tailoring requirements for set-aside programs). The inclusion of race or ethnicity as one among the "U" factors that is taken into consideration along with the multiplicity of other factors distinguishes the Michigan approach from the two-track model that the Court struck down in *Bakke*.

Unlike the Davis medical school's plan, no seats at Michigan are reserved for UMS students, and white applicants are competitively considered for all places in an entering class. One expert witness estimated through regression equations that if race were eliminated entirely from the University's admissions process, UMS enrollments would plummet but the statistical probability of admission of any non-UMS applicant would rise by only 0.02 per cent (from 0.61 to 0.63) (Cir. App. 1901). Race is a "very distant third" in determining a candidate's chances for undergraduate admission (Silver & Rudolph, at 7; *see also* Cir. App. 1871). Equally striking, Intervenors' experts closely analyzed admissions in 1995 and 1997 and concluded that the failure to offer admission to the individual Plaintiffs in this case did not result from the consideration given race in the process (Silver & Rudolph, at 10, 13).[42] Thus, the record makes clear that race is not accorded so much weight that it precludes competitive consideration of all applicants.

Not only is the process tailored to balance the negative impact on UMS candidates' chances of admission that result

[42]The analysis indicated that Jennifer Gratz received only a 0.1 initial adjustment in her GPA, no "S" factor points and no "A" points (Silver & Rudolph, at 11-12). In contrast, in 1995 there were 2,661 applicants who had unadjusted GPAs that were lower than Gratz's but that, when adjusted in accordance with the University's consistent procedure, outranked her adjusted GPA. All of these applicants received offers of admission; and 60% of them were non-UMS students (*id.* at 9-12). The experts concluded that it was "more probable that Gratz was displaced by a non-UMS applicant than by a UMS applicant" (*id.* at 10).

Patrick Hamacher, by contrast, had his GPA initially adjusted upward by 0.2 and also received "S" points based on the high school he attended and "A" points because his mother attended Michigan. However, even as adjusted Hamacher's GPA was only 3.0, leading the experts to find that he had less than a fifty-fifty chance of being admitted and that "race was not a factor in the recalculation of his GPA, nor in his non-admission" (*id.* at 13).

from factors not justified by educational necessity, and which are substantially determined by pervasive past and continuing discrimination,[43] but it is also directly related to and designed to dispel the lingering perception — that was created by the long history of discrimination and indifference that is documented on the record of this litigation — that the University is not open to minority applicants. By facilitating admission of a group of minority students sufficient to enable them to form community and social support networks, race-conscious admissions reduce the racial tensions on campus that are at the core of the University's negative reputation (see Cir. App. 2466); UMS students participating in focus groups conducted by Intervenors' expert witness identified increased numbers of students of color at the school as a crucial step in changing the racial climate (Cir. App. 2424-28).

Finally, it bears repetition that *all* of the candidates admitted to the University as a result of the race-conscious process in effect from 1995 to 2000 (the years for which evidence is available in this record) were qualified for admission and likely to succeed as students at the school. See *supra* note 3 and accompanying text.[44]

[43]See Brief of NAACP Legal Defense & Educational Fund, Inc. and American Civil Liberties Union as *Amici Curiae*, *Grutter v. Bollinger* (No. 02-241); Brief of NAACP Legal Defense & Educational Fund, Inc. as *Amicus Curiae*, *Adarand Constructors, Inc. v. Mineta*, 534 U.S.103 (2001) (No. 00-730).

[44]Despite the fact that all of the students on campus have been qualified and likely to succeed, Plaintiffs and others contend that students of color are stigmatized by a race-conscious admissions process. This is both a vicious and illogical argument. Any stigma attached to students of color at predominantly white institutions did not originate with race-conscious admissions programs, nor is it likely that it would end with their demise. Rather, the best way to destroy persistent myths of the inferiority of students of color is to create racially integrated environments where qualified individuals of all backgrounds have the opportunity to interact and make informed judgments about one another.

B. Percentage Plans Are An Inadequate Alternative

The United States, in its *amicus* brief, suggests that the University's admissions policies are not narrowly tailored because there are equally effective race-neutral alternatives. Specifically, the United States urges consideration of more aggressive recruitment combined with a percentage plan approach like those employed for the public universities in a number of states, including Florida, Texas, and California. All three States prohibit the use of race as a factor in school admissions.

As a threshold matter, the district court found, based on unrebutted testimony, that Michigan is already doing all it can to recruit under-represented minorities. Pet. App. 42a ("University has attempted to enlarge its pool of under-represented minority applicants through vigorous minority recruitment programs, which have all proved to be unavailing").

Percentage plans present a myriad of problems. *See generally* U.S. Commission on Civil Rights, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education* (Nov. 2002), available at http://www.usccr.gov/ (hereinafter "USCCR Report"). Early studies indicate that they are not, in fact, equally effective as the approach approved in *Bakke* in achieving diverse enrollments

Those opposed to race-consciousness in admissions do not explain why applicants who are admitted because they are the children of alumni, or are athletes, or are admitted based on geographical preference, or even socio-economic disadvantage, suffer no similar stigma — or at least are given the chance to overcome doubts by demonstrating their qualifications. *See, e.g.*, Sheila Foster, *supra*, 1993 WIS. L. REV. at 146

Ultimately, the fact that an admittedly qualified African American or Latino student, whose test score is lower than those of a rejected white applicant, is stigmatized, while a comparably qualified white student is not, says far more about the persistence of race and ethnicity as stigma than it does about problems inherent in a race-conscious admissions program.

at the undergraduate level.[45] Moreover, it is sophistry to

[45]For a comparative analysis of all three states' experiences, *see* Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences*, The Civil Rights Project, Harvard University (February 2003), *available at* http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.php (concluding that it is incorrect to attribute any significant increase in campus diversity to a percent plan alone, and noting that a variety of race-conscious outreach, recruitment, financial aid and support programs appear to be central to the ability of some campuses to recover even partially from loss of minority students that occurred after abolition of race-conscious admissions programs). Findings of researchers as to each state may be summarized as follows:

Florida: A recent study has concluded that Florida's plan, which guarantees admission to one of its colleges to students who graduate in the top 20% of their high school class, assuming a basic curriculum, is neither race-neutral nor an effective alternative to a race-conscious admissions program. Patricia Marin & Edgar K. Lee, *Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida*, The Civil Rights Project, Harvard University (February 2003), *available at* http://www.civilrightsproject.harvard.edu/research/affirmativeaction/florida.php (major findings include: (1) plan has led to admission of very few students to state university system who would not have been admitted under pre-existing, non-race-conscious rules; (2) plan provided no guarantee of admission to two most highly selective campuses in the system; (3) only an insignificant number of "newly eligible " minority students achieved access to the system; (4) plan includes far more White and Asian students than Blacks and Hispanics, the two groups most underrepresented at the most selective campuses; and (5) the minimal success of the plan relies on race-attentive recruitment, retention, and financial aid policies).

Texas: Since 1998, Texas has provided that the top 10% of students in each high school are guaranteed admission to the undergraduate program of their choice. In 1994, African Americans constituted 5.3% of the minority enrollment at the University of Texas-Austin. That amount dropped to 2.7% as a result of the decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996), prohibiting the use of race. As of 2001, it was still only 3%. At the same time, African American students constitute 12% of the state's population. USCCR Report at 23, Figure 2.4.

refer to such plans as "race neutral." Their effectiveness in producing diverse enrollments depends directly upon the existence of a feeder pool of racially segregated schools from which applicants are drawn.[46] Indeed, those who have challenged Michigan's policies here have already indicated that they plan to challenge programs utilizing the percentage plan approach as improperly race-conscious.[47]

Objective analyses of the effect of the prohibition on the use of race and the adoption of the percentage plan have concluded that the "absolute number of [minority] students [negatively] affected is substantial." Maria Tienda, *Closing The Gap?: Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action* 14 (Jan. 21, 2003), *available at* http://www.texastop10.princeton.edu/publications/tienda012103.pdf. "Using the pre-*Hopwood* distribution as a standard," 980 fewer African Americans and Hispanics enrolled at the University of Texas and 1179 fewer African Americans and Hispanics enrolled at Texas A&M. *Id.* at 17.

California: California generally guarantees admission to one of its universities (not necessarily to the school of the applicant's choice) to any applicant in the top 12.5% statewide or the top 4% of each California school. *See USCCR Report* at Tables 2.2 and 2.3 and accompanying text. Despite these policies, since the abolition of the affirmative action program, 1600 fewer African American, 4000 fewer Latino, and 575 fewer Native Americans have been admitted to the California system. *Id.* at Table 2.4. "The percentage of students in those minority groups admitted has declined at a time when the percentage of such students in California has increased. [*Id.* at Table 2.5]. The percentage decline has been particularly acute at the system's flagship institutions. *Id.* at Figure 2.2." The drop in minority students at graduate schools has been dramatic. *Id.* at Table 2.6.

[46]Even apart from percentage plans, as two leading commentators have observed: "[i]t is hard to imagine any admissions policy that, in fact, would be perfectly 'race neutral.' Race is associated with so many aspects of life in the United States that virtually every other attribute of the applicant — SAT scores, high school attended, parents' occupation and education — has, as it were, a racial component." Bok and Bowen, at 31 n.15.

[47] *See e.g.* Michael A. Fletcher, *Race Neutral Plans Have Limits in Aiding Diversity, Experts Say*, WASH. POST, Jan. 17, 2003, at A12; Stephanie Cahill, *Skirting the "Race Quota" Label*, ABA Journal *eReport* (Jan. 24, 2003); *available at http://www.abanet.org/journal/ereport/j24affirm.html; see also* Pacific Legal Foundation, *Quotas in UC Admissions Aggressively Challenged*, *available at* http://www.pacificlegal.org/view_PLFCaseDetail.asp?iID=181&sSubIndex=Operation+End+Bias+%2D+%2D+Enforcing+California%27s+Proposition+209&iParentID=8&sParentName=Securing+Individual+Rights; *cf. Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 560 (2000) (holding that requirement that information about projects available for bids be communicated to potential minority-owned contractors was a "preference" that violated Proposition 209, CAL. CONST. art. I, § 31(a)).

The record in this case demonstrates that a percentage plan would not work in Michigan. The University presented substantial evidence that race-neutral admissions policies would result in a sharp drop in the number of minority students, and the trial court credited that evidence. Pet. App. 41a-42a. While it is true that Michigan's high schools are segregated — a necessary (and troublesome) pre-requisite for such plans to work — they are so segregated that African American students are concentrated in a very small number of schools. For instance, in the mid-1990's (1995-98), 91 of 842 public high schools in Michigan (including alternative schools, juvenile centers, etc.) had enrollments 50% or more African-American; 63 schools were 75% or more African-American (Cir. App. 3645-67; *see also id.* at 1987-88).[48]

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[48]A percentage plan approach is also flawed because it is simply unavailable in many contexts. It is unavailable in graduate schools, and, not surprisingly, plaintiffs do not even mention them in their *Grutter* brief. Although the United States discusses percentage plans most extensively in its *Grutter* brief, none of the States cited by the United States utilize percentage plans for their graduate schools.

Percentage plans are also unavailable in states with few minority high school students. They are not available in states in which high schools are not segregated by race or too segregated by race. They are not available in national universities that draw from all over the country rather than from applicants in a particular state. They are not available in small colleges,

The district court's finding that so-called race-neutral plans will not work in Michigan is not seriously challenged by plaintiffs and is fully supported on the record. The contrary suggestion by the United States, largely unsupported by fact, that purportedly race-neutral percentage plans will ensure diversity without considering race is simply wrong and should be rejected.

CONCLUSION

For the foregoing reasons, the judgment entered by the district court in favor of the University respondents should be affirmed on all grounds, and the judgment entered by the district court with respect to intervenors' claims should be reversed, or alternatively vacated as moot.

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particularly those that are highly selective. See *Brief for Amici* Amherst College *et al., Gratz v. Bollinger* (No. 02-516) They will not work for Native Americans, who are too few in numbers to be adequately represented in such a plan (see Cir. App. 1965-67). Finally, percentage plans reward students who take less challenging courses or transfer to less challenging schools, thus potentially resulting in the potential admission of unqualified students (Cir. App. 1193).

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No. 02-516

IN THE

Supreme Court of the United States

JENNIFER GRATZ AND PATRICK HAMACHER,
Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,
Respondents.

On Writ of Certiorari Before Judgment to the United States Court of Appeals for the Sixth Circuit

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QUESTION PRESENTED

Whether this Court should reaffirm its decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and hold that the educational benefits that flow from a diverse student body to an institution of higher education, its students, and the public it serves, are sufficiently compelling to permit the school to consider race and/or ethnicity as one of many factors in making admissions decisions through a "properly devised" admissions program; and, if so, whether the admissions program of the University of Michigan's College of Literature, Science, and the Arts is properly devised.

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Board of Education v. Pico, 457 U.S. 853 (1982) 24

Board of Regents of University of Wisconsin v. Southworth, 529 U.S. 217 (2000) 24

Brown v. Board of Education, 347 U.S. 483 (1954) 24

Bush v. Vera, 517 U.S. 952 (1996) 26

California Democratic Party v. Jones, 530 U.S. 567 (2000) 31

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Dickerson v. United States, 530 U.S. 428 (2000) 16, 17

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General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982) 19

Georgia v. McCollum, 505 U.S. 42 (1992) 26

Hilton v. South Carolina Public Railways Commission, 502 U.S. 197 (1991) 16

Hopwood v. Texas, 236 F.3d 256 (2000), *cert. denied*, 533 U.S. 929 (2001) 37, 44

TABLE OF AUTHORITIES—CONTINUED

Page(s)

Hubbard v. United States, 514 U.S. 695 (1995) 21

J.E.B. v. Alabama, 511 U.S. 127 (1994) 25, 26

Johnson v. Transportation Agency, 480 U.S. 616 (1987) 20

Marks v. United States, 430 U.S. 188 (1977) 14

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) 21, 27, 31, 37

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Mitchell v. United States, 526 U.S. 314 (1999) 17

Planned Parenthood v. Casey, 505 U.S. 833 (1992) 16, 17, 18, 19

Plyler v. Doe, 457 U.S. 202 (1982) 24

Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994) 46

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) ..... *passim*

Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985) 22

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Taylor v. Louisiana, 419 U.S. 522 (1975) 26

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United States v. Fordice, 505 U.S. 717 (1992) 19

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44 Fed. Reg. 58,509 (Oct. 10, 1979) 18

56 Fed. Reg. 64,548 (Dec. 10, 1991) 18

59 Fed. Reg. 8756 (Feb. 23, 1994) 18

BOOKS, ARTICLES & INTERNET SOURCES

Antonio, Anthony Lising, et al., *Effects of Racial Diversity on Complex Thinking in College Students* (2003), *available at* http://www.siher.stanford.edu 29

Babcock, Charles R. & Loretta Tofani, *Reaction: All Sides Optimistic; A Ruling With Something for Every Group*, Wash. Post, June 29, 1978, at A1 16

TABLE OF AUTHORITIES—CONTINUED

Page(s)

The Bakke Decision, Wash. Post, June 29, 1978, at A26 16

Bowen, William G. & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (1998) 19, 30, 32, 38, 42

Bowen, William G. & Neil L. Rudenstine, *Race-Sensitive Admissions: Back to Basics*, Chron. Higher Educ., Feb. 7, 2003, at B7 ..... 17, 19, 32

Cantor, Nancy, *A Michigan Legacy: Ensuring Diversity and Democracy on Campus*, Mich. Alumnus (Summer 1998) 24

Ellis, Joseph, *Founding Brothers* (Knopf 2001) 23

Frankenburg, Erica, Chungmei Lee & Gary Orfield, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* (2003), *available at* http://www.civilrightsproject.harvard.edu 25

Gudeman, Roxanne Harvey, *Faculty Experience with Diversity: A Case Study of Macalester College*, in *Diversity Challenged: Evidence on the Impact of Affirmative Action* 251 (Gary Orfield & Michal Kurlaender eds. 2001) 29

Gurin, Patricia, *Evidence for the Educational Benefits of Diversity in Higher Education: Response to the Wood & Sherman Critique by the National Association of Scholars* (May 30, 2001), *available at* http://www.umich.edu/~urel/admissions/research/ 28

Horn, Catherine L. & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* (2003), *available at* http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.php#fullreport 43, 44, 45, 47, 48

TABLE OF AUTHORITIES—CONTINUED

Page(s)

Hurtado, Sylvia, *Linking Diversity and Educational Purpose: How Diversity Impacts the Classroom Environment and Student Development*, in *Diversity Challenged: Evidence on the Impact of Affirmative Action* 187 (Gary Orfield & Michal Kurlaender eds. 2001) 29

Hurtado, Sylvia, et al., *Enacting Diverse Learning Environments: Improving the Climate for Racial/Ethnic Diversity in Higher Education* (1999) 29

Kain, John F. & Daniel M. O'Brien, *Hopwood and the Top 10 Percent Law: How They Have Affected the College Enrollment Decisions of Texas High School Graduates* (2003), *available at* http://www/utdallas.edu/research/ greenctr/ 44, 45

Kane, Thomas J., *Racial and Ethnic Preferences in College Admissions*, in *The Black-White Test Score Gap* 431 (Christopher Jencks & Meredith Phillips, eds., 1998) 42

Letter to Alexander Hamilton, September 1, 1796, *Washington Writings* (Library of America 1997) 23

Liu, Goodwin, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 Mich. L. Rev. 1045 (2002) 37

Loury, Glenn C., *The Anatomy of Racial Inequality* (2002) 28

Marin, Patricia, *The Educational Possibility of Multi-Racial/Multi-Ethnic College Classrooms*, in American Council on Education & American Association of University Professors, *Does Diversity Make a Difference? Three Research Studies on Diversity in College Classrooms* 61 (2000) 29

TABLE OF AUTHORITIES—CONTINUED

Page(s)

Marin, Patricia & Edgar K. Lee, *Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida* (2003) 44, 45, 47

Pew Hispanic Center/Kaiser Family Foundation, *2002 National Survey of Latinos*, Executive Summary (2002), available at http://www.pew hispanic.org/site/docs/pdf/ 28

Scalia, Commentary, *The Disease as Cure: "In order to get beyond racism, we must first take account of race,"* 1979 Wash. U.L.Q. 147 16

Selingo, Jeffrey, *What States Aren't Saying About the 'X-Percent Solution,'* Chron. Higher Ed., June 2, 2000, at A43 ..... 45, 46

Statement of President George W. Bush, Jan. 15, 2003, *available at* http://www.whitehouse.gov/ news/releases/2003/01/print/ 20030115-7.html 24

Statement of Mary Sue Coleman, President of the University of Michigan, Jan. 15, 2003, *available at* http://www.umich.edu/%7Enewsinfo/ Releases/2003/Jan03/r011503c.html 24

The Supreme Court: 1977 Term, 92 Harv. L. Rev. 131 (1978) 16

Texas Higher Education Coordinating Board, *First-Time Undergraduate Applicant, Acceptance And Enrollment Information For Summer/Fall 2001 (2002), available at* http://www.thecb.state.tx.us/reports/pdf/0515.p df 47

Tienda, Marta, et al., *Closing the Gap? Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action* (2003), available at http://www.texastop10.princeton. edu/publications/tienda012103.pdf 45, 48

U.S. Commission on Civil Rights, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education* (2002) ... 43, 44, 45, 47

STATEMENT OF THE CASE

1. The College of Literature, Science, and the Arts ("LS&A") is the flagship undergraduate institution of the University of Michigan, one of the Nation's leading public institutions of higher education. LS&A seeks to provide an education that will prepare its students to excel in their chosen vocations and to participate as active citizens in our democracy. The University of Michigan enjoys a first-rate reputation for educational excellence and attracts nearly two-thirds of its applicants and a third of its entering class from outside Michigan, including all 50 states and over 80 nations.

LS&A is a selective institution. It receives many more applications than it has available spaces.[1] *See* Pet. App. 4a.[2] A great many of these applicants are fully qualified to attend LS&A. *See id.* at 108a. Indeed, it is undisputed that LS&A admits only qualified applicants. *See id.* at 46a, 111a. Thus, in selecting students from this competitive pool, "admissions officers must decide which set of applicants, *considered individually and collectively*, will take fullest advantage of what the college has to offer, contribute most to the educational process in college, and be most successful in using what they have learned for the benefit of the larger society." CAJA 1500 (emphasis in original).

Offers of admission are building blocks from which a university constructs its educational environment. There is a common misperception, especially when viewed from a single applicant's isolated perspective, that offers of admission are entitlements based on grades and test scores. *See id.* at 1506. That fundamentally misunderstands the

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[1] In 1997, when petitioners filed this lawsuit, for example, LS&A enrolled only 3,958 first-year students from more than 13,500 applicants. *See* Pet. App. 4a. Last year, LS&A received more than 17,000 applications.

[2] "Pet. App." refers to the Petition Appendix; "JA" refers to the Joint Appendix filed in this Court; "CAJA" refers to the Joint Appendix filed in the Sixth Circuit.

nature of admissions at a selective institution: with a finite number of available spaces, many qualified applicants must be rejected despite strong credentials. Grades, test scores, and other academic indicators are important in assessing an individual's potential contribution, but they are by no means the only relevant factors.[3]

The University considers a broadly diverse student body "an integral component of its mission" because such diversity "increase[s] the intellectual vitality of [its] education, scholarship, service, and communal life." Pet. App. 4a. Thus, the task of the admissions office is to assemble a class that will collectively "create an environment on our campus" that is diverse in many respects and that will foster the most vibrant educational atmosphere. CAJA 1483. To do so, LS&A selects from among qualified applicants with wide-ranging interests, achievements, experiences, talents, and beliefs, and different cultural, racial, ethnic, socioeconomic, and geographic backgrounds.

Racial and ethnic diversity is a single, though crucial, element of the diversity the University seeks. College is a coming of age, and college students, most of whom are between eighteen and twenty-two years old, learn as much from one another as through classroom study. *See* CAJA 1651-52, 1656-59, 1669-70, 1717, 1740. Living, working, and learning with a racially diverse group of peers provides opportunities for a richer exchange of ideas—whether or not explicitly touching on race—that reflects a wider range of life experiences. Such interactions allow students to develop a broad variety of academic and interpersonal skills, including understanding and tolerance with respect to race and ethnicity and the ability to thrive in a multiracial

[3] In 1995, when petitioner Gratz applied to LS&A, more than 1,400 white and Asian-American students with *lower* adjusted high school GPAs or test scores than hers were admitted, while more than 2,000 white and Asian-American students with *higher* adjusted GPAs or test scores were rejected. *See* CAJA 590.

environment. *See id.* at 1652-53. Neither petitioners nor the United States denies the value of the educational benefits of diversity.

Yet, without the presence of meaningful numbers of minority students on campus, these interactions—and the educational benefits they foster—cannot take place. *See* CAJA 1668-69, 1732-36, 1836; Pet. App. 40a.[4] Meaningful racial and ethnic diversity in a wide variety of educational environments is necessary both to ensure that minority students do not feel isolated or pressured to "represent" their racial or ethnic group, and to break down stereotypes by allowing students to view each other as unique individuals. *See* CAJA at 1734-40, 1834-36.

2. LS&A endeavors to enroll a broadly diverse student body while simultaneously maintaining its commitment to academic excellence. To achieve these two essential aspects of its mission—in light of the very small pool of potential minority applicants with competitive academic qualifications—LS&A must consider race or ethnicity as a factor in making admissions decisions.

To achieve the educational benefits of diversity, LS&A also pursues means other than considering race in admissions. LS&A vigorously recruits minority students with competitive academic credentials, both to maximize the number of such students who apply and to increase the percentage of those admitted who choose to enroll (the "yield"). *See* Pet. App. 42a. LS&A's minority recruiting and outreach efforts are a year-round campaign that includes identifying and contacting talented minority students from across the country; attending recruiting fairs in areas with substantial minority populations; hosting workshops for high school counselors; maintaining an office in Detroit to recruit local high school students, most of whom are minorities; coordinating campus visits for minority high school students;

[4] As used herein, the term "minority" refers to African-Americans, Hispanics, and Native Americans. *See infra* n.13.

enlisting the aid of current students to encourage admitted minority students to enroll; and hosting a Spring Welcome Day and other events for admitted minority students. *See id.*; CAJA 1480-81, 1487-88.

The University has found, however, that these targeted recruiting and outreach efforts are simply not enough. *See* Pet. App. 42a; CAJA 1441. That is because the number of potential minority applicants with competitive academic qualifications is very small—both in absolute terms and relative to the number of qualified non-minority applicants. *See* Pet App. 42a; CAJA 1441, 1492. For example, of all high school students in the United States in 1999 with a grade point average of B or above and SAT scores of 1200 or above, only 6% were African-American, Hispanic, or Native American. *See* CAJA 4016. Likewise, of all students in the State of Michigan in 1999 with those grades and scores, only 5% were African-American, Hispanic, or Native American. *See id.* at 4017. In addition, intense competition with other selective institutions for these highly sought-after students compounds this pool size problem by depressing the yield. *See id.* at 1492, 3992.

This reality has practical consequences for LS&A's admissions program. It means, first, that in making admissions decisions, LS&A must consider race and ethnicity to attempt to enroll meaningful numbers of minority students and thereby provide all students with the educational benefits of diversity. *See* Pet. App. 42a-43a; CAJA 1836, 1912-16.[5] It also means that, because the

[5] A race-neutral version of the current admissions system would reduce dramatically the number of minority students admitted to LS&A. *See* Pet. App. 40a-41a; CAJA 1901-02, 1874-76. In 1996, for example, under a race-blind system, the number of minority students admitted would have dropped from 1,335 to 269—out of 10,363 total admitted students. *See* CAJA 1874, 1881. This would have a devastating effect on integration in important learning contexts at the University. Under such a system, for example, the likelihood that a 60-person residence hall would include at least three African-Americans and at least three Hispanics would plummet from 92% to 19%. *See id.* at 1917. The likelihood of being the sole African-American student in that residence hall would jump from 2% to 31% under a race-blind admissions system, and the probability of being the sole African-American in a 30-person Introductory Psychology section would more than double, from 33% to 71%. *See id.* at 1921.

number of qualified minority applicants is so limited, LS&A ends up admitting virtually all minority applicants with competitive academic credentials.[6] *See* CAJA 1472-73, 1491-92.

3. The Office of Undergraduate Admissions ("OUA") employs 20 full-time, professional admissions counselors who spend most of each year reviewing application files and making admissions decisions.[7] Each of the more than 17,000

[6] Petitioners' suggestion that the University has a "policy" of admitting all qualified minority applicants is incorrect. *See* Pet. Br. 4. There is no such policy. The fact that virtually all qualified minority applicants are admitted is simply a description of admissions outcomes given that there are few such applicants. Moreover, although prior versions of LS&A's admissions guidelines encouraged counselors to admit qualified minority candidates as quickly as possible, without postponing decisions on their applications, it is undisputed that the guidelines from 1999 forward discontinued this practice. *See* Pet. App. 113a, 118a.

[7] LS&A implemented its current admissions system through guidelines adopted to govern admissions for the class entering in the fall of 1999. That system remains in place today. The admissions programs governed by the 1995-98 guidelines included three race-conscious practices that the University undisputedly has discontinued and disavowed: (1) the use of grids that take race into account by setting forth admissions options for applicants with various combinations of qualifications; (2) the exemption of minority students from the practice of rejecting candidates with very low grades and test scores without counselor review; and (3) a procedure known as "protected seats" that used projections of expected applications from groups known to apply late in the process (including minorities) to pace the rolling admissions process to permit consideration of such applications. *See* JA 275. The district court concluded that, while the use of grids, standing alone, was not necessarily unlawful, the combination of the three practices was impermissible. *See* Pet. App. 47a-48a. Petitioners devote much of their brief to attacking these abandoned admissions practices. However, because the University did not cross-petition to seek review of the district court's determination that these practices, taken together, were impermissible, those practices are not properly before this Court. *See,*

applications OUA receives is read from front to back and evaluated by a counselor. The volume of applications requires procedures and routines to promote fairness and consistency, while preserving counselors' ability to exercise judgment. *See* JA 223.[8] A single, unitary set of guidelines, which is reviewed annually and altered periodically, governs the admissions process.[9] The aim of the guidelines is to "blend the consistency of a formula with the flexibility of a review that is ultimately a matter of human judgment." *Id.* OUA instructs counselors that "[a]dmissions is more art than science, and these guidelines should not be read otherwise." *Id.*

Each counselor is assigned a geographic territory and is responsible for reviewing *all* applications from that region, regardless of the race of the applicant. *See* Pet. App. 38a. There is no separate review of minority applicants, *see id.*, and LS&A does not employ quotas or numerical targets for admission or enrollment of minority students, *see id.* at 36a.

Counselors assess a broad range of academic and other factors that the University believes are important in composing a class. To facilitate consistency, counselors

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e.g., *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n.14 (1985) (cross-petition is required to alter the judgment below).

[8] The volume of applications and the presentation of applicant information make it impractical for LS&A to use the same admissions system as the much smaller University of Michigan Law School. The large number of applications precludes LS&A from having a single decisionmaker. Also, applications to LS&A are not accompanied by comprehensive reports like those received by the Law School (from the Law School Data Assembly Service, a national clearinghouse), containing data on applicants' grades and test scores and comparing each applicant to others from the same undergraduate institution.

[9] Contrary to petitioners' assertion, there are no "written guidelines" for minority applicants that are "separate from . . . guidelines applicable to all other races and ethnicities." Pet. Br. 21. The document petitioners quote, *see* Pet. Br. 4, dated 1995, is *not* a guideline or policy and was never used to guide admissions decisions. It simply summarizes the typical admissions outcomes for minority applicants under LS&A's prior guidelines. *See* JA 80-81.

calculate a "selection index" by assigning numerical values for a variety of factors, up to a possible total of 150 points. *See* CAJA 1118, 1147.[10] While the selection index is designed to guide counselors' evaluations, it does not purport to identify every possible factor that might bear on an admissions decision.

Consonant with LS&A's commitment to academic excellence, the vast majority of available points are for academic factors. Of the 150 total potential points, 110 are available for academic factors, and a maximum of 40 are available for other factors. *See* JA 224.

The predominant factor is high school grade point average. Eighty points are available for GPA from tenth and eleventh grades, excluding non-academic courses. *See id.* at 225. Standardized test scores play a relatively smaller role in the admissions process, accounting for up to 12 points. *See id.* at 224, 230-31.[11]

Counselors use the expertise they develop concerning schools in their geographic region to evaluate several non-quantitative academic factors that provide a more detailed

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[10] Petitioners inaccurately describe changes LS&A made to its admissions programs since 1995. First, the changes made between the 1997 and 1998 guidelines were not related to this litigation. *See* Pet. Br. 5. The 1995-1997 guidelines were in effect when petitioners applied, but at the time the lawsuit was filed, the 1998 guidelines were already in effect. Second, the University did not stipulate that all changes to its admissions guidelines since 1995 were non-substantive. The Joint Proposed Summary of Undisputed Facts states that "[t]he development of the selection index for admissions in 1998 changed only the mechanics, not the substance, of how race and ethnicity [were] considered in admissions." Pet. App. 116a. This statement addressed only the change from the grids to the selection index and did not address any other changes to the admissions process. The district court did not contradict that statement when it determined that, in the aggregate, all of the changes to the admissions system—particularly the abandonment of protected seats and automatic rejections—were constitutionally significant.

[11] Test scores are highly correlated with grades and therefore do not add much value in predicting an applicant's future academic performance. *See* CAJA 1929.

portrait of an applicant's academic promise. Applicants may receive up to ten points for the academic strength of their high school. *See id.* at 226-28, 240.[12] In addition, "[g]iven the wide disparity in high school course selection and offerings," counselors are asked to assess the rigor of each applicant's course of study based on their knowledge of the meaning of course labels (e.g., "honors") used by the schools in their territory. *Id.* at 228. Counselors subtract up to four points for an applicant who chose a weaker curriculum when a stronger one was available, and add up to eight points for an applicant who selected more challenging courses. *See id.* at 228-30.

In addition to the 110 points available for academic qualifications, applicants also may receive a maximum of 40 points for other factors that the University believes indicate an applicant's potential contribution to the life of the campus. *See id.* at 231. Some of these factors relate to specific attributes; others are more open-ended, allowing counselors to take into account factors not specifically identified on the selection index, such as community volunteering, playing the trombone, writing poetry, or working part-time.

Reflecting the University's commitment both to Michigan residents and to broader geographic diversity, counselors assign ten points for Michigan residency, six additional points for residency in underrepresented Michigan counties (e.g., those in the State's Upper Peninsula), and two points for residency in underrepresented states (e.g., many in the West and South). *See id.* at 232-33. Applicants receive four points if a parent is an alumnus of the University or one point if another close relative, such as a sibling or grandparent, is an alumnus. *See*

[12] Counselors rate the high schools in their territory based on factors including college attendance rate, Advanced Placement courses offered, and average standardized test scores. *See* JA 226-28. Every applicant from the same secondary school receives the same number of points for this factor. *See id.*

id. at 233-34. An applicant may also receive 20 points for one—but only one—of the following: socioeconomic disadvantage, membership in an underrepresented minority group,[13] attendance at a predominantly minority or predominantly socioeconomically disadvantaged high school, recruitment for athletics, or at the Provost's discretion. *See id.* at 238-39. Based on information in the application, essay, or high school counselor's recommendation as to activities, work experience, and awards, counselors may assign up to five points for leadership and service. *See id.* at 236-38. Counselors may give up to five additional points for personal achievement as evidenced by persistence, character, commitment to high ideals, and level of awards. *See id.* at 235-36. Finally, counselors also may award up to three points for the personal essay, taking into account originality, organization, subject matter, and writing quality. *See id.* at 234. No matter how many non-academic factors might apply to a given applicant, no applicant may receive more than 40 (of the 53 available) points for any combination of such factors. *See id.* at 231.

Recognizing that the selection index score may not always reflect all of the ways an applicant might contribute to LS&A, in 1999, the University formed the Admissions Review Committee ("ARC") to evaluate more complex admissions cases. For these cases, every member of the ARC closely reviews each applicant's entire file; the whole committee discusses the applicant's strengths and weaknesses; and the committee decides whether to admit based on its assessment of the candidate (without further reference to the selection index). *See id.* at 273-75.

[13] LS&A considers African-Americans, Hispanics, and Native Americans to be underrepresented minorities for purposes of considering race or ethnicity in admissions. *See* CAJA 1471. Because LS&A receives sufficient numbers of applications from qualified white and Asian-American students, it can enroll meaningful numbers of such students without consideration of race or ethnicity in admissions. *See id.* at 1445.

Counselors have broad discretion to decide whether an application warrants this additional level of in-depth review. *See id.* at 257. A counselor may, in his or her "discretion and judgment," "flag" an application for ARC review if the counselor determines that the applicant meets three criteria: (1) is academically prepared to do the work at LS&A; (2) has a selection index score greater than 75 for non-Michigan residents and greater than 80 for Michigan residents; and (3) possesses at least one of a variety of qualities or characteristics important to the University's composition of its freshman class, such as underrepresented race, ethnicity, or geography; high class rank; socioeconomic disadvantage; unique life experiences, challenges, circumstances, interests or talents; connections to the University community; or athletics. *Id.* at 257-60. These wide-ranging criteria allow counselors the discretion to flag for ARC review a broad array of "any number of applicants, including applicants other than under-represented minorit[ies]."[14] Pet. App. 40a.

During the admissions season, decisions are made periodically, based on selection index scores, for all applications then pending. To avoid overenrollment, LS&A sets and adjusts, when necessary, the selection index levels that trigger the three possible admissions outcomes—admittance, deferral, and denial. *See* JA 275. Flagged applications that are not admitted based on the selection index are sent to the ARC for review and final decision. *See id.*

The result of this admissions process is a student body of remarkable talent and diversity.

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[14] While race therefore may be a factor in deciding which applicants receive this more searching review, petitioners are incorrect to suggest that all—or even close to all—minority applicants are flagged for this process, *see* Pet. Br. 7. *See* Pet. App. 39a-40a. Nor are all of the candidates who receive flags minorities. *See id.*

SUMMARY OF ARGUMENT

1. In the twenty-five years since this Court's decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), virtually all of this Nation's selective colleges and universities have embraced the educational value of a broadly diverse student body and have relied on *Bakke* in crafting admissions policies designed to obtain that diversity. These schools have sought and enrolled students of different cultural, racial, ethnic, socioeconomic, and geographic backgrounds, who bring with them a variety of interests, talents, beliefs, and experiences. Through this diversity, these colleges and universities have provided their students with a better education.

Race and ethnicity are significant components of this diversity. Our country is becoming increasingly diverse and increasingly aware of its diversity. We nevertheless remain a society largely separated by race and ethnicity. It is all too common for students to come to college campuses from high schools where they have had little opportunity to interact with students of different racial and ethnic backgrounds.

This is at once an educational challenge and an educational opportunity. Bringing together students with different life experiences creates opportunities for rich and vivid exchanges, as students reflect on those experiences in a new context and share their own interpretations of them. By assembling a diverse student body, universities also encourage students to identify and confront unspoken and, indeed, often unconscious stereotypes. Seeing similarities and differences across dividing lines—whether real or perceived, and whether drawn according to race, sex, geography, or belief—is a vital part of undergraduate education. To achieve sufficient racial and ethnic diversity to generate those educational benefits, the University of Michigan must consider race or ethnicity as one of many factors in admissions.

Petitioners argue that the Constitution prohibits the University from taking race into account to obtain the benefits of a racially and ethnically diverse student body.

But a majority of this Court held in *Bakke* that "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." 438 U.S. at 320. The majority agreed that a university is not required to adopt race-blind admissions policies, and expressly cited the admissions policy of Harvard College—which was designed to attain diversity—as an example of a constitutional race-conscious admissions program. Petitioners argue about *Bakke*'s meaning, but ultimately ask this Court to overrule it. Yet they have offered no persuasive justification for this Court to do so. Hundreds of selective public and private colleges and universities have relied on *Bakke*. Undermining this reliance would have serious consequences for our national educational culture, leading, among other things, to a near-total absence of minority students in our Nation's selective colleges and universities.

2. The University's consideration of race and ethnicity is a function of the fact that the number of potential minority applicants with the competitive academic credentials it seeks is quite small. The University's extensive outreach and recruiting efforts do not, without more, lead to the enrollment of meaningful numbers of minority students. Even taking race into account to the extent that it currently does—while maintaining its commitment to academic excellence—the University is unable to achieve the full benefits of diversity across all learning environments. Thus, a ruling that either forecloses the consideration of race altogether, or requires the University to place measurably less weight on race as a factor, would preclude the University from enrolling meaningful numbers of minority students.

The University of Michigan has crafted its admissions program in reliance on and in compliance with the principles elucidated in *Bakke*. The University has no quotas or numerical targets for the admission or enrollment of minority students. Each application, regardless of the race of the applicant, is read and evaluated by a counselor,

according to a uniform set of standards. The University values diversity across a broad spectrum of qualities and experiences, and therefore race is only one "plus" factor among many.

The United States emphasizes the educational value of a diverse student body but takes no position on whether that justifies the consideration of race or ethnicity to obtain it. That issue need not be reached, the United States argues, because race-neutral alternatives are available. It offers only one: the "percentage plans" now in place in Texas, California, and Florida. While these plans may be facially race-neutral, their purpose and intended effect is to achieve some measure of racial diversity. In any event, whatever the value of those plans in those States, they simply will not work for the University of Michigan because of demographic constraints. Moreover, any percentage plan would require the University to discontinue its consideration of a much wider and more nuanced range of academic factors in making admissions decisions and to abandon its mission of enrolling a broadly diverse student body.

While the consideration of race and ethnicity in LS&A's admissions program triggers strict scrutiny, it nevertheless survives constitutional challenge because the University has a compelling interest in obtaining the educational benefits of diversity, and its program is narrowly tailored to achieve that end.

ARGUMENT

I. THE UNIVERSITY OF MICHIGAN MAY CONSIDER RACE AND ETHNICITY AS FACTORS IN ADMISSIONS TO OBTAIN THE EDUCATIONAL BENEFITS OF DIVERSITY.

In *Bakke*, this Court rejected the very proposition that petitioners advance here—that the Constitution requires colleges and universities to ignore the race and ethnicity of applicants in assembling a student body, except as intended to remedy institution-specific past discrimination, *see* Pet. Br. 13. *Bakke* should not be overruled. First, discarding *Bakke* is unjustified as a matter of *stare decisis*. Doing so

would uproot longstanding, carefully considered educational policies that were developed in reliance on its holding and that have led to unprecedented integration of our Nation's premier institutions of higher education. Second, a wealth of empirical evidence confirms, as educators have long believed, that Justice Powell was correct in *Bakke* to conclude that obtaining the educational benefits of diversity improves the educational experience for all students, and constitutes a compelling interest that justifies the consideration of race and ethnicity in a properly devised admissions program.[15]

A. Settled Principles Of *Stare Decisis* Require Continued Adherence To *Bakke*'s Core Holding.

1. This Court already has confronted and resolved the central question presented here—whether, in the absence of an institution-specific history of discrimination, a university may constitutionally consider the race or ethnicity of applicants in composing its student body. Petitioners' claim that *Bakke* has no precedential value because it announced "no coherent rule," Pet. Br. 41, is wrong.[16] A majority of the Court joined in Part V-C of Justice Powell's controlling opinion,[17] which states *Bakke*'s core holding and judgment

[15] The United States concedes that diversity is an "important and laudable goal[]" for a university. U.S. Br. (*Gratz*) 11. Yet, in an attempt to sidestep *Bakke*'s controlling effect on this case, the United States asserts that race-neutral alternatives to race-conscious admissions are available, and that LS&A's current admissions system amounts to a disguised quota. Both of these assertions are incorrect, and both were properly rejected by the court below. *See infra* at Part II.

[16] *Cf. Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 287 (1986) (O'Connor, J., concurring in part and concurring in the judgment) (noting that "the number of separate writings" in cases involving affirmative action "do not necessarily reflect an intractable fragmentation in opinion with respect to certain core principles").

[17] That opinion is the narrowest ground in support of *Bakke*'s holding. *Cf. City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496-97 (1989) (O'Connor, J.) (recognizing that Justice Powell's opinion in *Bakke* demanded a more focused rationale than the "amorphous" concern with redressing societal discrimination to find a compelling interest); *Bakke*,

that the California Supreme Court's injunction barring any consideration of race in admissions "must be reversed" because "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." 438 U.S. at 320.

The Justices who formed that majority agreed on three key points that illuminate the meaning of *Bakke*'s core holding. First, they agreed that the Fourteenth Amendment does not require universities to employ race-blind admissions programs. *See id.* Second, they agreed that the Constitution permits an institution of higher education to consider race in admissions in furtherance of an interest *other than* remedying a pattern of discrimination by that institution.[18] Third, all five Justices expressly approved the admissions policy of Harvard College—which was explicitly designed to secure the educational benefits of diversity, and not to remedy societal discrimination[19]—as an example of a constitutional race-conscious admissions program. *See id.* at 316-18, 326 n.1.

Bakke is a landmark decision precisely because it decided a controversial national issue by permitting colleges and universities to take race into account in admissions,

438 U.S. at 307; *id.* at 296 n.36 (Powell, J., concurring) (describing Justice Brennan's rationale as having "breadth [that is] unprecedented"). It therefore controls. *See Marks v. United States*, 430 U.S. 188, 193 (1977). Justice Powell's and Justice Brennan's opinions are not "too different" to compare, Pet. Br. 32: both approved the "competitive consideration" of race and the diversity-focused Harvard plan.

[18] A narrow remedial rationale was not even at issue in *Bakke* because it was "conceded that [the University] had no history of discrimination." 438 US. at 296 n.36.

[19] *See Bakke*, 438 U.S. at 322-23 (appending Harvard College admissions policy, which observed that "if Harvard College is to continue to offer a first-rate education to its students, minority representation in the undergraduate body cannot be ignored" because racial and ethnic diversity "adds a critical ingredient to the effectiveness of the educational experience") (citation omitted).

subject to certain limitations. Indeed, when *Bakke* was announced, scholars and commentators reached a remarkably uniform consensus as to its meaning, even among those who may have disagreed with Justice Powell's controlling opinion.[20] These contemporaneous observers correctly understood that *Bakke* resolved the question whether the consideration of race as a factor in admissions is constitutional.

2. *Stare decisis* is "indispensable" to "the very concept of the rule of law underlying our own Constitution." *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) (plurality op.) (citing Powell, *Stare Decisis and Judicial Restraint*, 1991 Journal of Supreme Court History 13, 16). The doctrine "carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'" *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (citations omitted); *see also id.* at 461 (Scalia, J., dissenting). Petitioners cannot overcome their "heavy burden" of providing that "compelling justification" for overruling *Bakke*. *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986); *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991).

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[20] *See, e.g.*, Scalia, Commentary, *The Disease as Cure: "In order to get beyond racism, we must first take account of race,"* 1979 Wash. U.L.Q. 147, 148 (describing Justice Powell's opinion as "the law of the land"); Charles R. Babcock & Loretta Tofani, *Reaction: All Sides Optimistic; A Ruling With Something for Every Group*, Wash. Post, June 29, 1978, at A1 (quoting Robert Bork, then-professor at Yale Law School, who thus characterized *Bakke*: "We're told that we can count race somewhat, but not too much."); *The Supreme Court: 1977 Term*, 92 Harv. L. Rev. 131, 136 n.40 (1978) ("[The *Bakke* opinions] put a majority of the Court on record that a program which considers race and even the numerical balance of the class, but which does not set aside a specified number of seats for minorities, is lawful under Title VI and the 14th [A]mendment"); *The Bakke Decision*, Wash. Post, June 29, 1978, at A26 ("Those schools that want a diverse student body . . . . can give added points in the selection process to applicants because of their race just as they give added points to applicants because they are athletes, musicians, children of alumni, artists, poor, rich or residents of places from which few applications come.").

As this Court has observed, adherence to precedent is particularly important when a decision has become so woven into the fabric of our "national culture," *Dickerson*, 530 U.S. at 443, that overturning it would cause "serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it," *Casey*, 505 U.S. at 855; *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 233 (1995) (O'Connor, J.); *Mitchell v. United States*, 526 U.S. 314, 331-32 (1999) (Scalia, J., dissenting) (stating that a rule's "wide acceptance in the legal culture" is an "adequate reason not to overrule" it). These reliance interests develop when a decision provides a guidepost on a contested issue around which people and institutions "organize" their affairs, "order their thinking," and "define their views of themselves and their places in society." *Casey*, 505 U.S. at 856, 860.

All of this is true of *Bakke*. Over the past quarter century, nearly every selective university in the United States has relied on *Bakke* in developing admissions and related policies designed to obtain and provide the educational benefits of a diverse student body. *See* William G. Bowen & Neil L. Rudenstine, *Race-Sensitive Admissions: Back to Basics*, Chron. Higher Educ., Feb. 7, 2003, at B7 ("*Back to Basics*") ("Essentially all of these 'academically selective' colleges and universities have elected to take race into account in making admissions decisions.").[21] Justice Powell anticipated *Bakke*'s far-reaching influence in his announcement of the judgment on June 26, 1978:

> [M]any of our finest universities and colleges pursue a flexible competitive admissions program

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[21] It is undisputed that the University "views diversity as essential to its educational mission," and that it considers race in admissions "[t]o facilitate diversity." Pet. App. 108a-109a. After five years of litigation, petitioners for the first time question the truthfulness of the University's asserted motivation for considering race and ethnicity. Based solely on a few law review articles, petitioners also accuse the entire higher education community and, implicitly, Justice Powell, of concocting diversity as a "cover" for other motivations. Pet. Br. 46-47.

> in which race may be considered as a relevant admissions factor. This experience demonstrates that the Davis type program—one that arbitrarily forecloses all competition solely on the basis of race or ethnic origin—is not necessary to obtain reasonable educational diversity. . . . Yet the way is open to Davis to adopt the type of admissions program proved to be successful in so many of the universities and colleges of our country.

http://oyez.org/cases/cases.cgi?command=show&case_id=324 (bench statement of Powell, J.).[22]

Not only universities themselves, but the U.S. Department of Education (the agency charged with enforcing Title VI) also has relied on *Bakke* as a guide.[23] Since 1979, the Department of Education has consistently implemented *Bakke* through binding regulations and policy guidance statements confirming the legality of admissions and financial aid policies that consider race "to attain a diverse student body" in a manner consistent with Justice Powell's opinion. 44 Fed. Reg. 58,509 (Oct. 10, 1979).[24]

Overruling *Bakke* not only would upset the settled expectations of universities, but also would cause "significant damage" to our increasingly diverse Nation. *Casey*, 505 U.S. at 924. *Bakke* has been the touchstone for the substantial integration of our Nation's finest public and

[22] Because the composition of the student body is central to the development of the character, reputation, and educational environment of institutions of higher learning, those institutions' reliance on *Bakke* extends to their ability to "define their views of themselves and their places in society." *Casey*, 505 U.S. at 856. Universities also have relied on *Bakke* in devoting resources to structure their curricula, teaching programs, and learning environments to create the opportunities for interaction that trigger the educational benefits of diversity. *See, e.g.*, CAJA 1750-52.

[23] *See* CAJA 786-87 (Brief of the United States as *Amicus Curiae*).

[24] *See also* 34 C.F.R. § 100.3(b)(6)(ii); 59 Fed. Reg. 8756 (Feb. 23, 1994); 56 Fed. Reg. 64,548 (Dec. 10, 1991). These regulations remain in full force and effect.

private[25] institutions of higher learning. That integration produces real educational results both on campus,[26] and in society generally, given the role of the university as a professional and civic training ground.[27] Repudiating *Bakke* would effectively destroy these achievements.

This broad and deep reliance on *Bakke* demonstrates that its rule has in no sense "def[ied] practical workability." *Casey*, 505 U.S. at 854. To the contrary, *Bakke* provides educators with a practical framework for crafting an appropriate race-conscious admissions program. That framework incorporates a measure of flexibility that permits institutions with varying missions and different applicant pools to design admissions programs that satisfy constitutional requirements.

[25] The decision in this case will affect private institutions because the scope of Title VI, which governs institutions that accept federal funds, is coextensive with the Equal Protection Clause. *See United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992). Petitioner offers no basis for applying any different standards under 42 U.S.C. § 1981, and failed to preserve that argument in any event. *See also Gen. Bldg. Contractors Ass'n v. Pa.*, 458 U.S. 375, 389-90 (1982) (declining to impose broader obligations under § 1981).

[26] *See, e.g., Back to Basics* at B7 (noting that a survey of 90,000 alumni of selective colleges and universities found "much more interaction across racial lines than many people suppose").

[27] *See generally* William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (1998) ("*Shape of the River*"). Bowen & Bok's comprehensive research demonstrates that "academically selective colleges and universities have been highly successful in using race-sensitive admissions policies to advance educational goals important to them and societal goals important to everyone." *Id.* at 290. For example, African-American students who have enrolled at selective institutions with race-sensitive admissions policies have *higher* graduation rates than their peers with similar SAT scores who enrolled at *less* selective institutions. *See id.* at 61, 259. African-American graduates of selective institutions also have enjoyed great success in terms of increased earnings and more active involvement in community and civic undertakings. *See id.* at 257. *See also* Brief for Lt. Gen. Julius W. Becton, Jr., et al., as *Amici Curiae*.

This Court has never questioned the essential holding of *Bakke* and has, indeed, recognized its continuing vitality,[28] while evaluating race-conscious measures in contexts other than higher education.[29] In *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), for example, Justice O'Connor recognized that "a fair measure of consensus" existed among the five Justices in *Bakke* who voted to reverse the California Supreme Court's injunction—including a consensus that "a state interest in the promotion of racial diversity has been found sufficiently 'compelling' at least in the context of higher education, to support the use of racial considerations in furthering that interest." *Id.* at 286

[28] *See Alexander v. Sandoval*, 532 U.S. 275, 281 (2001) (recognizing *Bakke*'s reversal of injunction against "according any consideration to race in [the] admissions process"); *Johnson v. Transp. Agency*, 480 U.S. 616, 638 (1987) (relying on *Bakke*'s "competitive consideration" rationale in approving gender-conscious promotion plan, and recognizing that plan's similarity to the Harvard plan "approvingly noted by Justice Powell" in *Bakke*); *cf. Adarand*, 515 U.S. at 258 (Stevens, J., dissenting) ("The proposition that fostering diversity may provide a sufficient interest to justify [a racial or ethnic classification] is *not* inconsistent with the Court's holding today—indeed, the question is not remotely presented in this case[.]").

[29] This Court's case law on redistricting further supports the core holding of *Bakke*. This Court has held that in certain settings, race may be considered as part of a comprehensive evaluation, so long as it does not overwhelm other, traditional factors on which the relevant determination is made. *See Shaw v. Reno*, 509 U.S. 630, 633, 641-42 (1993) (in a decision bearing on "the propriety of race-based state legislation designed to benefit members of historically disadvantaged racial minority groups," holding that the "Court never has held that race-conscious state decisionmaking is impermissible in *all* circumstances" but that race may not be primary factor driving voter districting); *Miller v. Johnson*, 515 U.S. 900, 913 (1995) (race may contribute to determination so long as it is not "dominant and controlling rationale" to which neutral principles are "subordinated"); *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) (race may be *a* motivation but may not be *predominant* factor driving decisionmaking). Similarly, the approach of the Harvard plan endorsed by *Bakke* recognizes that, in the unique context of higher education, race may be considered as one factor so long as it does not eclipse the consideration of other relevant factors.

(O'Connor, J., concurring in part).[30] Four years later, in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 568 (1990), this Court cited *Bakke* for the proposition that "a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated."[31]

B. Institutions Of Higher Learning Have A Compelling Interest In Obtaining The Educational Benefits Of Diversity That Justifies The Consideration Of Race And Ethnicity.

Setting aside *stare decisis* considerations, Justice Powell's controlling opinion in *Bakke* was correct to hold that obtaining the educational benefits that flow from a

[30] While petitioners overstate the extent to which lower courts disagree on *Bakke*'s meaning, any such disagreement cannot justify repudiating this Court's precedent. *See Hubbard v. United States*, 514 U.S. 695, 718-19 (1995) (Rehnquist, C.J., dissenting, joined by O'Connor and Souter, JJ.) (criticizing plurality for relying on "aberrant" circuit court decisions in departing from *stare decisis* and observing that this "novel corollary" threatens to "subvert[] the very principle on which a hierarchical court system is built").

[31] Although this Court held in *Adarand* that strict scrutiny applies to all racial classifications, *see* 515 U.S. at 227, the Court at the same time acknowledged that Justice Powell had in fact applied strict scrutiny in *Bakke*, *see id.* at 218-19. Accordingly, *Adarand* does not undermine *Metro Broadcasting*'s characterization of *Bakke*'s holding. *See also Metro Broad.*, 497 U.S. at 621 (O'Connor, J., dissenting) (recognizing that, in *Bakke*, Justice Powell concluded that "race-conscious measures might be employed to further diversity" "if race were one of many aspects of background sought and considered relevant to achieving a diverse student body"). Similarly, Justice Powell's application of strict scrutiny in *Bakke* forecloses petitioners' argument that *Bakke* is not entitled to *stare decisis* deference because it is somehow incompatible with current equal protection doctrine. In any case, the propositions that petitioners attribute to Justice Powell and attack as outdated, *see* Pet. Br. 37-39, are unrelated to *Bakke*'s core holding that the consideration of race in admissions to obtain the educational benefits of diversity is constitutional.

diverse student body is a compelling interest. *See* 438 U.S. at 306.[32]

In concluding that "the interest of diversity is compelling in the context of a university's admissions program," *id.* at 314, Justice Powell noted that "our tradition and experience lend support to the view that the contribution of diversity [to education] is substantial," *id.* at 313. He emphasized that a far-reaching consensus recognized the direct link between positive educational outcomes and a broadly diverse student body: "[t]he atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body." *Id.* at 312 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).[33] This consensus is deeply rooted in our Nation's history and case law, confirmed by abundant empirical evidence, and consistent with the requirements that define a compelling interest.

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[32] Petitioners attack a straw man by characterizing the asserted interest as one in "academic freedom," standing alone. *See* Pet. Br. 13, 36. The University has never claimed that an interest in "academic freedom" is a sufficient justification for the consideration of race in admissions. Academic freedom certainly does not immunize a university's conduct from constitutional scrutiny. At the same time, this Court has recognized the "countervailing constitutional interest," rooted in the First Amendment, that universities invoke in selecting students to fulfill their educational mission, *Bakke*, 438 U.S. at 313; the autonomy and deference afforded educators in making educational judgments, *see id.*; *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985); and the importance of "[an] atmosphere of 'speculation, experiment and creation'" in the higher education context, *Bakke*, 438 U.S. at 312 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)). These principles undergird the compelling nature of the interest in achieving the benefits of diversity in the context of higher education.

[33] Justice Powell also grounded his conclusion in social science evidence. *See Bakke*, 438 U.S. at 315 n.50 & 318 n.51 (citing Manning, *The Pursuit of Fairness in Admissions to Higher Education*, in Carnegie Council on Policy Studies in Higher Education, *Selective Admissions in Higher Education* (1977)).

1. Our Nation has struggled throughout its history with the challenge of harnessing our diversity as a source of strength rather than a cause of friction. When our first President, George Washington, became concerned that the cultural, ethnic, religious, and regional differences among the colonists were creating tensions that endangered the new Nation, he drew upon his experience as leader of the Revolutionary Army. That Army was comprised of young men from across the colonies who, in Washington's words, had "imbibed" "prejudices" against one another. Exposing this diverse group of soldiers to each other, Washington found, served to "eradicate" many of these "prejudices" and create a shared sense of purpose. Seeking to harness this educational process, Washington advocated the creation of a National University to meet the urgent need for education through exposure to America's diversity:

> [T]hat which would render [a National University] of the highest importance, in my opinion, is, that the Juvenal period of life, when friendships are formed, & habits established that will stick by one; the Youth, or young men from different parts of the United States would be assembled together, & would by degrees discover that there was not that cause for those jealousies & prejudices which one part of the union had imbibed against another part .... prejudices are beginning to revive again, and never will be eradicated so effectually by any other means as the intimate intercourse of characters in early life, who, in all probability, will be at the head of the councils of this country in a more advanced stage of it.

Letter to Alexander Hamilton, September 1, 1796, *Washington Writings* (Library of America 1997); *see also* Joseph Ellis, *Founding Brothers* 154 (Knopf 2001).[34]

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[34] James B. Angell, the third president of the University of Michigan, emphasized a similar theme in his 1879 commencement address, not long

Echoing Washington's point nearly two centuries later, Justice Powell observed in *Bakke* that "it is not too much to say that the nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples." 438 U.S. at 313 (internal quotation marks and citation omitted).

Well before *Bakke*, this Court recognized the importance of diversity in educational settings, noting in *Sweatt v. Painter*, 339 U.S. 629, 634 (1950), that legal education "cannot be effective in isolation from the individuals and institutions with which the law interacts." *See also Brown v. Board of Educ.*, 347 U.S. 483, 493-95 & n.11 (1954). *Bakke* thus was a capstone to—not a departure from—an established line of precedent acknowledging the importance of diversity in education.[35]

2. This Court's recognition that diversity generates important educational benefits is reinforced by a remarkably uniform and non-ideological consensus among the country's leaders, educators, and social scientists. The President of the United States and the President of the University of Michigan share a conviction that college students "live and learn" better "with people from many backgrounds," and both "strongly support . . . racial diversity in higher education."[36] The record below contains unrebutted "solid

after the Civil War. *See* Nancy Cantor, *A Michigan Legacy: Ensuring Diversity and Democracy on Campus*, Mich. Alumnus (Summer 1998).

[35] This Court has long recognized the "special role" and significant mission of educational institutions in our democracy, *Board of Educ. v. Pico*, 457 U.S. 853, 921 (1982) (O'Connor, J., dissenting). *See, e.g., Board of Regents of Univ. of Wisc. v. Southworth*, 529 U.S. 217, 233 (2000); *Plyler v. Doe*, 457 U.S. 202, 221 (1982); *Brown*, 347 U.S. at 493. In enacting measures to reduce "racial isolation" in elementary and secondary schools, Congress has also repeatedly recognized the educational value of racially diverse educational settings. *See* Brief for Respondents, *Grutter v. Bollinger*, et al., No-02-241 at 21-22.

[36] Statement of President George W. Bush, Jan. 15, 2003, *available at* http://www.whitehouse.gov/news/releases/2003/01/print/ 20030115-7.html. *See also* Statement of Mary Sue Coleman, President of the University of

evidence" explaining how and why a student body that includes meaningful racial and ethnic diversity generates educational benefits for all students. Pet. App. 22a. Even petitioners do not disagree. *See* CAJA 4157.

Racial and ethnic diversity is educationally important because, notwithstanding decades of progress, there remain significant differences in our lives and perceptions that are undeniably linked to the realities of race. Continuing patterns of residential segregation, for example, mean that "the daily events and experiences that make up most Americans' lives take place in strikingly homogenous settings." *Id.* at 1968.[37] As a result, most students entering college have had few opportunities for meaningful interactions across lines of race and ethnicity. This separation contributes to misconceptions and mistrust, and provides little opportunity to disrupt racial stereotypes or to experience the richness of different racial and ethnic communities. *See id.* at 1953, 1955-56. Petitioners' position—that race has no place as a consideration in college admissions outside of remedying discrete instances of past discrimination—would require universities to ignore the world in which they are educating their students to live and lead.

Rather than relying on racial stereotypes or race as a "proxy," the benefits of diversity depend on the hardly debatable proposition that being part of a racial majority or minority, in a society in which race still so profoundly matters, will inform one's perspective and base of knowledge. *Cf. J.E.B. v. Alabama*, 511 U.S. 127, 148-51 (1994) (O'Connor, J., concurring) ("We know that like race, gender matters . . . one need not be a sexist to share the intuition that in certain cases a person's gender and

Michigan, Jan. 15, 2003, *available at* http://www.umich.edu/%7Enewsinfo/Releases/2003/Jan03/r011503c.html.

[37] *See also* Erica Frankenburg, Chungmei Lee & Gary Orfield, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* (2003), *available at* http://www.civilrightsproject.harvard.edu.

resulting life experience will be relevant to his or her view of the case.").

In jury selection cases, for example, members of this Court have recognized that jurors of different racial backgrounds may well bring varying experiences and prejudices to bear, such that the "distorting influence of race is minimized on a racially mixed jury." *Georgia v. McCollum*, 505 U.S. 42, 68 (1992) (O'Connor, J., dissenting); *see also id.* at 60 (Thomas, J., dissenting) ("the racial composition of a jury may affect the outcome of a criminal case. . . . I do not think that this basic premise of *Strauder* has become obsolete."). Exclusion of an identifiable group of persons removes from consideration

> qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude . . . that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance[.]

Taylor v. Louisiana, 419 U.S. 522, 531-32 & n.12 (1975) (internal quotation marks omitted). While the unique interpretations of experience that different individuals bring may not "make an iota of difference" on any given issue, their exclusion deprives the proceedings of something valuable. *Id.* at 532.[38]

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[38] While several Justices of this Court have recognized that including persons of different races and sexes on juries may bring valuable diversity of perspective and experience, the Court has rejected the notion that jurors can be excluded on the basis of race or sex alone. *See Batson v. Kentucky*, 476 U.S. 79 (1986); *J.E.B. v. Alabama*, 511 U.S. 127 (1994). This rejection stems from the special function of the jury, where the guiding principle is impartiality. "Without denying the possibility that race, especially as an imperfect proxy for experience, makes a difference in jury decisionmaking (and, in some cases, legitimately so)," race-neutrality is the better course in the deliberately neutral context of a jury. *Bush v. Vera*, 517 U.S. 952, 1051 n.5 (1996) (Souter, J., dissenting). The "cost of the alternative is simply too great." *Id.* Those concerns have no

Petitioners seem to believe that any acknowledgment that race has some bearing on an individual's experience is to deny that person's individuality. That is not so. There is a sound distinction between acknowledging that race may affect an individual's experience, and assuming that it determines an individual's behavior or beliefs. The particular conclusions that individuals draw, or the interpretations they give to their own experiences will, of course, be as varied as the individuals themselves.[39]

Thus, the argument for diversity in no way turns on the assumption that individuals of any given race will necessarily hold any particular set of views. The educational benefits of diversity stem in large part from a very different phenomenon. Exposing students at a critical period of personal development to situations in which they *cannot* predict viewpoint or behavior based on race actually undermines and deters stereotypical thinking. *See* CAJA 1656-59, 1736-40. This type of learning can occur only in an environment with meaningful racial and ethnic diversity and corresponding opportunities for students of different races and ethnicities to interact in and out of the classroom. *See*

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place in the educational context where the institutional interest is not impartiality, but an "atmosphere of speculation," *Bakke*, 438 U.S. at 312, best achieved by the inclusion of the widest variety of perspectives.

[39] Justice Powell recognized that distinction in *Bakke*. In concluding that Davis had failed to provide empirical support for its asserted compelling interest in providing doctors to underserved areas, Justice Powell rejected the unproven assumption that minority graduates would be more likely to practice in underserved communities. *See Bakke*, 438 U.S. at 310-11. In contrast, because he concluded that a university's interest in obtaining the educational benefits of diversity was compelling, Justice Powell evidently determined that *that* interest did *not* depend on an improper, stereotyping assumption. Dissenting in *Metro Broadcasting*, Justice O'Connor made the same point, noting that the link the majority drew between "race and behavior, especially when mediated by market forces" is precisely "the assumption that Justice Powell rejected" in *Bakke*. *Metro Broad.*, 497 U.S. at 619.

id. at 1732-34.[40] Put bluntly, "[t]eaching that 'not all blacks think alike' will be much easier when there are enough blacks around to show their diversity of thought." Glenn C. Loury, *The Anatomy of Racial Inequality* 147 (2002).[41] And such diversity of thought is much more likely to emerge in settings where there are more than token numbers of minority students, so that individual minority students do not feel isolated or pressured to act as "representatives" of a racial group. *See* CAJA at 1734-36, 1835-36; *see also Bakke*, 438 U.S. at 323 (recognizing risk that lack of meaningful numbers of minority students leads to "sense of isolation"). The give-and-take from perspectives informed by the widest variety of human experience makes the most of the diversity of our Nation. This is the heart of the "robust exchange of ideas," *Bakke*, 438 U.S. at 312, that the University seeks to foster.

Diversity leads not only to greater understanding of the ways in which race may—or may not—be relevant to a whole range of issues, but it also generates broader educational benefits. Abundant empirical evidence confirms

[40] Justice Powell recognized that actual interaction with diverse peers is the vehicle by which diversity benefits students. In acknowledging the widely-held consensus that a vibrant education is linked to a diverse student body, Justice Powell quoted the statement of then-President of Princeton University, William Bowen, that "a great deal of learning occurs informally . . . through interactions among students of . . . different races." *Bakke*, 438 U.S. at 313 n.48 (citing William G. Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Weekly 7, 9 (Sept. 26, 1977)). *See* Patricia Gurin, *Evidence for the Educational Benefits of Diversity in Higher Education: Response to the Wood & Sherman Critique by the National Association of Scholars* (May 30, 2001), *available at* http://www.umich.edu/~urel/ admissions/research/.

[41] This is also true for Hispanics, a population encompassing significant differences in both background and experience. "A diversity of views exists among Latinos, and the differences between the foreign born, regardless of their country of origin, and the native born and those between the English dominant and the Spanish dominant are most notable." *See* Pew Hispanic Center/Kaiser Family Foundation, *2002 National Survey of Latinos*, Executive Summary 6 (2002), *available at* http://www.pewhispanic.org/site/docs/pdf/.

educators' long-held beliefs and experience that "[s]tudents who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest . . . growth in intellectual engagement and motivation[.]" CAJA 1652.[42] Likewise, experience with diverse peers in an educational setting better equips students "to understand and consider multiple perspectives, deal with the conflicts that different perspectives sometimes create, and appreciate the common values and integrative forces that harness differences in pursuit of the common good." *Id.* at 1652-53. A successful education, particularly at the undergraduate level, encourages students to move beyond familiar habits of thinking by confronting the "unknown." This is a crucial aspect of learning how to approach and understand the unfamiliar—whether it be a classmate, a foreign culture, or a newly-encountered text.[43]

Petitioners and some of their amici claim that any consideration of race in admissions causes stigmatic harm to minority students which outweighs any benefits that increased levels of diversity might bring. *See, e.g.*, Brief for National Association of Scholars as *Amicus Curiae* 23. William Bowen and Derek Bok definitively refute that

[42] *See generally Diversity Challenged: Evidence on the Impact of Affirmative Action* (Gary Orfield & Michal Kurlaender eds. 2001) ("*Diversity Challenged*"); Sylvia Hurtado, et al., *Enacting Diverse Learning Environments: Improving the Climate for Racial/Ethnic Diversity in Higher Education* (1999); *see also* Sylvia Hurtado, *Linking Diversity and Educational Purpose: How Diversity Impacts the Classroom Environment and Student Development*, in *Diversity Challenged* at 187, 198.

[43] *See* Roxanne Harvey Gudeman, *Faculty Experience with Diversity: A Case Study of Macalester College*, in *Diversity Challenged* at 251, 271; Anthony Lising Antonio, et al., *Effects of Racial Diversity on Complex Thinking in College Students* (2003), *available at* http://www.siher.stanford.edu; Patricia Marin, *The Educational Possibility of Multi-Racial/Multi-Ethnic College Classrooms*, in American Council on Education & American Association of University Professors, *Does Diversity Make a Difference? Three Research Studies on Diversity in College Classrooms* 61, 69 (2000).

assertion in their comprehensive study of the effects of race-conscious admissions policies at selective colleges and universities. *See Shape of the River* at xxxi.[44] Their findings demonstrate that this "assertion withers in the light of the evidence," *id.*, because "if minority students were truly demoralized, one would expect that they would be less likely than whites to succeed in graduate and professional schools, less likely to appreciate their college experience, and less inclined to report that they benefited intellectually by having attended a selective school," but "[n]one of these results appears in [the] data," *id.* at 261. Bowen and Bok found that the overwhelming majority of African-American graduates of selective colleges and universities with race-sensitive admissions programs performed well and were very satisfied with their undergraduate educational experience. *See id.* at 265.[45]

Bakke's holding has an even stronger empirical foundation today than it did in 1978. As the court below correctly concluded, *see* Pet. App. 22a, 27a-28a, extensive social science research confirms the soundness of Justice Powell's conclusion that "the attainment of a diverse student body. . . . clearly is a constitutionally permissible goal for an institution of higher education." *Bakke*, 438 U.S. at 311-12.

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[44] Amicus NAS' brief misconstrues Bowen & Bok's findings, *see* Brief for National Association of Scholars as *Amicus Curiae* 25 n.25, by omitting their conclusion that any "costs" of race-sensitive admissions are *outweighed* by the benefits: "In the eyes of those best positioned to know, any putative costs of race-based policies have been overwhelmed by the benefits gained through enhanced access to excellent educational opportunities." *Shape of the River* at 265.

[45] In *Bakke*, Justice Powell considered the possibility that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection," but concluded that this risk was outweighed by the significant educational benefits of diversity to all students. 438 U.S. at 298-99. Bowen & Bok's findings confirm that Justice Powell was right to discount the possibility of stigmatic harm resulting from considering race in admissions.

3. The interest in obtaining the educational benefits of diversity is not only firmly grounded as an empirical matter, but it also fits squarely within the framework defining whether an interest is compelling as a matter of law. While strict scrutiny clearly requires a "skeptical view of all governmental racial classifications," *Adarand*, 515 U.S. at 228, it rejects petitioners' argument that no interest other than remedying institution-specific past discrimination is capable of justifying race-conscious measures. *See* Pet. Br. 40. Strict scrutiny analysis requires "carefully examining the interest asserted by the government" precisely because it "*does* take relevant differences into account" in assessing whether an interest is sufficiently compelling. *Adarand*, 515 U.S. at 228 (emphasis in original) (internal quotation marks omitted); *cf. Calif. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000) (cautioning that the compelling interest "determination is not to be made in the abstract"). Contrary to petitioners' characterizations, the interest in obtaining the educational benefits of diversity is neither inappropriately amorphous nor timeless. *Cf. Metro Broad.*, 497 U.S. at 613 (O'Connor, J., dissenting).

The University's interest in providing its students with the concrete educational benefits generated by a diverse student body bears no resemblance to the generalized interest in remedying societal discrimination that has been rejected as "amorphous." *Bakke*, 438 U.S. at 307; *Wygant*, 476 U.S. at 276. Petitioners suggest that this Court's specific rejection of the role model theory in *Wygant* is actually a broad rejection of any interest that might produce educational benefits. *See* Pet. Br. 35. This argument misconstrues the nature of the interest repudiated in *Wygant*. The plurality opinion, authored by Justice Powell, characterized the role model theory—as the school district did—as a subset of the broad remedial rationale. The Court did not treat the role model theory as an interest in the educational benefits of diversity. Rather, it described the interest in "providing minority role models for its minority students, as an attempt to alleviate the effects of societal discrimination[.]" *Wygant*, 476 U.S. at 274; *see also id.* at

289 n.* (O'Connor, J., concurring) (distinguishing the asserted interest from "the very different goal of promoting racial diversity among the faculty" for educational reasons).

Nor does the interest in obtaining the educational benefits of diversity justify the consideration of race in admissions without any "logical stopping point." *Id.* at 275 (Powell, J.). The need to consider race and ethnicity in admissions is inherently time-limited because it stems from the disparities in academic qualifications, such as grades and test scores, between minorities and non-minorities, and the correspondingly small number of minority students with competitive academic credentials. These phenomena are by no means permanent fixtures of our educational landscape. For example, recent studies show that test score gaps have narrowed, *see, e.g.*, *Shape of the River* at 22 (noting that SAT gap between whites and African-Americans shrank from 282 to 181 points from 1976 to 1989); *Back to Basics* at B9 (observing additional improvement through 1995), and the University looks forward to the day when it is no longer necessary to consider race in admissions to compose a diverse student body.

II. LS&A'S ADMISSIONS PROGRAM IS NARROWLY TAILORED TO ACHIEVE THE COMPELLING INTEREST OF OBTAINING THE EDUCATIONAL BENEFITS OF DIVERSITY.

LS&A's current admissions program is "properly devised" to achieve the meaningful racial and ethnic diversity that allows the University to realize the educational benefits of diversity. It hews closely to the "plus" system that *Bakke* approved, in which race and ethnicity are accorded competitive consideration in combination with other factors relevant to an applicant's potential contribution to the student body. Because LS&A is unable to achieve, through active recruiting and outreach programs, sufficient racial and ethnic diversity to make possible the opportunities for interactions that facilitate the educational benefits of diversity, *see* CAJA 1836, 1912-16, and because no race-neutral admissions alternatives

currently are viable, LS&A properly considers race and ethnicity as factors in admissions.

A. LS&A's Admissions Program Is Narrowly Tailored.

In devising and refining its admissions program, LS&A has relied on the principles set forth in *Bakke*. As Justice Powell observed, a system that considers race as one of many factors and treats each applicant as an individual reflects an appropriate fit between the objective of obtaining the educational benefits of diversity and the means by which that objective is achieved.

1. The Davis program rejected in *Bakke* "consisted of a separate admissions system operating in coordination with the regular admissions process." 438 U.S. at 272-73. The two defining features of that system were (1) a rigid quota that set aside 16 out of the 100 seats in each year's entering class for minorities, and (2) a "special admissions program" that funneled applications from minorities through a separate committee walled off from the "regular admissions process." *Id.* at 272-75. Justice Powell identified the crux of the problem with this system as the insulation of minority students from competition with all other applicants, *see id.* at 315, and the exclusion of non-minority students from competition for all places in the class, *see id.* at 318. *See also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496 (1989) (O'Connor, J.) (describing the flaw in the Davis program as the "complete[] eliminat[ion] [of] nonminorities from consideration for a specified percentage of opportunities").

By contrast, an admissions program that considers race as a "plus factor," like the Harvard policy approved by a majority of the Court in *Bakke*, comports with the Fourteenth Amendment:

> This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all

> consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant.

438 U.S. at 318. Such a system does not rely on quotas or their "functional equivalent." *Id.*

Thus, while petitioners seem to believe that comparing different manners of considering race in admissions is just an "exercise in formalism," Pet. Br. 24, *Bakke* makes clear that the process makes a constitutional difference. After all, an admissions system that operates like the approved Harvard plan might end up admitting the same number of minority students as the impermissible Davis quota system. The pertinent distinction between the two, however, is that the design of the Davis system subordinated a broad interest in educational diversity to a narrow interest in achieving a specific racial result that was not linked to an educational outcome. *See Bakke*, 438 U.S. at 315 ("The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."); *cf. Miller v. Johnson*, 515 U.S. at 913.

Although Justice Powell rejected numerical quotas and set-asides that serve as their functional equivalents, *Bakke* makes plain that an admissions program "properly devised" to achieve the compelling interest of obtaining the educational benefits of diversity may—even must—pay "some attention to [the] numbers" of minority students admitted. 438 U.S. at 323 (quoting from the Harvard policy). Thus, *Bakke* contemplates that a university would structure its admissions system to seek to enroll "more than a token number" of minority students because "there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those

students admitted." *Id.* at 316, 323. In determining how much of a "plus" to give for race and ethnicity, universities need not weigh all factors equally. *See id.* at 317. Rather, they are permitted to set and adjust the "weights" to account for "the 'mix' both of the student body and the applicants for the incoming class" in view of the objective of enrolling meaningful numbers of minority students. *Id.* at 318.

2. The district court correctly concluded that "LSA's current admissions program, under which certain minority applicants receive a 'plus' on account of their race but are not insulated from all competition with other applicants, meets the requirements set forth by Justice Powell in *Bakke* and is therefore constitutional." Pet. App. 43a. Race is only one of "many factors" that permit applicants to receive a "plus" in LS&A's admissions process. *Id.* at 37a. LS&A "does not utilize rigid quotas or seek to admit a predetermined number of minority students," *id.* at 34a-35a, and "[t]here is no separate review or assignment of under-represented minority applicants as there was in *Bakke*," *id.* at 38a. The court thus properly concluded that LS&A's current program has *none* of the features that rendered the Davis program unconstitutional.

Indeed, the LS&A admissions system is characterized by the very features that Justice Powell described as important to a "properly devised" admissions program. Every LS&A applicant receives individualized counselor review, which Justice Powell considered a hallmark of a constitutionally appropriate admissions program. *See Bakke*, 438 U.S. at 318. Admissions counselors read every application and consider a wide range of factors that provide insight into the contribution an applicant might make to the overall educational environment. Based on these factors, counselors determine a selection index score for each applicant. Counselors may also "flag" an application for review by the Admissions Review Committee, which provides an additional level of in-depth review in a small-group discussion format and makes a decision based on the

applicant's whole file, without further reference to the selection index score.

Race or ethnicity represent only a single factor considered by counselors.[46] Whether the points awarded for race make a difference to the outcome of an admissions decision depends on the individual applicant's *combination* of qualities and credentials.[47] Applicants with very strong academic records are likely to be admitted, regardless of their race; likewise, students of any race with very weak academic records are likely to be rejected. *See* CAJA 1871-72. It is, as Justice Powell noted, for "the large middle group of applicants who are 'admissible' and deemed capable of doing good work in their courses, [that] the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other

[46] The admissions data belie petitioners' claim that the University makes "unbridled use of race and ethnicity in making admissions decisions," Pet. Br. 13. The University's expert, Professor Stephen Raudenbush, demonstrated statistically that "one cannot reasonably conclude that [race] predominates over other factors in the admissions process." CAJA 1871. *Cf. Miller v. Johnson*, 515 U.S. at 913 (race may be considered so long as it is not the "dominant and controlling rationale"). Indeed, this conclusion is obvious given that measures of academic capability account for up to 110 points, and all other factors combined can account for no more than 40 points.

[47] Applicants may receive points for many different combinations of attributes and experiences. For example, a white student from Michigan's Upper Peninsula who had demonstrated outstanding leadership and service could receive 21 points (10 points for Michigan residency, six points for residency in an underrepresented Michigan county, and five points for leadership); a white student from rural North Carolina whose family is on public assistance and who wrote an outstanding essay could receive 25 points (two points for residency in an underrepresented state, 20 points for socioeconomic status, and three points for the essay); and an Asian-American Michigan resident whose mother is an alumnae and who demonstrated superb personal achievement and leadership could receive 24 points (ten points for Michigan residency, four points for alumni relationship, five points for personal achievement, and five points for leadership).

candidates' cases." *Bakke*, 438 U.S. at 323.[48] Petitioners urge that race should *never* affect an admissions outcome. But that position is irreconcilable with *Bakke*: if race never made a difference in the outcome, it would not be a "plus" factor in any meaningful sense.[49]

Petitioners and the United States suggest that awarding points to every minority applicant "tips the balance" in favor of admission for every minority applicant. But the fact that every minority applicant receives the same "plus" hardly means that race plays the same role in the admissions outcome for each applicant. *See* CAJA 1842; *id.* at 1867-68, 1871.[50] The "weight" given to race, or its impact, if any, on the ultimate admissions decision cannot be

[48] LS&A's consideration of race in admissions does not "unduly burden" non-minority applicants. *Metro Broad.*, 497 U.S. at 630 (O'Connor, J., dissenting). Shifting to a race-neutral system "would dramatically reduce the probability of acceptance for members of under-represented minority groups while having a very small positive effect on the probability of admission for others." CAJA 1876; *see also id.* at 1889 (demonstrating that likelihood of admission for minorities would fall from 86% to 32% but would rise only from 71% to 77% for non-minorities). *See generally* Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 Mich. L. Rev. 1045 (2002); *see also Hopwood v. Texas*, 236 F.3d 256, 265-72 (2000) (upholding as "eminently correct" district court's finding, on basis of expert testimony, that none of the plaintiffs would have been admitted to law school under a race-blind system), *cert. denied*, 533 U.S. 929 (2001).

[49] Petitioners confuse an impermissible "two-track" system with the notion—explicitly permitted under *Bakke*—that race may be a scale-tipping factor. Petitioners' evidence of a "two-track" system is nothing more than different admissions outcomes for two hypothetical students, one minority and one non-minority, who have the same selection index score apart from the "plus" the minority student receives for race. *See* Pet. Br. 21. This simply shows that race will in certain cases make a difference to the outcomes of admissions decisions. But that, of course, is what it means for race to be considered as a factor in admissions.

[50] Petitioners are wrong to argue that assigning points to all minority applicants is unduly mechanical and thereby unconstitutional. Standardized procedures designed to ensure consistency across a large volume of applications are not incompatible with the individualized review that *Bakke* requires.

understood in isolation from the applicant's other attributes or the strength of the applicant pool as a whole. For example, for minority applicants with strong academic records or a combination of other attributes, the "plus" for race might have no effect because the applicant would be admitted without it. *See id.* at 1867-68, 1871. As Justice Powell described it, "[t]he file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive." *Bakke*, 438 U.S. at 317. The key is that a "properly devised" admissions program "is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Id.* at 317.

Petitioners' complaint that all minority applicants, regardless of "disadvantage," receive the same "plus" for race misunderstands the nature of the compelling interest. Assigning a "plus" only to those minority students who are disadvantaged might be narrowly tailored to achieve some kind of remedial purpose, but LS&A's objective is to achieve the educational benefits that come from a racially diverse student body, not to provide a remedy for societal discrimination. Inclusion of minority students from all walks of life and from very different backgrounds will not only contribute to a richer educational environment, but will also demonstrate the diversity of experience and views among minority students. That is why a "black student with high grades from Andover may challenge the stereotypes of many classmates just as much as the black student from the South Bronx." *Shape of the River* at 280.

Moreover, assigning points to all minority students is necessary to create a realistic possibility that the University can achieve the educational benefits that flow from meaningful racial and ethnic diversity on campus. Justice Powell recognized this point, in expressly permitting a university to pay "some attention to distribution among many types and categories of students" and to operate its admissions system with an "awareness of the necessity of

including more than a token number of [minority] students," so long as it does not set a "minimum number" of minorities for admission. *Bakke*, 438 U.S. at 316-17 (citation omitted).

One significant hurdle to achieving meaningful racial and ethnic diversity is the small pool of qualified minority applicants—both in terms of absolute numbers and in comparison to the pool of non-minority applicants.[51] Petitioners assert that LS&A employs "separate standards" for minority and non-minority applicants because it ends up admitting virtually all "qualified" minorities, while denying admission to "qualified" non-minorities. Pet. Br. 22-24. What petitioners characterize as "separate standards"[52] is instead a backward-looking description of admissions outcomes in light of the small pool of qualified minority applicants.

To the extent that petitioners use the term "separate standards" to capture the statistical fact that the average grades and test scores of admitted minority students are somewhat lower than the average grades and test scores of admitted non-minorities, that fact, standing alone, has no constitutional significance. Further, this phenomenon cannot be said to measure the "extent" to which race is taken into account, as it is in part an unavoidable consequence of the reality that, nationally and in the State of Michigan, average grades and test scores are lower for minority students. *See* CAJA 4012-23. This disparity means that, for example, even if the University selected a particular SAT score and admitted all applicants with scores

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[51] Petitioners' description of admissions data, *see* Pet. Br. 7, is misleading because it ignores the pool size disparities. Acceptance rates expressed as percentages are deceptive, standing alone, because they often reflect decisions for very few minority applicants.

[52] There are no "separate standards" for minority applicants. Counselors use the same selection index worksheet, listing the same factors, to evaluate all applications. Admissions decisions are made according to selection index cutoffs applicable to all applicants, or through a discussion that takes into account every aspect of a candidate's application.

above that level, regardless of race, the average scores of the admitted minority students would still be lower. In any event, the gap in academic credentials is smaller than petitioners suggest. Between 1995 and 1999, the average academic GPA was approximately 3.5 for non-minority applicants and approximately 3.2 for minority applicants. *See id.* at 1879, 1906. This marginal difference in average GPAs remains roughly the same when comparing the data for admitted and enrolled students: it is approximately the difference between an A- (3.67) and a B+ (3.33).

The 20 points that the University attributes to race and ethnicity in its admissions process reflects LS&A's judgment, based on its experience, regarding the proper balance to be struck among competing considerations: the goal of obtaining the educational benefits of a racially diverse student body; the need for more than token numbers of minority students on campus to make it possible to generate those benefits; the small size of the pool of minority applicants with competitive academic credentials; the interest in assuring that all students admitted are prepared to succeed academically; and the objective of enrolling a class that is broadly diverse in ways other than race and ethnicity. *See Bakke*, 438 U.S. at 316-18 (noting that universities may accord different weights to different admissions criteria in light of "the 'mix' both of the student body and the applicants" and the universities' goal of obtaining the educational benefits of diversity). Another institution might strike the balance in a different place, depending on the particular values that institution seeks to further in the admissions process.

For LS&A, allotting fewer than 20 points would undermine its ability to achieve the educational benefits of diversity, because *even with* a 20-point "plus," LS&A is not able to achieve sufficient racial diversity to ensure that meaningful numbers of minority students consistently are present in formal and informal educational settings on campus. At the same time, it is LS&A's judgment that allotting more than 20 points may tip the scale too far in terms of admitting students who might not be academically

prepared to succeed at the University. That would not only unacceptably undercut the University's commitment to academic excellence, but it also would undermine its ability to secure the educational benefits of diversity because it would hinder the University's efforts to provide an educational environment in which students view each other as peers.

Striking the proper balance among these factors is an exercise of educational expertise and judgment. Competing admissions objectives, such as academic selectivity and broad diversity across categories other than race, will always limit the extent to which an institution considers race as a factor in admissions. Requiring the University to accord measurably less weight to race would, as a practical matter, preclude any selective institution of higher education from employing any admissions program that gives a "plus" to race. Justice Powell was right to conclude that, within the framework set forth in *Bakke*, this fine-tuning ought to be left to the exercise of good-faith judgment by education professionals who have the expertise and experience to balance the consideration of race against other concerns to advance the institution's educational mission. That is the workable balance that *Bakke* struck in prohibiting quotas, while permitting universities to consider race as one of many factors in an individualized, comprehensive review that evaluates each applicant as a whole person.

B. The University Cannot Achieve Meaningful Diversity Without Considering Race And Ethnicity As Factors in Admissions.

Without suggesting any viable race-neutral alternatives for achieving diversity, petitioners flatly assert that the University has not "meaningfully considered" any such alternative. Pet. Br. 12, 30. But as the district court specifically found, the University came forward with substantial, credible, and unrebutted evidence that "a race-neutral admissions program would substantially reduce the number of under-represented minority students in the

LSA's incoming student body." Pet. App. 40a. The court rejected petitioners' suggestion that a random selection of applicants who passed some fixed "qualification threshold" might suffice, because of the small size of the relevant applicant pool; noted that another so-called alternative—bare reliance on test scores at the expense of all other relevant criteria—would result in significant additional rejections of qualified minority applicants; and credited expert testimony as to the inefficacy of relying solely on family income as a predictor of racial and ethnic diversity, given the even smaller pool of highly qualified minorities in the lowest income strata. *See id.*[53]

The United States echoes the unsupported assertion that race-neutral plans were ignored. *See* U.S. Br. (*Gratz*) 10, 18. It further asserts that LS&A has "ample race-neutral alternatives" at its disposal, *id.* at 18—approaches that it claims have "proven effective in meeting the . . . laudable goals of educational openness, accessibility and diversity in other States," *id.* at 11. The United States actually offers only one such alternative: percentage-based admissions programs such as those currently in place in the public university systems of Texas, Florida, and California. *See id.* at 13-14.[54] These programs, which guarantee some

[53] An academically selective college can expect that only one in six qualified low-income applicants will be either African-American or Hispanic. *See* Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions*, in *The Black-White Test Score Gap* 431, 450 (Christopher Jencks & Meredith Phillips, eds., 1998); *Shape of the River* at 46-50.

[54] The United States briefly alludes to other possible "race-neutral alternatives," suggesting that the University might actively seek other sorts of diversity, such as geographical diversity; "modify or discard facially neutral admissions criteria that tend to skew admissions results" against minorities; or open its doors "to the best students from throughout the State or Nation." U.S. Br. (*Grutter*) 13-14; *see also* U.S. Br. (*Gratz*) 14-15. As to the first suggestion, it is uncontroverted that LS&A already pursues such a policy, as it grants selection index points to, for example, students from underrepresented areas, from underprivileged socioeconomic backgrounds, and with extraordinary indicia of personal achievement and leadership potential. The United States' second point actually supports LS&A's educationally sound decision to consider non-academic factors in combination with standardized testing and to place more emphasis on high school grades than on test scores. Incomprehensibly, petitioners and the United States urge the Court to force LS&A to rely *more* heavily on standardized test scores, U.S. Br. (*Gratz*) 24 (urging reliance on "objective qualifications"); *see also* Pet. Br. 25, even as the United States promises that diversity could be better pursued were such data *disregarded*. Finally, as to the third suggestion, it is undisputed that LS&A already "opens its doors" to the best students from throughout Michigan, the other 49 States, and dozens of countries.

form of admission to a fixed percentage of the graduates from each high school in the State,[55] are by no means "race-neutral." Nor have they been proven effective.[56] Further, even were such plans minimally "effective" in maintaining some level of racial and ethnic diversity in those states' public systems of undergraduate education, they would have

[55] Texas offers students graduating in the top 10% of any Texas high school admission to the public institution of their choice. California offers admission to the state system, though not to the school of one's choice, to the top 4% of each high school's graduates, provided they have completed requisite coursework. Florida guarantees admission, though not choice of school, to the top 20% of each high school's graduates who have completed a prescribed curriculum. *See generally* Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* 19-22 (2003), *available at* http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.php#full report; U.S. Comm'n on Civil Rights, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education* vii-x (2002) ("*Beyond Percentage Plans*").

[56] Even the authors of Texas' percentage plan confirm that it has been ineffective in increasing diversity, is not a national model, and cannot substitute for direct, competitive consideration of race in admissions. *See* Brief for Authors of the Texas Ten Percent Plan as *Amicus Curiae*. *See also* Brief for Professors Glenn C. Loury, Nathan Glazer, John F. Kain, Thomas J. Kane, Douglas Massey, and Marta Tienda as *Amici Curiae*; Brief for the University of Pittsburgh, et al. as *Amici Curiae*.

devastating effects on the University of Michigan's ability to define and pursue its educational mission.[57]

As an initial matter, the suggestion that the percentage plans in Texas, Florida, and California are "race-neutral" is erroneous. First, while *facially* race-blind, they unquestionably were adopted with the specific purpose of increasing representation of African-Americans and Hispanics in the public higher education system.[58] Indeed, petitioners, the United States, and the universities themselves measure the success of these percentage plans by examining a single, race-driven data point, that is, the level of minority representation in the student body—the very criterion petitioners would have LS&A ignore. Such programs are deemed effective when minorities represent a specific percentage of the student body—a percentage roughly equivalent to that in place in the last year in which the university explicitly considered race in individual admissions.[59]

Second, these percentage plans are not race-neutral because they knowingly are premised on racial segregation in a state's elementary and secondary public school system. In Texas, for example, granting automatic admission to all

[57] The district court considered and rejected the viability of a percentage plan like the one in Texas. *See* Pet. App. 40a-41a (crediting unrebutted expert testimony that a percentage plan would damage LS&A's academic selectivity and result in a "spurious form of equality").

[58] *See* Petition for Writ of Certiorari by the State of Texas et al. at 18-19, *Hopwood v. Texas*, 236 F.3d 256 (5th Cir. 2000), *cert. denied*, 533 U.S. 929 (2001) (conceding as much); Horn & Flores, *supra*, at 15-19; Patricia Marin & Edgar K. Lee, *Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida* 11 (2003); John F. Kain & Daniel M. O'Brien, *Hopwood and the Top 10 Percent Law: How They Have Affected the College Enrollment Decisions of Texas High School Graduates* 3-4 (2003), *available at* http://www/utdallas.edu/research/greenctr/; *Beyond Percentage Plans*, *supra*, at 16 (California), 53 (Florida).

[59] *See* U.S. Br. (*Gratz*) 14; U.S. Br. (*Grutter*) 14-17 and sources cited therein; Brief for the State of Florida as *Amicus Curiae* at 4, 8-10; Kain & O'Brien, *supra*, at 4-5.

students in the top 10% of their high school's graduating class would, it was thought, guarantee a pool of African-American and Hispanic freshmen, because the racial segregation of Texas high schools had resulted in sufficient majority-minority schools as to guarantee that almost all of the top 10% of students in many schools would be minorities.[60] It is simply hiding the ball to hold out percentage plans as a race-blind alternative, where they in fact manifest a less forthcoming form of race-consciousness.

Moreover, the assertion that the few extant percentage programs have "proven effective" in attaining educational diversity is premature and inaccurate. U.S. Br. (*Gratz*) 11. Research on these recently-instituted programs is just beginning to generate data measuring their short-term impact. And that data shows that percentage plans have not been nearly so successful in achieving racial and ethnic diversity as their proponents might claim, particularly with respect to selective flagship institutions.[61] Further, such

[60] *See* Marta Tienda et al., *Closing the Gap? Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action* 7 (2003), *available at* http://www.texastop10.princeton.edu/publications/tienda012103.pdf; Kain & O'Brien, *supra*, at 4; *see also* Jeffrey Selingo, *What States Aren't Saying About the 'X-Percent Solution,'* Chron. Higher Ed., June 2, 2000, at A43 ("Aides to Gov. Jeb Bush of Florida admit they settled on a 20-percent standard after computer models of 10-percent and 15-percent policies failed to produce enough black and Hispanic students.").

[61] "[T]he top ten percent admission policy is not an alternative to affirmative action and by itself can only achieve minimal campus diversity, even in the presence of high levels of [high] school segregation." Tienda, et al., *supra*, at 41 (emphases omitted); *see also Beyond Percentage Plans*, *supra*, at 19-24, 57-60, 65-66, 116; Marin & Lee, *supra*, at 23, 27-31, 34-36; Kain & O'Brien, *supra*, at 29-32; Horn & Flores, *supra*, at 50-51, 58-59 ("percent plans seem to have the least impact on the most competitive campuses, which have persisting losses in spite of many levels of efforts to make up for affirmative action").

Further, to the extent that some percentage plans have contributed to the presence of minorities in higher education, that limited success is dependent on race-conscious recruitment, financial aid, and support programs. *See* Horn & Flores, *supra*, at 58-59; Marin & Lee, *supra*, at 31-

plans may create perverse incentives, encouraging African-American and Hispanic parents to keep their children in low-performing, segregated schools,[62] discouraging students from taking challenging classes in the interest of boosting class rank, and deterring students from pursuing extracurricular activities.[63]

More fundamentally, even were the percentage plans proffered by the United States shown eventually to have some moderate success in achieving racial and ethnic diversity, they would require institutions of higher education that seek to enroll a highly qualified, broadly diverse student body to radically alter their missions. In Michigan, such a plan would be destructive.

First, imposition of a percentage plan in Michigan would fundamentally change the composition of LS&A's student body, on which the school's character, reputation, and educational excellence depends. With their exclusive focus on class rank, percentage plans are incompatible with the individualized, "whole-person" file review that LS&A employs and that Justice Powell praised. *See Bakke*, 438 U.S. at 318. Rather than focusing separately on each of the ways in which an individual might contribute to the overall strength and diversity of the class, percentage plans are a blunt instrument that deprives admissions professionals of

33, 35-37 (Florida's Talented 20 program expressly retained explicitly race-conscious scholarship, recruitment, and support programs). The legality of these efforts may well be at issue herein. *See, e.g., Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994).

[62] The position of the United States is in direct tension with national efforts to desegregate secondary education and encourage mobility out of low-performing schools, for example, through the No Child Left Behind Act, Pub. L. No. 107-110, § 5301(a)(4) (A), 5301(a)(5), 115 Stat. 1425, 1806 (2002) (codified at 20 U.S.C. § 7231).

[63] *See* Selingo, *supra*, at A31 (noting that Florida's percentage plan penalizes students at more competitive high schools and generally excludes strong minority students in integrated schools and magnet programs).

the flexibility to achieve the broad diversity that is crucial to the University's mission.

For this reason, percentage plans cannot be considered more narrowly tailored to achieve the genuine compelling interest—the educational benefits of diversity—than the current LS&A admissions system. Indeed, in subordinating the interest in the whole-file review that Justice Powell emphasized to the interest in enrolling a certain percentage of minority applicants, these plans more closely resemble the Davis quota than either the Harvard plan or LS&A's admissions program.

Percentage plans also would hinder the University's ability to maintain its character as a national institution with a geographically diverse student body. Except for the University of California's campuses at Berkeley and Los Angeles, none of the three percentage-plan States' systems includes a flagship campus comparable to the University of Michigan at Ann Arbor,[64] and the student body at LS&A is by far the most national in scope.[65] In that sense, the University is similarly situated to many selective private

[64] It is telling, therefore, that Berkeley's and UCLA's ability to attract, enroll, and retain African-Americans, Hispanics, and Native Americans has been especially hindered by enforced race-neutrality and imposition of a percentage plan. *See* Horn & Flores, *supra*, at 39, 48; *Beyond Percentage Plans*, *supra*, at 18.

[65] While LS&A draws more than half its applicants and one-third of its student body from out-of-state, the same is not true of the flagship institutions in States with percentage plans. In 2001, 14% of University of Texas-Austin applicants and 9.5% of Texas A&M applicants were non-Texans, and out-of-state students comprised only around 7% and 5%, respectively, of those schools' freshman classes. *See* Texas Higher Education Coordinating Board, *First-Time Undergraduate Applicant, Acceptance and Enrollment Information for Summer/Fall 2001*, 66-67, 42-43 (2002), *available at* http://www.thecb.state.tx.us/reports/ pdf/0515.pdf. Similarly, Florida's flagship campus, the University of Florida, draws only 13% of its students from outside Florida. *See* Marin & Lee, *supra*, at 28. The University of California at Berkeley has an out-of-state undergraduate enrollment of just under 10%, *see* http://osr4.berkeley.edu/, and at UCLA such enrollment is a mere 6%, *see* http://www.ucla.edu.

institutions. The effect of such a sea change on its ability to define itself cannot be overstated: the University would be an entirely different institution.

Second, a percentage plan in Michigan could not possibly generate a racially and ethnically diverse student pool. California, Florida, and Texas all are extremely populous States with very substantial populations of both African-Americans and Hispanics.[66] Each encompasses numerous geographical areas that are majority-minority, and correspondingly embraces relatively large numbers of high schools in which African-Americans and Hispanics form the overwhelming majority of students at all levels of class rank.[67] While Michigan's secondary school system is highly segregated by race, the overwhelming concentration of African-Americans in the Detroit area means that the statewide number of majority-minority schools is dwarfed by the far greater number of Michigan schools that are virtually all-white. *See* CAJA 1985, 1951. Indeed, Michigan is overwhelmingly white.[68] Hispanics and Native Americans

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[66] Texas is projected to become a "majority-minority" state by 2005, and whites already are a minority among those of college age. *See* Tienda, et al., *supra*, at 6. Indeed, this is now the case in California, where non-Hispanic whites are already the minority. *See* http://quickfacts.census.gov/qfd/states/06000.html. Looking specifically to potential college applicants, the demographics of these three states are telling. Among Texans between 15 and 19 years of age as of the 2000 census, 44% were white, 13% African-American, and 39% Hispanic. Among Californians of the same age cohort, 34% were white, 7% African-American, and 39% Hispanic. In Florida, that same youth population was 55% white, 21% African-American, and 20% Hispanic. *See* Horn & Flores, *supra*, at 26. Indeed, more than three-quarters of the Nation's Hispanic population lives in those three states plus New York and Illinois; more than half live in California and Texas. *See* CAJA 1959.

[67] *See* Horn & Flores, *supra*, at 27. For example, in Florida's populous Miami-Dade County, 60% of the population is Hispanic and 21% is African-American. *See* http://factfinder.census.gov.

[68] According to the 2000 U.S. Census, among Michigan residents of 15-19 years of age, 75.7% were white, 15.2% African-American, 4.3% Hispanic, .6% Native American, and 1.8% Asian-American. *See* http://factfinder.census.gov/servlet. The pool of potential minority college applicants is even smaller: among Michigan students attending the 12th grade of high school in the 2000-2001 school year, 83% were white, 12% African-American, 2% Hispanic, 2% Asian-American, and 1% Native American. *See* http://nces.ed.gov/ccd/bat.

are not a majority in *any* county or school district in Michigan. *See id.* at 1985-88, 1965-67 (Table 3), 1974 (Table 7).

Thus, even were it otherwise feasible for the University to implement some sort of high school-based percentage plan without fundamentally altering its very identity—which it plainly is not—the effects on diversity would be disastrous, particularly with regard to Hispanic students. The statistical reality is that infinitesimal numbers of minorities would be admitted through such a program, except through a small number of primarily African-American high schools in the urban Detroit area. Because virtually all of LS&A's Hispanic students come from outside the State of Michigan, under a percentage plan, LS&A would be hamstrung in its ability to enroll such students. And its African-American student population would be dominated by students from a small geographical area, frustrating the interest in geographic and other diversity within all sectors of the student body.

This Court has taught that a race-neutral approach is "viable" for purposes of narrow tailoring only if that approach would be "comparably consistent" with, or better satisfy, the other traditional, non-racial goals also at stake. *Easley v. Cromartie*, 532 U.S. 234, 258 (2001); *see also Wygant*, 476 U.S. at 280 n.6 (an alternative must "promote the substantial interest about as well and at tolerable administrative expense"). That is not the case here. The University is not required to adopt a proposed race-neutral alternative that would undermine traditional admissions standards, depriving it of the ability to judge applicants as individuals and admit a class that, viewed collectively, brings to the table a stimulating mix of talents, perspectives, backgrounds, and academic interests.

The University of Michigan has a substantial interest in creating and maintaining a world-class, selective institution of higher learning, seeking to enroll a diverse array of the best students from within the State and beyond its borders. The University's current admissions system represents a careful and measured effort to tailor its admissions processes to its legitimate—indeed, unchallenged—educational objectives.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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JENNIFER GRATZ AND PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Respondents,

and

EBONY PATTERSON, et al.,

Respondents.

On Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Sixth Circuit

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ARGUMENT

I. The University's Use of Racial Preferences in Admissions Is Not Justified by a Compelling Interest.

A. There should be no mistaking what the University of Michigan ("University") and its higher education *amici* are asking this Court to rule. They seek a standard of review for racial preferences in admissions that is defined by vested deference in these institutions to use race and ethnicity in the manner and to the extent that they judge best for everyone concerned. *See, e.g.*, Resp. Br. 21-32; Brief for Harvard University, *et al.* as *Amicus Curiae* 28 ("a matter of educational judgment"); Brief for Columbia University, *et al.* as *Amicus Curiae* 15 ("higher degree of deference"); Brief for Amherst College, *et al.* as *Amicus Curiae* 26 ("substantial deference"); Brief for University of Pittsburgh, *et al.*, as *Amicus Curiae* 13 ("deference"); Brief for Judith Areen, *et al.* (Law Deans) as *Amicus Curiae* 25, filed in *Grutter v. Bollinger* (No. 02-241) ("substantial deference"). Far from having any support in the modern precedents of this Court, the view urged by respondents and the institutions that support them represents a breathtaking departure from the demands of strict scrutiny, to which all governmental racial classifications must be subjected. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

A "deferential" standard of review is completely incompatible with one premised on "skepticism" and requiring "a most searching examination." *Id.* at 223. The exemption from this standard that the University seeks for itself and other educational institutions is based on a claim that educators can be trusted to use race only for proper purposes and then only to the extent necessary to achieve them. This is merely a formulation of the argument that strict scrutiny should not apply when a racial classification is being used for allegedly "benign" reasons. *See Metro Broad., Inc. v.*

FCC, 497 U.S. 547, 564-65 (1990), *overruled by Adarand*, 515 U.S. at 226. Its troubles are well known. "Policies of racial separation and preference are almost always justified as benign, even when it is clear to any sensible observer that they are not." *Metro Broad.*, 497 U.S. at 635 (Kennedy, J., dissenting). The policies here are certainly not benign with respect to those individuals who are disadvantaged by the preferences.

Moreover, a right to discriminate founded on "academic freedom," as respondents and their *amici* would have it founded, necessarily entails the near certainty that educators will have differing notions about what purposes could justify differential treatment on the basis of race. A standard of deference genuinely derived from the First Amendment provides no principled basis for distinguishing between "good" and "bad" academic theories for different kinds of racial classifications.

The argument made by educators that they should be left with the task of deciding whether and how to employ racial classifications in the service of educating their students is one that has been made and rightly rejected before by this Court. It should not be given credence now, fifty years after *Brown v. Board of Education*, 347 U.S. 483 (1954), even when made by those who run the Nation's most selective and prestigious institutions.

Hand in hand with the argument for a deferential standard of review is the one made for subjecting racial preferences in admissions to a test of reasonableness, like the one employed in *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896), that is applied to review of ordinary government classifications. *See, e.g.*, Brief for NOW Legal Defense and Education Fund as *Amicus Curiae* 11-12, 16; Brief of Judith Areen, *et al.* (Law Deans) as *Amicus Curiae* 3, filed in *Grutter v. Bollinger* (No. 02-241).[1] It would be as wrong

[1] The Governor of the State of Michigan has even made the remarkable argument that the Michigan Constitution cloaks the

(Continued on following page)

today to apply such a standard to racial classifications as it was to do so more than one hundred years ago in *Plessy*.

Ultimately it is important to understand the scope of the discretion that respondents and their educational *amici* seek permission to exercise. They seek discretion to decide which groups get a plus for race, and which ones get a minus. Discretion would also presumably extend to deciding how to determine whether someone has the racial or ethnic characteristics necessary to receive a conferred preference, an issue that will presumably become only more difficult (and arbitrarily resolved) as our society becomes increasingly inter-racial.[2] Finally, respondents lay claim to decide for themselves how much of the selected type of racial and ethnic diversity to pursue to realize the "educational concept" on which all this race discrimination and racial balancing are justified.[3]

University with authority to consider race in the admissions process. Brief for Michigan Governor Jennifer Granholm as *Amicus Curiae* 13-17.

[2] *See Metro Broad.*, 497 U.S. at 633 n.1 (Kennedy, J., dissenting) (noting "the difficulties, both practical and constitutional, with the task of defining members of racial groups"). Educational institutions will get to grapple with the same kind of problem that was presented in *Plessy*, where it was necessary to decide whether Plessy, who was seven-eighths caucasian, was properly assigned to the separate railway car for "persons not of the white race." *See also Fullilove v. Klutznick*, 448 U.S. 448, 534 n.5 (1980) (Stevens, J., dissenting) ("If the National Government is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935, translated in 4 Nazi Conspiracy and Aggression, Document No. 1417-PS, pp. 8-9 (1946)."). *See also Metro Broad.*, 497 U.S. at 633 n.1 (Kennedy, J., dissenting) ("Other examples are available. See Population Registration Act No. 30 of 1950, Statutes of the Republic of South Africa 71 (1985).").

[3] Respondents suggest that they may use race as a factor in admissions as long as it is not the "predominant" factor. Resp. Br. 20 n.29. However, the test they cite is used to determine whether race-neutral means should be subjected to "strict scrutiny." *See, e.g., Easley v. Cromartie*, 532 U.S. 234, 241 (2001). *See also* Brief for Harvard

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B. While the University rests its plea for deferential review on its status as an educational institution, recognizing the interest it articulates as compelling is almost certain to have implications reaching far outside the field of education. First, if disparities among racial groups on such matters as test scores can justify racial preferences on a theory that the disparities are the product of historical discrimination, *see* Resp. Br. 32, there is no principled reason to confine the rationale to educational testing. It could be equally well argued, for example, that disparities among racial groups in employment testing should justify the same kind of disparate treatment that respondents defend in this case (and in *Grutter v. Bollinger*).

Second, once one accepts the proposition that race is a legitimate proxy for experience and that exposure to diverse races is a *compelling* interest of the highest order, there are few race preferences that cannot be justified. If student understanding improves when exposed to marginally larger numbers of preferred minorities, so should jurors' understanding improve. Indeed, this Court has repeatedly explained how jurors' diverse experiences can aid the jury in understanding a case. *Peters v. Kiff*, 407 U.S. 493, 504 (1972) (Marshall, J.) ("exclusion [of a segment of the community from jury service] deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented"); *id.* at 510-11 (Burger, C.J., dissenting) ("I completely agree that juries should not be deprived of the insights of the various segments of the community, for the 'common-sense judgment of a jury' . . . is surely enriched when all voices can be heard."). Yet the rule this Court derives from that conclusion is not a rule for race-norming predominantly-white or sex-norming predominantly-male

University, *et al.* as *Amicus Curiae* 18. This case, of course involves the use of explicit racial preferences, to which it is undisputed that strict scrutiny applies, as respondents concede that their use of race must be narrowly tailored to achieve a compelling interest.

juries to insure that such broad perspectives are heard and considered. Rather, the rule is one of hard and fast race and sex neutrality. *See, e.g., Batson v. Kentucky*, 476 U.S. 79 (1986); *cf. Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 313 (1986) (Stevens, J., dissenting) ("utterly irrational" to conclude that race should be considered in selecting members of a jury).[4] The Court has not tolerated the use of race as a factor in selecting juries when it is just one among many factors considered, or to the point it is not considered too much in the good faith exercise of discretion by judges and attorneys, acting as officers of the court. The rule should not be any different when it comes to admissions officers making choices among individuals in the valuable award of places in the class in our Nation's colleges and universities.

The claims for diversity made by the University can also be made just as easily in the employment context. Indeed, some of the University's *amici* have already made them. For example, General Motors, in addition to justifying racial preferences in higher education to improve its "bottom line," has even adopted the University's jargon by noting the "manifold benefits of having a critical mass of people of color and persons of different ethnicities in . . . upper ranks" of corporate management. Brief for General Motors Corporation as *Amicus Curiae* 12, 23; *id.* at 13 (noting General Motors has "made diversity a 'core business objective'"); *id.* at 23 ("There can be little doubt that racial and ethnic diversity in senior leadership of the corporate world is *crucial* to our Nation's economic

[4] The University's suggestion that consideration of race would somehow taint the juror's impartiality is opaque and unexplained. Resp. Br. 26 n.38. The ability to bring a "new perspective" ought not to compromise anyone's ability to remain impartial, and the University offers no reason why it should. And if it does, then presumably it also would compromise a student's ability to pursue knowledge and truth, a pursuit which lies at the core of any educational experience and is the end for which the much-touted "atmosphere of speculation" is just a means.

prospects.") (emphasis added). Because respondents and the corporate *amici* justify racial preferences in university admissions in large part for the benefits said to accrue to post-school careers and in the work place, it is hard to understand why the interest would be compelling in assembling a student body, but not a workforce. *See also* Brief for 65 Leading American Businesses as *Amicus Curiae* 1 (arguing that "diverse work force" is essential).

C. Respondents seek to bolster their claim for an exception to the prohibitions of the Equal Protection Clause with reference to social science findings on the educational benefits for diversity. The scope of individual rights guaranteed by the Constitution should not be a matter to be decided in academic conferences and scholarly journals. The defendant school boards offered much testimony of educators, psychiatrists, and psychologists to support their respective positions on the great issue decided in *Brown v. Board of Education* and its related cases. *See* Brief for The Center for Equal Opportunity, *et al.* as *Amicus Curiae* 21-26. That evidence did not affect the central holding of *Brown*, nor could *Brown* ever be subject to change on a mere showing or claim that it is no longer supported by empirical evidence. It is no more tolerable that respondents seek to justify their unequal treatment of individuals like Jennifer Gratz and Patrick Hamacher on such a basis.

It is far from the case, moreover, that there is any consensus in the social science community about the empirical claims made for diversity. For example, a study published recently in a peer-reviewed journal reached conclusions that are quite different and inconsistent with those of respondents' witness, Patricia Gurin,[5] whose work

[5] *See* Stanley Rothman, Seymour Martin Lipset & Neil Nevitte, *Does Enrollment Diversity Improve Education?* 15 INT'L J. PUB. OP. 8 (2003).

has been widely criticized by others as well.[6] The conclusions and methodology of William Bowen and Derek Bok in their book *The Shape of The River* have also been challenged by others,[7] including by a former Dean of the University of Michigan Law School.[8] A recent study sponsored by the same Mellon Foundation that underwrote the project discussed in *The Shape of the River* reached conclusions that racial preferences are not helpful and, are, indeed, harmful to the intended beneficiaries. *See* STEPHEN COLE & ELINOR BARBER, INCREASING FACULTY DIVERSITY 205-06, 344 n.25 (2003). The state of controversy on the subject is such that no constitutional principle should depend on one set of findings or another.

D. Respondents have tried to bootstrap their argument that Justice Powell's lone opinion with respect to diversity in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), stated a majority rationale

[6] *See* Brief for National Association of Scholars as *Amicus Curiae* 6-30.

[7] *See, e.g.*, Stephan Thernstrom & Abigail Thernstrom, *Reflections on the Shape of the River* 46 UCLA L. REV. 1583 (1999). For a discussion of the history of the diversity concept, *see* PETER WOOD, DIVERSITY: THE INVENTION OF A CONCEPT (2003).

[8] *See* Terrance Sandalow, *Minority Preferences Reconsidered*, 97 U. MICH. L. REV. 1874 (1999). The article generated a response from Professors Bok and Bowen and a reply from Professor Sandalow. William G. Bowen & Derek Bok, *Response to Review by Terrance Sandalow*, 97 U. MICH. L. REV. 1917 (1999); Terrance Sandalow, *Rejoinder*, 97 U. MICH. L. REV. 1923 (1999).

Even the seemingly uncontroversial proposition that the beneficiaries of race preferences themselves are advantaged from having attended more selective colleges has been questioned. Stacy Berg Dale & Alan Kreuger, *Estimating the Payoff to Attending A More Selective College: An Application of Selection on Observables and Unobservables*, National Bureau of Economic Research Working Paper No. 7322 (1999) (using same database as Bok & Bowen, researchers conclude that students who attended more selective colleges do not earn more than other students who were accepted and rejected by comparable schools but attended less selective colleges).

with their assertion that it has generated "settled expectations," in the manner considered in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854-55 (1992). Resp. Br. 18. This Court used the framework set forth in *Casey* to consider whether it should overrule a precedent set in a case by a 7-2 majority. It is precisely because of the fractured nature of the *Bakke* opinions and their failure to produce a majority rationale[9] supporting a specific non-remedial use of race that "principles of *stare decisis*, as articulated in *Casey*," do not resolve the parties' dispute. Resp. Br. 17.

In any event, the factors of reliance and stability discussed in *Casey* have no application here for reasons which relate to the nature of the rights involved and the effect of the judicial decision with respect to them. Unlike *Casey* and the case it considered, *Roe v. Wade*, 410 U.S. 113 (1973), Justice Powell's opinion in *Bakke*, to the extent it joined with Justice Brennan's opinion to reverse the California Supreme Court's injunction against the use of race, did not identify an individual right, but rather a *limitation* on such a right (to equal protection). No individual can rely upon such limits because the state agency or its superior can ignore the limit and bolster the right – just as Virginia Tech has recently done, and just as the states of California, Washington, and Florida have done with the right to equal protection by forbidding racial considerations in, among other things, university admissions. Because it only declared a limit on a right, Justice Powell's opinion could not (even if it had been joined by four or more other Justices) have "call[ed] the contending

[9] *See also Adarand*, 515 U.S. at 257 (Stevens, J., dissenting) ("Thus, prior to *Metro Broadcasting*, the interest in diversity had been mentioned in a few opinions, but *it is perfectly clear* that the Court *had not yet decided* whether that interest had sufficient magnitude to justify a racial classification.") (emphasis added).

sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution." *Casey*, 505 U.S. at 867. The controversy would persist because states and federal fund recipients are free under the Constitution to bolster the right of equal protection and to eliminate race as a consideration. *Bakke*, 438 U.S. at 379 (Brennan, J.) ("any State . . . is generally free, as far as the Constitution is concerned, to abjure granting any racial preferences in its admissions program").[10]

Even if the remainder of the *Casey* analysis were applicable here, where petitioner does not seek to "overrule" any precedent of the Court, it would not militate in favor of accepting "diversity" as a compelling governmental interest justifying racial preferences. Justice Powell's deferential approach, for reasons already explained, simply cannot be squared with the requirements of strict scrutiny. Moreoever, experience has demonstrated that it is not sensible, realistic, or "[ ]workable," *Casey*, 505 U.S. at 855, to regard an admissions system that *facially* treats applicants differently based on race and ethnicity as if it were one that is "*facially* nondiscriminatory," *Bakke*, 438 U.S. at 318 (Powell, J.) (emphasis added).[11] It requires an intolerable sacrifice of candor in describing actual

[10] Moreover, respondents' reliance arguments to the contrary, *see* Resp. Br. 19, could have been made just as forcefully by states and school districts that operated race-based dual school systems before they were ruled unconstitutional in *Brown v. Board of Education*, 347 U.S. 483 (1954). Like Justice Powell's opinion in *Bakke*, *Plessy* declared a limit on the right of equal protection and did not prevent any state from creating integrated schools.

[11] The cases cited by Justice Powell to demonstrate how the presumption of "good faith" and "legitimate educational purpose," *Bakke*, 438 U.S. at 318-19 & n.53, of a university could be overcome were cases involving *race-neutral* means. *See, e.g., Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976). They offer no guidance in ascertaining how to distinguish between lawful and unlawful *facial* discrimination.

admissions systems to sustain such a contradiction. It is this fiction that explicit racial preferences in admissions can pass a test of facial nondiscrimination that has been the basis for justifying many a racial preference by those wielding them, including preferences bearing little difference, even in form, from what was struck down in *Bakke*. *See* Pet. Br. 43-45 (discussing race-based admissions policies challenged in other cases).[12]

Finally, it is simply strange and perverse to invoke "settled expectations" to defend racial preferences, which the Court has repeatedly stressed should be only "temporary" measures since they conflict with the command of equality contained in the Equal Protection Clause. Under respondents' analysis, the *longer* "temporary" preferences are in place, the *stronger* the argument becomes that they should remain in place. If racial preferences justified on "diversity" grounds have indeed become part of the "national culture" such that their removal would "damage the stability of the society," Resp. Br. 18-19, and if these are reasons that justify their continuance into the 21st Century in spite of the equality guarantee, then the Nation should abandon as pretense the notion that they are "temporary."

E. With respect to the separate claims of the intervenors, they never offer any evidence to dispute the district court's finding that remedying past discrimination was not the purpose behind the race preferences employed by the

[12] Respondents are certainly wrong to suggest that there is anything like a "consensus" in this country supporting the use of race in college and university admissions. To the contrary, polls have repeatedly shown that large majorities oppose the use of race in making such decisions. *See* Brief for National Association of Scholars as *Amicus Curiae* 4-11, in *Grutter v. Bollinger* (No. 02-241) (listing polls, including 2001 joint survey by the *Washington Post*, Kaiser Foundation, and Harvard University that found overwhelming opposition, across racial lines, to use of race as a factor in college admissions); Brief for the Cato Institute as *Amicus Curiae* 14-15 n.10 (same); Brief for the Center for New Black Leadership as *Amicus Curiae* 7 n.6 (same).

University, a point that fatally undermines their argument. *See* Pet. Br. 48. Even ignoring that problem, intervenors never suggest how the scheme of preferences can "remedy" the isolated incidents of discrimination from the staff, instructors, or campus police (Resp. Interv. Br. 12-14) upon which they rely. Indeed, it appears that the preferences have *not* remedied them at all, since the intervenors assert that those incidents continue. *Id.* at 14. They apparently give no thought at all to the possibility that a scheme of race preferences might be the *cause* of some of the racial tension on campus, and have failed to identify why the problem of discriminatory employees or fellow students cannot be resolved in perfectly race-neutral ways (like ridding the University of such individuals).

Intervenors also argue that the scheme of preferences counteracts the discriminatory impact of "economically or politically advantageous criteria" (Resp. Interv. Br. 25) such as geographic preferences and the preference for alumni children. But if such preferences are validly employed by the University, then they cannot be discriminatory.[13] If they are not valid, then they should be eliminated. Intervenors cite no case for the proposition that a state can use race preferences to counteract *ongoing* discriminatory practices *while doing nothing at all about the practices themselves*.[14]

Ultimately, the intervenors demonstrate only that the University's interest in diversity is not compelling. If the

[13] *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989) ("[T]here is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet and would result in [*inter alia*, race and sex quotas to avoid lawsuits].").

[14] All of the lower courts (including two en banc courts) that have considered such a proposition have rejected it. *Aiken v. City of Memphis*, 37 F.3d 1155, 1164 (6th Cir. 1994) (en banc), quoting *Billish v. City of Chicago*, 989 F.2d 890, 894 (7th Cir. 1993) (en banc); *Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1572 (11th Cir. 1994).

University insists that it must *balance* the interest in diversity with criteria that have a discriminatory impact *against* its preferred minorities, and that are of questionable educational value (like alumni preferences), then the University itself does not treat the interest as one "of the highest order." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993). *See also* Brief for Center for Individual Freedom as *Amicus Curiae* 7.

II. The University's Use of Racial Preferences Is Not Narrowly Tailored.

A. For the first time in the more than five years that this case has been pending, respondents have expressly "disavowed" the admissions system that was in place when petitioners Jennifer Gratz and Patrick Hamacher applied to the LSA in 1995 and 1997, respectfully. Resp. Br. 5 n.7. They do so while contending that this Court need not consider the lawfulness of those systems since they have been replaced by the current point-based "selection index" regime and because respondents did not petition for review of the district court's judgment invalidating the systems in place from 1995 to 1998.[15] Resp. Br. 5 n.7.

[15] Respondents vigorously defended in the district court and the court of appeals the systems in place in 1995-1998, with the separate race-based "grid" guidelines (1995-1997), racially-segregated waiting lists, exemption of the preferred minority students from automatic rejection based on low test scores and grades, and "protected spaces" in the class for members of the preferred minority groups. The last three of these egregious features were not abandoned until two years after commencement of the filing of this lawsuit, with the implementation of the 1999 guidelines. At least until the filing of their merits brief in this Court, respondents had consistently expressed the view that *all* of these prior forms of racial preferences were fully consistent with the consideration of race as a "plus" factor in the manner approved in Justice Powell's opinion in *Bakke* and the "Harvard plan" described in his opinion. This new "disavowal" of their earlier systems undermines respondents' arguments that they have "relied" on *Bakke* and that their

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Respondents then proceed to discuss the system implemented in 1999 as if it bears no relation to the earlier one, now effectively conceded by them to be unlawful.

What respondents simply ignore is that by their own admission the current system was statistically designed to produce the "same outcomes" as the former one.[16] *See* Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment and Memorandum in Support of Defendants' Cross-Motion for Summary Judgment 20, filed May 3, 1999 (district court Record No. 81). They have demonstrated only how easy it is to convert a preference from one form to another. As Justice Brennan observed in *Bakke*, Davis could have accomplished what it did through a fixed award of places in the class for disadvantaged minorities by instead "adding a set number of points to the admission rating of disadvantaged minority applicants." *Bakke*, 438 U.S. at 378 (Brennan, J.).[17] In respondents' case, the converse proposition is equally true. The unlawfulness of the current system can thus be perceived both

current mechanical award of a fixed number of points for race is merely a "plus" in the manner approved by Justice Powell.

[16] The history of the change from the grid system to the "linear" selection-index system was explained in a University document as due to the "anti-affirmative action climate." App. 277.

[17] The Sixth Circuit, with an apt illustration, made the same point in another case involving racial preferences in employment:

> [W]e note that quotas and preferences are easily transformed from one into the other. Certainly, where the ranking criteria are already known, the correspondence is exact. In our case, if it were deemed objectionable to admit that there was a 1:1 quota, exactly the same result could have been reached by adding 20 points to the score of each minority applicant. . . . A pre-existing commitment to a fixed amount of preference . . . has the result, in any given case, of determining exactly the proportion of the favored group that will be selected.

Middleton v. City of Flint, 92 F.3d 396, 412-13 (6th Cir. 1996).

on its own terms and in the way that it is simply a transparent disguise for the now "disavowed" system.[18]

B. It is hard to understand how respondents can seriously suggest that their mechanical award of a fixed number of points for racial status "hews closely to the 'plus' system" that Justice Powell approved in *Bakke*. Resp. Br. 32. There is nothing remotely like it discussed in either Justice Powell's opinion or in his description of the "Harvard plan" discussed in (and appended to) it.[19]

Central to Justice Powell's approach was the consideration of race on an "individualized, case-by-case basis." *Bakke*, 438 U.S. at 319 n.53 (Powell, J.). He wrote that race "may be deemed a 'plus' in a *particular* applicant's file . . . [and that] [t]he file of a *particular* black applicant may be *examined* for diversity. . . . " *Id.* at 317. No reasonable reading of this language can be considered consistent with the University's use of race, which amounts to "automatically and blindly," *Johnson v. Transp. Agency*, 480 U.S. 616, 656 (1987) (O'Connor, J., concurring), giving *every* member of one of the preferred groups a fixed "plus" for race in the award of 20 points. The only respect in which a file is "examined for diversity" for the purpose of assigning the rigid "plus" is to determine whether an

[18] It is notable and telling that while the *amici* on the University's side in this case and in *Grutter v. Bollinger* (No. 02-241) defend in often abstract terms an interest in "diversity" as a justification for racial preferences, few of them articulate in any specific way a defense of the particular policies at issue in these cases.

[19] As the dissenters noted in *Grutter v. Bollinger*, 288 F.3d 732, 799 (6th Cir. 2002) (Boggs, J., dissenting) (*Grutter* Pet. App. 137a), one can only be "deeply puzzled" regarding a claim that an admission system operates just like the Harvard plan, *see* Resp. Br. 33-34, when there was no evidence in *Bakke* about the actual operation of that plan. *See* Alan M. Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext*, 1 CARDOZO L. REV. 379, 383 n.13 (1979) (noting that the percentage of African Americans in Harvard classes from 1973 through 1981 was 7% in every year but one, when it was 8%).

applicant has checked the box indicating that he or she is a member of one of the preferred racial or ethnic groups.

The University's defense of the automated and rigid manner in which race is considered in its system gives its game away. The stated objective is to get "meaningful" numbers of students from specified races, Resp. Br. 38, regardless of their personal experiences, backgrounds, or perspectives (since these characteristics are not looked to in the award of points). In no sense can the University's racial preference be said to be narrowly tailored to achieving diversity of perspective or experience; narrowly tailoring to those objectives would naturally require looking *directly* for such perspectives and experiences, rather than using race as a proxy for educational diversity. Instead, the only objective to which the University's racial preferences can be said to be closely tailored is achieving a specific racial result – admission of all members of the preferred minorities who meet the minimum academic requirements of the University. That is what the original grid-based guidelines were "set" to accomplish, App. 80; and those are the guidelines that the current selection index system was statistically designed to reproduce. In this respect, the University's objective is not different from the specific racial result that the Davis program sought, except that Davis did not design a system intended to admit *all* qualified minority students and only permitted disadvantaged minorities to receive a special benefit.

The University tries to back away from statements of its own admissions officers that the goal of the institution is to admit all qualified minorities.[20] *See* Resp. Br. 5 n.6. It does so by noting that the specific reference to this aspect of the system was removed beginning with the 1999 policy (again, two years after the litigation commenced). *Id.* The University neglects to mention that, as noted above, the

[20] *See* Pet. Br. 4; Cir. App. 331-39, 355-56, 362, 367, 383-84.

objective of admitting all qualified minority students is statistically built into the guidelines, a fact the University cannot change by simply removing a reference to it in the policy. It should come as no surprise, then, that just as the old system resulted in admission of "virtually all qualified" minority students, so too does the current one. Pet. App. 111a. It is disingenuous, in view of the record and the respondents' insistence everywhere else that they *must* have their preferences to get their desired racial result, to argue that this phenomenon is just a "backward-looking description of admissions outcomes in light of the small pool of qualified [preferred] minority applicants." Resp. 39.

By describing the difference in admissions outcomes between qualified minorities receiving a preference and other groups on the basis of the *size* of the *racial pools*, respondents are making an even more telling point – competition occurs *within* the pools, but not *across* them, or at least not between the preferred and disfavored pools. Because the University "receives *many more* applications than it has available spaces" and "[a] *great many* of these applicants are fully qualified to attend" the University, Resp. Br. 1 (emphasis added), there is no reason why "virtually all" qualified members of one racial group would be admitted while many from other groups are not, *unless the applicants are not competing in a single competitive pool.* It is a tenet of Justice Powell's analysis, however, that applicants from different races compete for admission on the "same footing." *Bakke*, 438 U.S. at 317 (Powell, J.).

A system like the University's, in which there is a policy and practice to admit all (or "virtually all") qualified members of some racial groups, while the rest of the applicants compete based on scarce, available spaces in the class, App. 80-81, is self-evidently one in which applicants do not compete on the "same footing."[21] It is instead

[21] The cumulative and systematic way in which applicants compete on unequal footing based on race is demonstrated also by the use of race

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a system that values one individual more than another based on race. This is expressed by the fact the University engages in "intense competition with other selective institutions for these highly sought after [preferred minority] students," Resp. Br. 4, while thousands of those like Jennifer Gratz and Patrick Hamacher must instead, for reasons explained solely by race, compete against other members of the disfavored races for a spot in the class. Whatever it can mean to have race "weighed fairly," *Bakke*, 438 U.S. at 318 (Powell, J.), in the award of a valuable benefit, this surely cannot be it.

C. In addition to failing the test of constitutionality that respondents hold out as the controlling one – Justice Powell's in *Bakke* – the University's admission system falls far short under traditional narrow-tailoring requirements. *See, e.g., United States v. Paradise*, 480 U.S. 149, 171 (1987). Even if respondents' stated interest in diversity is assumed to be compelling, the Court's precedents demonstrate the importance of consideration of race-neutral alternatives, which do not impose harms in the nature of stereotype, stigma, and racial hostility that the use of racial preferences entail. The record below reflects primarily respondents' *ipse dixit* determination that there are no available race-neutral alternatives, rather than any genuine consideration by respondents, before they

to "flag" applicants who are not admitted on the basis of their selection index score. One of the threshold qualifications for receiving a "flag" is a minimum selection index score of 75 (non-Michigan residents) or 85 (Michigan residents), *see* Resp. Br. 10, which means that the 20-point bonus for race remains at work in this feature of this system. Moreover, "underrepresented race" status is a separate category that a counselor may use to "flag" an application that meets the other thresholds. *Id.* Such a system plainly gives members of preferred races a competitive advantage over members of other racial groups in having their applications receive "an additional level of in-depth review . . . and a decision based . . . without further reference to the selection index." *Id.* at 35-36. This is so regardless of the fact that admissions counselors have "discretion" to "flag" an application or that non-racial factors can also result in receipt of a "flag."

employed their explicit preferences, of such alternatives. *See, e.g., Rothe Develop. Corp. v. United States Dep't of Defense*, 262 F.3d 1306, 1331 (Fed. Cir. 2001) (District Court erred because "it did not strictly scrutinize whether Congress found these race-neutral alternatives ineffective. . . . On remand, the district court should conduct a probing analysis of the efficacy of race-neutral alternatives . . . by inquiring into any attempts at the application or success of race-neutral alternatives prior to the reauthorization of the . . . program."). While respondents devote much attention to disparaging so-called "percentage" plans, *see* Resp. Br. 42-49, petitioners have not suggested that the University be required to adopt any particular type of policy,[22] and neither have they suggested that the University must or should admit students strictly on the basis of rank order of grades and test scores.

The University's preferences demonstrate no closeness of fit between means and ends, unless the end is "outright racial balancing." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989). A narrowly-tailored means of achieving the educational benefits produced by an intellectually and experientially diverse class would look for those characteristics directly, rather than relying on race as a proxy in the inflexible way that the University does. Moreover, as others have explained in exacting detail,[23] the social science evidence relied upon by respondents does

[22] Respondents' expressed disagreement about the wisdom of percentage plans does not change the fact that these plans have produced substantial empirical evidence refuting the notion that race-neutral alternatives are incompatible with the levels of "critical mass" for the "underrepresented" groups that the University's racial preferences seek to ensure. *See* Brief for the United States as *Amicus Curiae* 10-17, in *Grutter v. Bollinger* (No. 02-241); Brief for the State of Florida *et al.* as *Amicus Curiae* 6-8.

[23] *See, e.g., Grutter v. Bollinger*, 288 F.3d 732, 803-06 & n.36 (6th Cir. 2002) (Boggs, J., dissenting); Brief for National Association of Scholars as *Amicus Curiae* 6-28.

not even address such questions as how much racial diversity is needed to produce the educational benefits deemed compelling, or how much educational benefit is attributed to the marginal increases in racial diversity gained with the use of the preferences.

It is certainly not plausible to regard as "flexible" the University's rigid, automatic award of points for race and its determination to admit all qualified members of the preferred races. Respondents' argument that the preferences have only a small effect on the groups disfavored by them, *see* Resp. Br. 37 n.48, repudiates the principle that the Constitution protects the rights of *individuals*, not of racial *groups*, and it also ignores the fact that the same thing could be said about the result in *Bakke*.[24]

Finally, as the district court made clear, there is nothing temporary about respondents' preferences, founded as they are on an interest deemed "permanent and ongoing." Pet. App. 26a. The University tries to distance itself from the district court's assessment by arguing, for the first time in this case, that the "need to consider race and ethnicity in admissions is inherently time-limited because it stems from the disparities in academic qualifications, such as grades and test scores, between minorities and non-minorities."[25] Resp. Br. 32. This reveals an interest as indefinite in time as an interest

[24] For the sixteen spaces set aside by Davis, there were more than 2,000 applicants who did not receive a preference in 1973 and more than 3,000 such applicants in 1974. *Bakke*, 438 U.S. at 273 n.2, 275 n.5.

[25] The newness of this claim by respondents is reflected by their citation to nothing in the record on the point, with their reliance placed instead on secondary sources suggesting that "test score gaps have narrowed." Resp. Br. 32. There is also evidence that the gap has *not* narrowed. *See* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER 21 (1998); Brief for the Center for New Black Leadership as *Amicus Curiae* 11. Moreover, one theory for the reason that the gap has remained or widened is that racial preferences create perverse incentives. *See, e.g.*, JOHN H. MCWHORTER, LOSING THE RACE 231-33 (2000).

in remedying the lingering effects of societal discrimination, *see Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986), because, of course, the University has expressed it in precisely those terms.

III. The University's Use of Racial Preferences Violates 42 U.S.C. § 1981.

Respondents assert without elaboration that petitioners did not preserve an argument that they are entitled to prevail under 42 U.S.C. § 1981. *See* Resp. Br. 19 n.25. Petitioners raised the claim in the district court[26] and never argued below that Section 1981 prohibited only the same conduct prohibited by the Equal Protection Clause, so there is nothing new about the contention that the terms of the statute prohibit conduct that the Equal Protection Clause does not. Moreover, the fact that the Court has held that Section 1981 reaches only purposeful conduct, *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 389-90 (1982), does not mean that the statute reaches only the same purposeful conduct prohibited by the Fourteenth Amendment. Section 1981 remains an independent basis on which to reverse the judgment of the court of appeals.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request the Court to reverse the judgment of the district court with respect to the admissions systems in place from 1999 to the present.

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[26] *See* Plaintiffs' Memorandum of Law in Support of Motion for Partial Summary Judgment on Liability 38-39, filed May 3, 1999 (district court Record No. 77). Moreover, since the petition specifically identified Section 1981 as a potential source of liability distinct from any illegality based upon "strict scrutiny" analysis under the Equal Protection Clause (e.g., Pet. 28), respondents waived any objection by failing to raise it in their opposition to the petition. Sup. Ct. R. 15.2.

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In the Supreme Court of the United States

JENNIFER GRATZ AND PATRICK HAMACHER,
PETITIONERS

v.

LEE BOLLINGER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Does the University of Michigan's use of racial preferences in undergraduate admissions violate the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) or 42 U.S.C. 1981?

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BRIEF FOR THE UNITED STATES
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INTEREST OF THE UNITED STATES

The United States has the responsibility for enforcing numerous federal statutes prohibiting discrimination on account of race and ethnicity[1] and, accordingly, has frequently participated in the Supreme Court, both as a party and as amicus curiae, in cases presenting constitutional and statutory claims of discrimination.[2] The Department of Justice has significant

[1] See, *e.g.*, 42 U.S.C. 2000h-2, 2000e-5(f)(1); Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980).

[2] See, *e.g.*, *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103 (2001); *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995);

responsibilities for the enforcement of the Equal Protection Clause of the Fourteenth Amendment in the context of public education, see 42 U.S.C. 2000c-6, including admission to public colleges and universities, and also has responsibility for enforcement of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, which prohibits discrimination of the basis of race, color, or national origin by recipients of federal financial assistance. The United States Department of Education has parallel responsibility for the administrative enforcement of federal civil rights laws affecting educational institutions, including Title VI.

STATEMENT

At the time this litigation commenced, the University of Michigan received approximately 13,500 applications for admission to the College of Literature, Science and the Arts and admitted approximately 3950 students each year. Pet. App. 4a.[3] It seeks to admit a racially, ethnically, culturally, and economically mixed student body because it believes that diversity "increase[s] the intellectual vitality of [its] education, scholarship, service and communal life." *Ibid.* (citation omitted).

1. During the years relevant to this lawsuit, the University has used two different methods for admissions decisions, both of which rely on race as a significant factor and provide a preference to applicants who are members of "under-represented minority" groups, including African Americans, Hispanics, and Native

Georgia v. *McCollum*, 505 U.S. 42 (1992); *Metro Broad., Inc.* v. *FCC*, 497 U.S. 547 (1990); *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *University of Cal. Regents* v. *Bakke*, 438 U.S. 265 (1978).

[3] Respondents assert that the University currently receives in excess of 17,000 applications each year. Br. in Opp. 3.

Americans. Pet. App. 108a-109a, 111a. Under both systems, the degree to which race affects "the outcome of admissions decisions varies"; "race is dispositive in the outcome" in some, but not all, cases. *Id.* at 111a. The University's consideration of race under both systems has the effect of "admitting virtually every qualified under-represented minority applicant," or every preferred minority applicant who is deemed "qualified," or believed capable of achieving passing grades at the University, as well as selecting the most qualified non-minority applicants. *Ibid.* Both systems also ensure that preferred minority applicants are not automatically rejected regardless of their academic credentials. *Id.* at 113a, 117a-118a.

a. In 1995, 1996, and 1997, the University utilized guideline tables or grids that reflected a combination of an applicant's adjusted high school grade point average and score on the ACT or SAT college entrance examination in determining whether to admit an applicant. Pet. App. 33a, 112a.[4] For all three years, the University used different grids and admissions criteria for applicants who were members of preferred minority groups as compared to other candidates and set aside a prescribed number of seats in the entering class for the former in order to achieve its numerical target. *Id.* at 43a, 46a, 112a-114a. As a result, the University used more selective and rigorous academic admissions criteria for applicants who were not members of under-

[4] An adjusted grade point average reflects a number on a zero to 4.0 scale that is calculated after the removal of grades for certain high school courses and the addition or subtraction of points based on the quality of a candidate's high school, the strength of his or her curriculum, unusual circumstances, geographical residence, and alumni relationships. Pet. App. 33a n.15, 111a-112a.

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represented minority groups than for those who were. In 1997, the University also automatically added an additional .5 to the grade point average of every applicant who was a member of a preferred minority group. *Id.* at 33a.

b. In 1998, the University began changing its admissions program. Pet. App. 116a. It dispensed with using tables and cells in favor of a point system that determines an applicant's "selection index." *Ibid.* An applicant's "selection index" or rank on a 150-point scale generally determines whether he or she is admitted. *Id.* at 33a, 116a. The new system was not intended to alter the "the substance, of how race and ethnicity [were] considered in admissions." *Id.* at 116a (citation omitted); see *id.* at 34a n.16. Indeed, the parties agreed, "[t]he difference between the selection index and the grids * * * has no legal significance." *Id.* at 116a (citation omitted).

Under the "selection index" system, which the University still employs, the University awards applicants varying points for a variety of factors in one of three categories: "Test Score, Academic, and Other Factors." Pet. Lodging 36. Up to 12 points can be awarded under the Test Score category based on the applicant's score on the standardized ACT or SAT examination. Up to 98 points can be awarded under the Academic category based on the applicant's GPA, the category of school attended, and the strength or weakness of the curriculum. And an applicant may receive up to 40 points in the Other Factors category. Up to 20 of those "Other Factors" points can be based on a combination of factors such as geography, alumni relations, an outstanding essay, personal achievement, or leadership and service activity. The remaining 20 "Other Factors" points can be awarded under a "Miscellaneous" heading

for socio-economic disadvantage, underrepresented racial/ethnic minority identification or education, athletic scholarship, or discretionary selection by the Provost. *Id.* at 36-40; Pet. App. 116a. The University automatically awards applicants who are members of an "under-represented racial or ethnic minority group," defined as African American, Hispanic, or Native American, 20 points under this "Miscellaneous" heading. *Id.* at 33a; see *id.* at 116a-117a.

The Selection Index scale was divided linearly into ranges generally calling for admissions disposition as follows: 100-150 (admit); 95-99 (admit or postpone); 90-94 (postpone or admit); 75-89 (delay or postpone); 74 and below (delay or reject). Pet. App. 116a. Counselors reviewing the applications "were generally expected to and generally did conform admissions decisions to the selection index scale and retained some discretion to make departures from the scale after consulting with a supervisor." *Ibid.*

c. Beginning in 1999, the University abandoned its policy of reserving a certain number of seats for preferred minority applicants. Pet. App. 44a, 46a, 118a. It also initiated a policy of "flagg[ing]" applicants who "achieved a minimum selection index score" and "possess[] a quality or characteristic important to the University's composition of its freshman class," which includes membership in a preferred minority group, high class rank, unique life experiences, challenging circumstances, interests or talents, or socieoeconomic disadvantage. *Id.* at 33a-34a, 117a. Applicants who are "flagged" remain in the pool of eligible candidates and receive individualized consideration by the Admissions Review Committee (ARC), regardless of their selection index score. The ARC reviews only "a portion of all of the applications" the University receives, with the

"bulk" of admissions decisions being made based solely on selection index scores. *Id.* at 117a.

d. Petitioners, Jennifer Gratz and Patrick Hamacher, are unsuccessful white applicants who resided in Michigan and sought admission to the University of Michigan's College of Literature, Science and the Arts in 1995 and 1997, respectively. Pet. App. 5a. Ms. Gratz applied with an actual and adjusted high school grade point average of 3.8 and an ACT standardized test score of 25. *Id.* at 113a. The University initially "delayed" her admission and then placed her on an extended waiting list and recommended that she "make alternative plans to attend another institution" because it "expect[ed] to take very few students" from that list. *Id.* at 109a. As a result, Ms. Gratz enrolled at the University of Michigan at Dearborn and graduated in 1999. *Ibid.* The University's admissions guidelines in effect in 1995, called for the acceptance of all under-represented minority applicants with Ms. Gratz' academic credentials regardless of whether they were in-state or out-of-state candidates. *Id.* at 113a.

Mr. Hamacher applied to the University's College of Literature, Science and the Arts with an actual and adjusted high school grade point average of 3.32 and 3.0, respectively, and an ACT standardized test score of 28. Pet. App. 115a. The University initially "postponed" its admissions decision and subsequently rejected his application. *Id.* at 109a-110a. Mr. Hamacher attended Michigan State University and graduated in 2001. *Id.* at 5a. The University's guidelines in effect in 1997, called for the admission of under-represented minority applicants with Mr. Hamacher's academic qualifications. *Id.* at 115a.

2. In 1997, petitioners filed this class-action suit challenging the legality of the University's race- and

ethnic-based admissions policies and sought declarative, injunctive, and monetary relief. They alleged that the University illegally discriminated on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, 42 U.S.C. 1981, and 42 U.S.C. 1983. The parties submitted a "Joint Summary of Undisputed Facts Regarding Admissions Process" and filed cross-motions for summary judgment. Pet. App. 106a-118a.

On December 13, 2000, the district court held that the University's race-based admissions system in existence between 1995 and 1998 violated both the Equal Protection Clause of the Fourteenth Amendment and Title VI and that its current admissions program, initiated in 1999, is lawful. Pet. App. 3a, 6a. As a result, it denied petitioners' request for injunctive relief permanently barring the University from using an applicant's race or ethnic status in its admissions decisions. *Id.* at 3a.[5]

The district court held that the University has a compelling interest in enrolling a student body with diverse experiences and viewpoints. Pet. App. 9a-28a. Analyzing this Court's decision in *University of California Regents* v. *Bakke*, 438 U.S. 265, 314 (1978), the district court concluded that "there were no clear grounds upon which a majority of the Court agreed in reaching their respective decisions." Pet. App. 12a. Nonetheless, the court ruled that "no Supreme Court decision has explicitly" held that an interest in diversity "can never

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[5] The district court also granted defendants Duderstadt and Bollinger's motion for summary judgment on the ground of qualified immunity and denied the Board of Regents' motion for summary judgment on the ground of Eleventh Amendment immunity. Pet. App. 4a.

constitute a compelling state interest, especially in the context of higher education" and thus, "if presented with sufficient evidence regarding the educational benefits that flow from a diverse student body, there is nothing barring * * * [a] determin[ation] that such benefits are compelling under strict scrutiny analysis." *Id.* at 19a, 22a. Accordingly, "based upon the record before it," and "solid evidence" that "a racially and ethnically diverse student body produces significant educational benefits," the district court concluded that diversity, in the context of higher education, constitutes a compelling governmental interest. *Id.* at 28a; see *id.* at 22a, 27a-28a.

As to narrow tailoring, the district court separately analyzed the race-based admissions program in existence from 1995 through 1998 and the University's current admissions system and reached different conclusions as to their validity. Pet. App. 34a-48a. The court held that the University's current admissions program is properly structured because it uses race only as a "plus" factor by awarding 20 points to the "selection index" of applicants who are members of preferred minority groups and allowing the applications of preferred minorities to be "flagged" based solely on their race for further individualized consideration not available to most applicants. *Id.* at 35a-36a. The court relied heavily on its findings that the current admissions policy "does not utilize rigid quotas or seek to admit a predetermined number of minority students," *id.* at 34a-35a, or result in the kind of "'dual' or 'two-track' system prohibited by Justice Powell in *Bakke*," *id.* at 37a; see *id.* at 35a-39a. The court also upheld the University's policy of "flagging" minority applicants to guarantee that they remain eligible for admission and receive an additional round of individualized consideration by the ARC, noting that admissions counselors "are not *required* to flag every under-represented minority applicant" and that "flagged" applicants are not protected from competition with the remaining applicant pool. *Id.* at 39a-40a. The court also held that the University could not achieve its interest in diversity through race-neutral means, concluding that "[i]f race were not taken into account, the probability of acceptance for minority applicants would be cut dramatically." *Id.* at 40a-41a.

Finally, the district court held that the race-based admissions program in existence between 1995 and 1998 was constitutionally defective. Pet. App. 43a-48a. It explained that the University's practice of "'protecting' or 'reserving' seats for under-represented minority applicants" makes it "clear that the * * * system operated as the functional equivalent of a quota and therefore, ran afoul of Justice Powell's opinion in *Bakke*." *Id.* at 43a, 45a. It also pointed out that because the University "used facially different grids and action codes based solely upon an applicant's race" from 1995 through 1997, non-preferred minorities failed to receive any "individualized counselor review" and were "systematically exclude[d] * * * from participating in the admissions process based solely on account of their race." *Id.* at 45a-46a. In addition, the court explained that the admissions program is defective because an applicant's race was "the *only* defining factor" for the University's use of different grids and admissions criteria. *Id.* at 47a.

3. Both parties appealed. The case was briefed and argued to the Sixth Circuit, sitting en banc. The court of appeals has not issued a decision.

SUMMARY OF ARGUMENT

This case and *Grutter* v. *Bollinger*, No. 02-241, demonstrate the pernicious consequences that result when public institutions deviate from this Court's precedents by ignoring race-neutral alternatives and employing race-based policies that amount to racial quotas. As these cases demonstrate, to the extent such institutions adopt such race-based policies, they have two basic options, both of which are impermissible under this Court's precedents. First, they can employ racial quotas or set asides directly. That is the course the University chose in its 1995-1998 admissions policies, which set aside a target number of seats in each entering class for preferred minorities and shielded those minorities from competition with the rest of the applicant pool. That is the kind of two-track admissions system the Court condemned in *Bakke*. That is also the approach the Law School has taken in the *Grutter* case with its policy of enrolling a "critical mass" of preferred minority students. Second, institutions can meet such quotas indirectly by providing preferred minorities a "bonus" based solely on their race. By selecting the appropriate "bonus," a university can admit a predetermined level of minority applicants without expressly adopting an overt quota. That is the course the University has chosen in its current admissions policy. But whether the school adopts an actual quota or simply awards a race-based bonus consistent with such a quota, its admissions policy is inconsistent with this Court's precedents.

For the basic reasons outlined in the United States' amicus brief in *Grutter* v. *Bollinger*, at 8-29, the Court should reverse the decision of the district court upholding the University's current race- and ethnic-based

undergraduate admissions policy. That policy is plainly unconstitutional under this Court's precedents. The University has failed to employ race-neutral alternatives that have proven effective in meeting the important and laudable goals of educational openness, accessibility, and diversity in other States, and has instead resorted to impermissible racial quotas or their equivalent.

The district court correctly concluded that the University's 1995-1998 admissions policies were not narrowly tailored because they "'protect[ed]' or 'reserv[ed]' seats for under-represented minority applicants," "used facially different grids and action codes based solely upon an applicant's race," placed preferred minorities on a separate track that effectively shielded them from competition with the rest of the applicant pool, and "systematically exclude[d] * * * non-minority applicants from participating in the admissions process based solely on account of their race." Pet. App. 43a, 45a-46a. Thus, there is no doubt that the 1995-1998 admissions policies involved a two-track admissions system and "operated as the functional equivalent of a quota." *Id.* at 45a.

The district court erred, however, in holding that the University's 1999 and 2000 admissions policy, which remains in place today, satisfies this Court's narrow tailoring requirements. In particular, the district court erroneously concluded that the University lacked race-neutral alternatives to achieve its goal of educational diversity. The experiences of Texas, Florida, and California, and their success in maintaining truly diverse student bodies under race-neutral admissions standards, proves to the contrary. Because race-neutral alternatives remain available, the University's race-based policy is unconstitutional.

Moreover, the University's current policy also violates this Court's precedents forbidding dual-track admissions programs and racial quotas. The University automatically awards all preferred minorities, regardless of their background, academic performance, or life experiences, 20 points to their "selection index" score—or roughly the equivalent of one full grade point (on a 4.0 scale)—based solely on their race. It also provides special individualized review to preferred minority applicants not available to other applicants based solely on their race. Its predominant emphasis on race renders it functionally indistinguishable from the rigid quota system it employed between 1995-1998. Indeed, the University itself has conceded that in changing from its 1995-1998 admissions policies to its current policy, it "develop[ed] * * * the selection index" so as to "change[] only the mechanics, not the substance, of how race and ethnicity [were] considered." Pet. App. 116a (citation omitted). And under its current admissions policy, just as under its prior policies, the University's "consideration of race * * * has the effect of admitting virtually every qualified under-represented minority applicant," while denying admission to non-preferred applicants with the same or higher index scores based solely on their race. See *id.* at 111a. Other factors this Court has looked to in determining whether a program is narrowly tailored confirm that the University's policy is unconstitutional. Accordingly, however its objectives are defined, the University's race-based admissions policy violates the Equal Protection Clause.

ARGUMENT

RESPONDENTS' USE OF RACE-BASED ADMISSIONS CRITERIA IS NOT JUSTIFIED IN LIGHT OF THE AMPLE RACE-NEUTRAL ALTERNATIVES

A. Public Universities Have Ample Means To Ensure That Their Services Are Open And Available To All Americans

For the same basic reasons outlined in the United States' amicus brief in *Grutter* v. *Bollinger*, No. 02-241, at 10-21, the Court should hold that the University's race- and ethnic-based undergraduate admissions policies are unconstitutional because proven race-neutral alternatives to achieving the laudable goals of educational openness and diversity remain available. Although ensuring that public institutions, and in particular public universities, are open and available to all segments of American society represents a paramount government objective, public universities have substantial latitude to tackle such problems and ensure that universities and other public institutions are open to all individuals and that student bodies are educationally diverse and broadly representative of the public.

The district court's conclusion that "[i]f race were not taken into account, the probability of acceptance for minority applicants would be cut dramatically" is plainly mistaken. Pet. App. 40a-41a. Three of the Nation's most populous States, Texas, Florida, and California, have adopted race-neutral admissions standards for their public universities, and have maintained, or in some instances increased, minority enrollment under those race-neutral standards. See U.S. Br. in *Grutter*, at 14-17. Similarly, the district court erred by crediting

testimony from respondents' expert that Texas's race-neutral percentage enrollment plan "would not be as effective in enrolling 'an academically well prepared and diverse student body.'" Pet. App. 41a. Not only has Texas's race-neutral policy maintained or increased the number of minority students enrolled at the University of Texas, but the students enrolled through its percentage plan, including minority students, consistently outperform other students at the University of Texas with comparable standardized test scores. See Gary M. Lavergne & Dr. Bruce Walker, *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin* 10-14 (last modified Jan. 13, 2003) <http://www.utexas.edu/student/research/reports/admissions/HB588-Report5.pdf>.

Under this Court's precedents, the availability of such race-neutral alternatives precludes the University's use of race in admissions. This Court has repeatedly emphasized that race-based measures are permissible only to the extent that the asserted interest may not be achieved "without classifying individuals on the basis of race." *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 510 (1989) (plurality opinion). See U.S. Br. in *Grutter*, at 18-21.

Accordingly, the existence of race-neutral alternatives, such as those adopted in Texas, Florida, and California, make clear that, regardless of how the University's interest in diversity is defined, respondents' policy fails this fundamental tenet of this Court's precedents.

In addition, if the University genuinely seeks candidates with diverse experiences and viewpoints, it can focus on numerous race-neutral factors including a history of overcoming disadvantage, geographic origin,

socioeconomic status, challenging living or family situations, reputation and location of high school, volunteer and work experiences, exceptional personal talents, leadership potential, communication skills, commitment and dedication to particular causes, extracurricular activities, extraordinary expertise in a particular area, and individual outlook as reflected by essays. See *Metro Broad., Inc.* v. *FCC*, 497 U.S. 547, 623 (1990) (O'Connor, J., dissenting); U.S. Br. in *Grutter*, at 19-21.

B. The University's 1995-1998 Admissions Policies Were Not Narrowly Tailored Because They Operated As An Express Racial Quota

It hardly can be disputed that the undergraduate admissions programs in existence between 1995 and 1998 were not narrowly tailored. It is well settled that, even where the Constitution permits consideration of race, it generally forbids the use of racial quotas. See *Bakke*, 438 U.S. at 319-320 (opinion of Powell, J.); *Croson*, 488 U.S. at 499; *Wygant*, 476 U.S. at 276.

Nevertheless, the University acknowledges, and the district court found, that for each of those years the University expressly reserved a certain number of seats for applicants who were members of preferred minority groups. Pet. App. 44a-45a, 118a. Indeed, the University expressly conceded that "[b]ecause the class is selected on a rolling basis, rather than at one point in time, a certain number of seats is designated during the admissions cycle for * * * *underrepresented minority candidates* * * * to enable [the University] to achieve [its] enrollment targets." *Id.* at 44a (quoting Defs. Answer Interrog. No. 1).

Moreover, as the district court noted, the University's own "memoranda refer to these 'protected' seats as being 'reserved' for particular [minority] groups,"

and "one memorandum specifically states that the number of 'protected groups' for Fall 1997 would be decreased, thereby 'opening up slots for non-protected applicants.'" Pet. App. 45a (citation omitted). The University further acknowledged that (1) it determined the number of protected spaces to reserve for preferred minority and other candidates "by the expected pool size of various groups" of applicants; (2) it "carefully monitored and managed" its offers of admissions "to ensure that sufficient spaces are reserved, or protected, for attractive applicants who apply later in the cycle"; (3) "*[a]s applicants from a particular group are admitted over the course of the admissions season, the protected spaces reserved for that group are used*"; and (4) "[i]f the pool of qualified applicants never reaches the number of protected spaces, those slots are filled with qualified applicants off the wait list." *Id.* at 44a (quoting Pls. 4/9/99 Br. at 7 n.4). Accordingly, as the district court held, "[i]t is clear that the [University's] system [between 1995-1998] operated as the functional equivalent of a quota." *Id.* at 45a.

Further, from 1995-1997, the University used different grids and criteria for admitting preferred minority candidates. Pet. App. 46a, 111a-113a. Accordingly, the district court correctly held that up until 1999 the University operated a two-tier system in which favored minority applicants were insulated from competition with other candidates because race was a determinative factor in admissions decisions. See *Bakke*, 438 U.S. at 315-320 (opinion of Powell, J.); *Croson*, 488 U.S. at 499; *Wygant*, 476 U.S. at 276. Moreover, the district court correctly concluded, the University's admissions systems in place between 1995-1998 constituted an "impermissible use of race" because they "systematically exclude[d] a certain group of non-

minority applicants from participating in the admissions process based solely on account of their race." Pet. App. 43a, 46a.

For example, statistics from 1995, the year Ms. Gratz applied, reflect that the University accepted all 46 applicants who were members of preferred minority groups and had the same adjusted GPA and test score, but only accepted slightly less than one third, or 121 of 378 non-preferred candidates. See Pet. App. 47a (holding University's admissions program in effect in 1995 and 1996 defective in part because non-preferred applicants were "automatically rejected, whereas * * * minority applicant[s] with the same grade/score would have most likely been admitted").

C. The University's Current Admissions Policy Is Also Unconstitutional

The University's current undergraduate admissions program shares many of the same defects as the prior program and, in any event, cannot be squared with this Court's precedents. It ignores available race-neutral alternatives and amounts to a forbidden racial quota. More broadly, the program provides an enormous, inflexible bonus to students solely on the basis of race. On its face, the 20-point raced-based bonus automatically added to the selection index scores of all preferred minority applicants, without regard to their background, academic performance, or life experiences, is plainly unconstitutional. That 20-point racial bonus is roughly the equivalent of raising a candidate's grade point average one full point on a 4.0 scale and has 20 times the weight of an outstanding application essay. See Pet. Lodging 36-40.

1. *The University's admissions policy ignores race-neutral alternatives*

First and foremost, the University's race-based bonus system is unconstitutional because it ignores the ample race-neutral alternatives available. As outlined in the Government's amicus brief in *Grutter*, at 10-17, universities in Texas, Florida, and California have employed race-neutral means to ensure that minorities have access to institutions of higher learning. The University's failure to consider these efficacious alternatives renders its use of race unnecessary and its admissions policy unconstitutional. See *id.* at 18-21.

2. *The University's admissions policy represents a forbidden quota*

In addition, the admissions policy provides that preferred minority applicants who have a "minimum selection index score" may be "flagged" for additional, individualized review by the Admissions Review Committee (ARC) solely because of their race, while other candidates with the same or better index scores are denied any individualized review and, in fact, are automatically rejected. Pet. App. 117a. Indeed, because the University acknowledges that "[t]he bulk of admissions decisions are executed based on selection index score parameters" and "[t]he ARC reviews only a portion of all of the applications," the University's policy of "flagg[ing]" preferred minority students based solely on their race appears to create a dual admissions system where preferred minority students receive individualized review, while non-preferred candidates with similar or better index scores are denied such consideration and, indeed, are automatically rejected. *Ibid.*; see *Bakke*, 438 U.S. at 318 n.52 (opinion of Powell, J.) (explaining that "the principal evil" of the Medical

School's race-based admissions program is that it denies non-preferred applicants "individualized consideration without regard to race"); Pet. App. 46a-47a (holding University's admissions policy in existence between 1995-1997 defective in part because non-favored applicants could be "automatically rejected" while "all minority applicants received some type of individualized counselor review").[6]

Taken together, the University's substantial race-based "bonus" and its practice of providing preferred minorities special, individualized review denied to non-preferred applicants leaves little doubt that the University's current admissions policy operates as a disguised racial quota. Indeed, as if to remove any doubt on the question, the University has conceded that in changing from the open quota system it employed between 1995-1998 to its current selection-index system, it "develop[ed] * * * the selection index" so as to "change[] only the mechanics, not the substance, of how race and ethnicity [were] considered." Pet. App. 116a (citation omitted); see *ibid.* ("The difference beween the selection index and the grids [the University employed in 1995-1997], therefore, has no legal significance."). Rather than adopt a particular overt quota, the University now employs a race-based bonus designed to achieve the same result. After all, adding 20 points has no independent significance apart from its effect on the number of preferred minority students

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[6] The district court opinion does not reflect how often the University "flags" applicants merely because of their race, as opposed to race-neutral factors, or whether there are significant differences in the academic qualifications of those who are "flagged" and ultimately admitted based on the applicant's being a member of an under-represented minority group.

admitted. Selecting the "correct" race-based bonus generates the "correct" number of minority students.

Moreover, the record reflects that the change from the overt quota system employed between 1995-1998 to the "selection index" system now in place has not affected the overwhelming role race plays in the University's admissions process. Rather, under each of the admissions systems at issue in this lawsuit, "[i]t is undisputed that the University's consideration of race in the admissions process has the effect of admitting virtually every qualified under-represented minority applicant," while denying admission to non-preferred applicants with the same or better qualifications based solely on their race. Pet. App. 111a. Accordingly, under the current admissions policy, just as under the prior policies, an applicant's race or ethnic status is an extraordinarily important factor in admissions decisions and, by the University's own admission, may be the "dispositive" factor. *Ibid.*

That the University has attempted to disguise its racial quota in its current selection-index system does not make its use of race any more narrowly tailored than in its prior open-quota admissions policies. Rather, just as with University's prior admissions policies and the Law School's admissions policy at issue in *Grutter*, the University's automatic, inflexible, and overwhelming reliance on race in its current admissions policy fails to satisfy the remaining narrow-tailoring factors identified by this Court.

3. *The University's admissions policy would permit race-based discrimination in perpetuity*

The University's admissions policy is also not narrowly tailored because its reliance on race-based decisionmaking "has no logical stopping point" and would permit racially discriminatory admissions standards in perpetuity. *Croson*, 488 U.S. at 498 (quoting *Wygant*, 476 U.S. at 275 (plurality opinion)); *Metro Broad.*, 497 U.S. at 613, 614 (O'Connor, J., dissenting); see U.S. Br. in *Grutter*, at 25-27. The University's policy "provides no guidance [as to] the * * * scope of the [preference]" or how long race must be relied upon to attain the University's diversity-related goals. *Croson*, 488 U.S. at 498 (quoting *Wygant*, 476 U.S. at 275 (plurality opinion)). Indeed, the logic and inevitable outcome of the University's policy would permit it to rely on racial and ethnic admissions preferences indefinitely to obtain and sustain any racial balance, including proportional representation or "outright racial balancing," it believes contributes to its educational mission. *Metro Broad.*, 497 U.S. at 625 (O'Connor, J., dissenting) (quoting *Croson*, 488 U.S. at 507); see *Wygant*, 476 U.S. at 276 (plurality opinion) (rejecting rationale that would permit race-based decisionmaking "ageless in [its] reach * * * and timeless in [its] ability to affect the future"); accord *Tuttle* v. *Arlington County Sch. Bd.*, 195 F.3d 698, 706 (4th Cir. 1999), cert. dismissed, 529 U.S. 1050 (2000). This Court has never found such open-ended and potentially unlimited racial preferences narrowly tailored.

4. *The University's admissions policy places an automatic, inflexible, and disproportionate emphasis on race*

Another factor this Court has looked to in evaluating a race-based policy's compliance with the Equal Protection Clause is its flexibility. See, *e.g.*, *United States* v. *Paradise*, 480 U.S. 149, 171 (1987). The University's rigid, inflexible provision of a 20-point bonus to every member of a preferred race cannot be squared with this requirement and ignores the Equal Protection Clause's requirement that the government treat people as individuals. See, *e.g.*, *Miller* v. *Johnson*, 515 U.S. 900, 911 (1995) ("The idea is a simple one: At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.") (citations omitted). As the Eleventh Circuit held in reviewing a similar race-based university admissions policy, "[a] race-based admissions policy still must ensure that, even when using race as a factor, the weight accorded that factor is not subject to rigid or mechanical application, and remains flexible enough to ensure that each applicant is evaluated as an individual and not in a way that looks to her membership in a favored or disfavored racial group as a defining feature of her candidacy." *Johnson* v. *Board of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1253-1254 (11th Cir. 2001).

The University's current admissions program is the antithesis of such a flexible program. It mechanically awards all preferred minorities a 20-point bonus on their selection index score—an enormous racial preference roughly equal to a full grade point (on a 4.0 scale), see Pet. Lodging 40, 49—without regard to their background, academic performance, life experience, or

overall contribution to the educational diversity of the student body.

This rigid race-based bonus reveals just how dominant race is in the University's admissions system. Other factors related to educational diversity are given far less weight. The University, for example, awards a maximum of only 6 points for being from an "Underrepresented Michigan County" and only 2 points for being from an "Underrepresented State." Pet. Lodging 40, 49. The total available points for "Personal Achievement" is five, as is the total points available for "Leadership [and] Service." *Ibid.* Only one point is awarded to applicants who submitted an "Outstanding Essay." *Ibid.* By comparison, the 20 points mechanically awarded to preferred minorities based solely on race is an enormous preference.

The University's rigid, mechanical approach to considering race is incompatible with the need for flexibility in the admissions process and the requirement that all applicants be treated as individuals, not merely as members of a racial group. See *Johnson*, 263 F.3d at 1253-1256; see also *Croson*, 488 U.S. at 508 ("[T]he interest in avoiding the bureaucratic effort necessary to tailor remedial relief * * * cannot justify a rigid line drawn on the basis of a suspect classification."); *Frontiero* v. *Richardson*, 411 U.S. 677, 690 (1973) ("[W]hen we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality."). Regardless of the interest it seeks to achieve, the University's automatic, inflexible, and disproportionate emphasis on race cannot be reconciled with this Court's precedents.

5. The University's race-based admissions policy unfairly burdens innocent third parties

The Court has recognized that the "American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance" in part because "education provides the basic tools by which individuals * * * lead economically productive lives to the benefit of us all." *Plyler* v. *Doe*, 457 U.S. 202, 221 (1982) (quoting *Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923)). It has also explained that government should not impose "barriers presenting unreasonable obstacles to advancement on the basis of individual merit" since "the promise of equality under the law [ensures] that all citizens, regardless of race, ethnicity or gender, have the chance to take part." *Plyler*, 457 U.S. at 222; *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994) (O'Connor, J., concurring); *Georgia* v. *McCollum*, 505 U.S. 42, 59 (1992) (quoting *Ristaino* v. *Ross*, 424 U.S. 589, 596 n.8 (1976)).

The University's discriminatory admissions criteria unfairly burden qualified applicants not subject to its preference by accepting favored minority candidates who have lesser objective qualifications. As the Court has explained, "[t]he exclusion of even one [person] for impermissible reasons harms that [individual] and undermines public confidence in the fairness of the system." *J.E.B.*, 511 U.S. at 142 n.13; see *Bakke*, 438 U.S. at 361 (opinion of Brennan, White, Marshall & Blackmun, JJ.) (noting that "advancement sanctioned, sponsored, or approved by the State should ideally be based on individual merit or achievement, or at least on factors within the control of an individual").

CONCLUSION

The judgment of the district court holding that the race- and ethnic-based undergraduate admissions program is constitutional should be reversed.

Respectfully submitted.

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No. 02-516

In the

Supreme Court of the United States

JENNIFER GRATZ AND PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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38 pp

QUESTION PRESENTED

Does the University of Michigan's use of racial preferences in undergraduate admissions violate the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), or 42 U.S.C. § 1981?

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Forde-Mazrui, Kim, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 Geo. L.J. 2331 (2000) 6

Kahlenberg, Richard, *Race-Based Remedies: Rethinking the Process of Classification and Evaluation: Class-Based Affirmative Action*, 84 Calif. L. Rev. 1037 (1996) 5-6, 11, 15

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3(a), Pacific Legal Foundation respectfully submits this brief amicus curiae in support of Petitioners Jennifer Gratz and Patrick Hamacher. All parties consented to the filing of this brief and their letters of consent have been lodged with the Clerk of this Court.[1]

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California, for the purpose of engaging in litigation in matters affecting the public interest. PLF has participated in numerous cases involving discrimination on the basis of race including *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987); and *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000). PLF considers this case to be of special significance in that it addresses a state's use of race classifications for objectives, such as diversity, that are non remedial in nature.

STATEMENT OF THE CASE

This Court granted certiorari to determine whether the University of Michigan's use of race as a factor for admissions to its undergraduate program violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), or 42 U.S.C. § 1981. Petitioners Jennifer Gratz and Patrick Hamacher allege that they

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[1] Pursuant to Supreme Court Rule 37.6, Amicus affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

were denied admission to the University of Michigan's College of Literature, Science & the Arts (hereinafter University of Michigan or University) in the mid 1990's due in part to the University's policy of race-balancing admitted applicants by weighting the applications of targeted minorities. *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 814-16 (2000). Each application was categorized by race and African-American, Hispanic, and American-Indian applicants were automatically granted a twenty point bonus[2] to their selection-index score. *Id.* at 827. This award of bonus points to target minority candidates was designed to ensure that a balanced number of minority students were admitted with each incoming freshman class.

The question before this Court is whether the University of Michigan had a compelling interest to enact and continue its race-conscious admissions program and, if so, whether these race-based preferences are narrowly tailored to serve that interest.

SUMMARY OF ARGUMENT

The Equal Protection Clause of the Fourteenth Amendment prohibits states from benefitting or burdening individuals on the basis of race. Equality in the modern day does not suggest or require that "the less qualified be preferred over the better qualified simply because of minority origins." *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971).

The University of Michigan's undergraduate admissions policy grants preferences to members of some minority groups solely on the basis of their race. In implementing its race-based

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[2] This twenty point bonus for minorities, on a scale of up to 150, is approximately 15% of an applicant's total score. Twenty points is also the difference in selection-index points awarded an applicant with a 4.0, or straight "A," grade point average in comparison with an applicant carrying a 3.0 grade point average.

program, the University of Michigan failed to identify any specific or demonstrable discrimination which required a race-based remedy. Without such findings, the University of Michigan's goal to create a "diverse" student body amounts to an attempt to racially balance its admissions. This Court's jurisprudence rejects race-balancing as a compelling state interest. *See Bakke*, 438 U.S. at 307 (Powell, J.) ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."). "Diversity," if sought by using race classifications, is simply a different term for the same objective and thus, fails to provide a compelling state interest. Absent a compelling state interest and due to the pliable and amorphous nature of a "diversity" goal, the University's plan also fails to be narrowly tailored to survive strict scrutiny. The University's admissions program considers race for no reason other than to include more target minority students. This is a program that the Constitution forbids.

INTRODUCTION

Twenty-five years after this Court's plurality decision in *Bakke*, high school students seeking entry to the highly competitive University of Michigan continue to be categorized by the color of their skin, and their probability for admission is largely determined by the University's racial classifications. The University's race-based admissions policy was enacted behind the screen of promoting "diversity" in the incoming class. This argument for "diversity" in an educational setting has been presented before in *Bakke* and, more recently in the lower courts, in *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), and *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). Then, as it does now, the diversity rationale remains an attempt to distract attention from a state's ultimate goal of creating a racial balance.

The University's race-balancing policies, by any name, fail to survive strict scrutiny review because non remedial justifications for racial preferences do not provide a compelling state interest. The "diversity" rationale, standing alone, without evidence of continuing effects of identified discrimination, fails under this Court's ruling in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). Justice O'Connor's opinion in *Croson* sets the standard: Race, as a suspect classification which triggers strict scrutiny, can only be used by states as part of a "narrowly tailored" plan to remedy identifiable effects of past or present discrimination. *Id.* at 498-500, 506. Objectives such as "diversity" or "disadvantage" are non remedial in nature and fail to provide a compelling state interest. The only constitutional rationale, under the Equal Protection Clause, for state-sponsored race classifications is to provide a remedy. Because the University of Michigan cannot pinpoint any discrimination that necessitates a race-based remedy, its admissions policy violates the rights of prospective students to be treated equitably under the law.

ARGUMENT

I

UNDER EXISTING CIVIL RIGHTS PRECEDENT, THE EQUAL PROTECTION CLAUSE PROHIBITS NON REMEDIAL USES OF RACE CLASSIFICATIONS

This Court's decisions regarding the Equal Protection Clause of the Fourteenth Amendment have been distilled over the decades to a clearly iterated standard of review for all race-based classifications. In *Croson*, a plurality of this Court ruled that race classifications are justified only when used to remedy the effects of racial discrimination. Justice O'Connor, joined by Chief Justice Rehnquist and Justices White and Kennedy, there held, 488 U.S. at 493:

> Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.

Justice Scalia concurred in the judgment, arguing that racial classifications must be restricted even more narrowly:

> At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates—can justify an exception to the principle embodied in the Fourteenth Amendment that "[o]ur Constitution is colorblind, and neither knows nor tolerates classes among citizens . . . ."

Id. at 521 (citations omitted).

Because the University's purported interest in operating a racially diverse law school is neither remedial nor necessary to prevent imminent danger to life and limb, the Sixth Circuit holding contravenes *Croson*.

While the Court has acknowledged that certain, unique circumstances may call for the use of race as a classification, those circumstances must be limited to situations where past or current discrimination has been proven. *Id.* Only then may states engage in race-based preferences and, even then, such race-conscious actions must be "narrowly tailored" to remedy the present effects of past discrimination. *Id.* at 507. Forward-looking goals, such as those seeking racial balance in schools or a diverse employee pool, cannot provide a "compelling interest" or sufficiently show "narrow tailoring" to survive strict scrutiny. Richard Kahlenberg, *Race-Based Remedies: Rethinking the Process of Classification and Evaluation:*

Class-Based Affirmative Action, 84 Calif. L. Rev. 1037, 1041 (1996).

A. Evolution of Equal Protection Law Has Established Strict Scrutiny as the Standard of Review for All Race-Based Classifications

This Court's jurisprudence regarding states' use of race classifications has run a twisted course. After struggling for decades with the level of review warranted by race-conscious state actions, the Court concluded in *Croson* that "state-sponsored benign racial classifications are presumptively invalid and . . . subject to strict scrutiny." Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 Geo. L.J. 2331, 2337-38 (2000). *See Croson*, 488 U.S. at 494. This standard of strict scrutiny was reiterated in *Adarand*, 515 U.S. at 222, where Justice O'Connor wrote to clarify that: "With *Croson*, the Court finally agreed that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments."

Strict scrutiny requires the acting state or local government to provide a "compelling interest" that is "narrowly tailored" to meet the compelling interest it supposedly serves. *See generally Croson*, 488 U.S. 469 (1989). However, since the *Croson* decision, the Court has offered little guidance as to what constitutes a "compelling interest" and what programs are sufficiently "narrowly tailored" to survive the strictest scrutiny. Forde-Mazri, *Supra*, at 2339; Cass Sunstein, *Reshaping Remedial Measures: The Importance of Political Deliberation and Race-Conscious Redistricting: Public Deliberation, Affirmative Action, and the Supreme Court*, 84 Calif. L. Rev. 1179, 1187 (1996). What can be derived from the existing case law is that non remedial, diversity-seeking programs will not provide a sufficiently compelling state interest to survive strict scrutiny.

B. The University of Michigan's Desire to Obtain a Racially Balanced and Diverse Student Body Fails to Provide a Compelling State Interest Under *Croson*

Justice O'Connor's carefully crafted opinion in *Croson* reviewed the decisions in *Bakke* and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), and concluded that strict scrutiny applies to all racial classifications, regardless of which race is being benefitted or burdened. *Croson*, 488 U.S. at 494. In *Croson*, this Court solidified a strict scrutiny standard of review and clarified that use of race classifications for non remedial purposes would fail any heightened review. *Id.* at 494, 505.

While Justice Powell's opinion in *Bakke* stated in dicta that the University's goal of "attainment of a diverse student body" might provide a compelling interest,[3] he did not garner a majority of the Court in that conclusion. *Hopwood*, 78 F.3d at 944. Indeed, Justice O'Connor, in *Croson*, used Justice Powell's opinion to highlight that non remedial uses of race

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[3] While much has been made of Justice Powell's opinion in *Bakke* by the district court in this case, the Fifth Circuit Court of Appeals' recent decision appears to be in direct conflict.

> We refused to follow Justice Powell's single-Justice concurring opinion in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), because his "argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case." (Citing *Hopwood*, 78 F.3d at 944.) Justice Powell's view that diversity represents a compelling state interest justifying racial preferences under the strict scrutiny test represented the view of "only one Justice." *Id.*
>
> *Encore Videos, Inc. v. City of San Antonio*, 310 F.3d 812, 819 n.10 (5th Cir. Oct. 29, 2002).

amount to "'the remedying of the effects of "societal discrimination," an amorphous concept of injury that may be ageless in its reach into the past'" *Croson*, 488 U.S. at 497. Justice Powell failed to observe that the "diversity" argument falls for the same reason as the "role model" argument in *Wygant*, 476 U.S. at 276 (plurality opinion of Powell, J.). State goals to eradicate societal discrimination, whether couched in terms like "diversity" or "role modeling," are insufficiently compelling to survive strict scrutiny and equate to "'discrimination for its own sake,' [which is] forbidden by the Constitution." *Croson*, 488 U.S. at 496 (citing *Bakke*, 438 U.S. at 307).

The University of Michigan's use of race as a factor for admissions is based on the stated desire to obtain a "sufficiently diverse student body." *Gratz*, 122 F. Supp. 2d at 830. The University of Michigan seeks diversity of race and ethnicity in every incoming class. In pursuit of this goal, the University grants an extra twenty points to certain minority applicants[4] and "flags" minority applicants for further consideration. *Id.* at 827. This twenty point bonus is based only on race and does not consider socio-economic background or life experience. Indeed, the University offered expert testimony that use of race-

[4] The district court's opinion never addressed what races or ethnicities were considered to be "minorities" for the purposes of the University's admissions program. According to Petitioners' Petition for Writ of Certiorari, three racial groups were selected by the University as being worthy of preferences in admissions: African-American, Hispanic, and Native American. Pet'r Pet. for Writ. of Cert. at 5. The University has never articulated why these three racial groups contribute more to "diversity" in the educational atmosphere than groups like Korean Americans or students of Middle Eastern descent. The University's restricted definition of "diversity" to only mean "race," and then only certain racial groups, indicates an underlying desire to achieve a balancing of skin tones, not a cross-section of cultures, experiences, and philosophies.

neutral programs, such as those based on socio-economic factors, would be "ineffective as there 'are simply too few blacks and Latinos from poor families who have strong enough academic records to qualify for admission . . . .'" *Id.* at 830.

The University argues that its desire to produce a "diverse" student body rises to the level of fundamental, paramount, or overriding and, thus, demonstrates a compelling state interest. *Id.* at 817. However, the University never argues or provides evidence that its race-based preferences are intended to remedy any "effects of past discrimination." *Id.* at 824. Rather, the University claims that "[i]f race were not taken into account, the probability of acceptance for minority applicants would be cut dramatically." *Id.* at 830.

These considerations only demonstrate that the University of Michigan is using racial preferences for the impermissible purpose of correcting conditions that result from perceived societal discrimination. By ignoring race-neutral socio-economic factors, *id.*, the University gives a boost to middle and upper class minority applicants because fewer minority applicants actually meet the standard criteria necessary for admissions. Thus, in order to admit a significant number of minority students and obtain a "diverse" or racially balanced student body, the University stops treating all applicants equally and grants a preference to those of a certain race. While the University of Michigan may desire to admit a more racially diverse class of students, absent any evidence of direct and proven past discrimination, the University lacks a compelling interest and its racial classifications cannot survive strict scrutiny.

In the *Croson* plurality opinion, Justice O'Connor concluded that seeking to address societal discrimination or achieve an arbitrary racial balance does not rise to the requisite compelling state interest. *Croson*, 488 U.S. at 496-97. Similar to the factual circumstances the Supreme Court faced in

Wygant, the disparity between minority applicants that satisfy all standard admissions criteria to the University and the ideal number of minority students the University of Michigan hopes to admit has "no probative value in demonstrating the kind of prior discrimination . . . that would justify race-based relief." *Id.* at 497 (citing *Wygant*, 476 U.S. at 276). Without a finding of past discrimination that warrants a race-based remedy, the University's desire for "diversity" is a "mere recitation of a 'benign' or legitimate purpose for a racial classification [that] is entitled to little or no weight." *Id.* at 500.

The Fourth and Fifth Circuits in *Podberesky* and *Hopwood* demonstrate the course set by the Supreme Court in *Croson*. In *Podberesky*, the Fourth Circuit struck down the University of Maryland's race-based policy restricting eligibility for a scholarship program to African-American students. *Podberesky*, 38 F.3d at 151. The University attempted to justify the program by claiming that African-American students were underrepresented in the student body and that African American students had a lower retention and graduation rate. *Id.* at 152. In applying strict scrutiny to the race-based program, the Fourth Circuit determined that the state's interest is sufficiently compelling only where it has demonstrated a "strong basis in evidence for its conclusion that remedial action [is] necessary." *Id.* at 153. The Fifth Circuit held similarly in *Hopwood*, that: "The law school has presented no compelling justification, under the Fourteenth Amendment or Supreme Court precedent, that allows it to continue to elevate some races over others, even for the wholesome purpose of correcting perceived racial imbalance in the student body." *Hopwood*, 78 F.3d at 934. These courts of appeals adhered to the purpose of strict scrutiny review and determined that "diversity," as a non remedial goal, fell short of a compelling interest. The University of Michigan's desire to "diversify" or racially balance its student body may be an understandable goal but it is one that fails to

provide a compelling state interest for disparate treatment of applicants based on race.

C. The University's Race-Based Admissions Policy Fails to Be Narrowly Tailored Because "Diversity" Is a Broad Public Policy Objective Unsuited to a Race-Based Remedy

Similar to the circumstances this Court addressed in *Croson*, "it is impossible to assess whether the . . . [p]lan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way." *Croson*, 488 U.S. at 507. The University of Michigan never set forth any specific and proven discrimination to support a claim that its race-based policy was remedial in nature. The University provides no evidence that qualified minority students have been denied admission, either recently or in the near past. Rather, the University relies on the fact that fewer minority students would be admitted, and its student body less ethnically diverse, if its policies were race-neutral. *Gratz*, 122 F. Supp. 2d at 830. That claim, standing alone, will not suffice to create a compelling state interest nor does it provide guidance to the courts in determining whether the program is narrowly tailored.

The University's pursuit of "diversity" is not a compelling interest from which a narrowly tailored and, thus, constitutional program can emerge. *See generally* Kahlenberg, *Supra*, at 1042. Without evidence of specific discrimination to provide a compelling interest, regardless of whether the University claims "disadvantage, diversity, or other grounds for favoring minorities." *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 422 (7th Cir. 1991), the University's race-based policies cannot be narrowly tailored. The University's twenty point bonus and "flagging" of minority applicants was created to achieve a racial balance in the student population. "Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been *caused* by a

constitutional violation." *Freeman v. Pitts*, 503 U.S. 467, 494 (1992) (emphasis added).

Another fatal flaw in the University's "diversity" goal is that the goal has never been well-defined. As such an "amorphous" goal, the University's claim of "diversity" should wither under strict scrutiny. Even if "diversity" enhanced educational environments, this University has used race as a proxy for the greater goal of "diversity." The University's use of race, whereby only the race of African-American, Hispanic, and American Indian applicants are important for "diversity" purposes, robs applicants of full consideration of their merits and character. The University's program assumes that all African-American children have similar experiences and will add to the University's goal of "diversity" in the same manner. The University's race-based preferences grant the son of an upper-class African-American Michigan law professor the same twenty point bonus as the daughter of a South African sharecropper. *Gratz*, 122 F. Supp. 2d at 830 (rejecting socio-economic considerations); *see, e.g.*, Thomas Sowell, *Civil Rights: Rhetoric or Reality* 77 (1984) (comparing cultural differences between black West Indians living in the United States, who have demonstrated economic success, and other black Americans, who have lagged behind). Justice O'Connor specifically rejected this manner of using race as a proxy for experiences or characteristics in her dissent in *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547, 602 (1990) (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting) stating: "Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think."

Because the University uses race as a proxy for the ill-defined goal of "diversity," this program fails to demonstrate narrow tailoring suited to achieve a compelling state interest.

II

THE UNIVERSITY OF MICHIGAN'S RACE PREFERENCES, LIKE OTHER FORMS OF DISCRIMINATION, UNDERMINE THE ESSENCE OF THE EQUAL PROTECTION CLAUSE BY FOSTERING RACIAL STEREOTYPES AND SOCIAL STIGMAS

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to *any person* within its jurisdiction the equal protection of the laws." As this Court has noted in the past, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.

Croson, 488 U.S. at 493. The Equal Protection Clause does not provide for "group rights." Rather, "[t]he central purpose of the Equal Protection Clause 'is to prevent the States from purposefully discriminating between individuals on the basis of race.'" *Hopwood*, 78 F.3d at 939-40 (quoting *Shaw v. Reno*, 509 U.S. 630, 642(1993)). The Equal Protection Clause ultimately seeks to "render the issue of race irrelevant in governmental decisionmaking." *Id.* at 940.

However, states, in the name of affirmative action, continually step outside the boundaries of the Equal Protection Clause to bestow certain benefits and preferences on a group of individuals on the basis of their ethnicity or race. *See Podberesky*, 38 F.3d at 151; *Hopwood*, 78 F.3d at 934. Despite the "best of intentions" that states may have in enacting preferential or discriminatory policies to benefit minorities, a looming likelihood is that such government-sanctioned policies actually serve to promote stigmas and stereotypes that states should not be in the business of fostering. *See generally* Jim Chen, *Is Affirmative Action Fair? Diversity in a Different*

Dimension: Evolutionary Theory and Affirmative Action's Destiny, 59 Ohio St. L.J. 811, 899 (1998).

This Court has noted the dangerous potential of race-based programs, stating that: "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hositility." *Croson*, 488 U.S. at 493 (citing *Bakke*, 438 U.S. at 289-90 (op. of Powell, J.)). A decade earlier, Justice Douglas, warned in his dissent in *DeFunis v. Odegaard*, that:

> A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce that result despite its contrary intentions. One other assumption must be clearly disapproved: that . . . [minorities] cannot make it on their individual merit. That is a stamp of inferiority that a State is not permitted to place . . . . All races can compete fairly at all professional levels. So far as race is concerned, any state sponsored preference to one race over another in that competition is in my view "invidious" and violative of the Equal Protection Clause.

DeFunis v. Odegaard, 416 U.S. 312, 342-44 (1974) (Douglas, J., dissenting). A plausible and harmful effect of the University of Michigan's race-based policy is that it brands the admitted minority students as underacheivers who need assistance in the form of preferences to gain entry to the University. *See Bakke*, 438 U.S. at 298 (op. of Powell, J.). Such a damaging stereotype can undermine the self-esteem of minority students and create questions as to their achievements and qualifications. The Fourth Circuit has stated that:

> Of all the criteria by which men and women can be judged, the most pernicious is that of race. The injustice of judging human beings by the color of

> their skin is so apparent that racial classifications cannot be rationalized by the casual invocation of benign remedial aims. While the inequities and indignities visited by past discrimination are undeniable, the use of race as a reparational device risks perpetuating the very race-consciousness such a remedy purports to overcome. . . . It thus remains our constitutional premise that race is an impermissible arbiter of human fortunes.

Podberesky, 38 F.3d at 152 (quoting *Maryland Troopers Ass'n v. Evans*, 993 F.2d 1072, 1076 (4th Cir. 1993)). The Equal Protection Clause is intended to protect all individuals from harms that may result from racial classifications. "Race is immutable" and States cannot be in the business of handing out race-based preferences that foster harmful stereotypes and social stigmas. Kahlenberg, *supra*, at 1062.

CONCLUSION

"The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Croson*, 488 U.S. at 494. The Fourteenth Amendment requires that states treat individuals equally under the color of the law. The University of Michigan's program of granting preferences to minority applicants fails to provide equitable treatment for all applicants, regardless of race. Furthermore, because no valid remedial purpose exists for the University of Michigan's program, any race-based classifications of applicants fails under a strict scrutiny review. For the reasons set forth herein, the decision of the District Court for the Eastern District of Michigan,

Southern Division, before this Court pursuant to Rule 11, should be reversed.

DATED: January, 2003.

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No. 02-516

IN THE

Supreme Court of the United States

JENNIFER GRATZ, ET AL.,

Petitioners,

v.

LEE BOLLINGER, ET AL.,

Respondents.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* NATIONAL ASSOCIATION OF SCHOLARS IN SUPPORT OF PETITIONERS

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City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 5, 6, 24

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Shaw v. Hunt, 517 U.S. 899 (1996).....5

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FEDERAL CONSTITUTIONAL PROVISION

U.S. CONST. amend. XIV § 1 5

OTHER SOURCES

ALEXANDER W. ASTIN, WHAT MATTERS IN COLLEGE? (1993) 13, 16, 21

WILLIAM G. BOWEN AND DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998).....25

STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991).....24

Patricia Gurin, *Reports Submitted on Behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education*, 5 MICH. J. RACE & L. 363 (1999) 4

Stephen D. Johnson, *Consequences of Reverse Discrimination*, 47 PSYCH. REPS. 1035 (1980) 24

Stephen D. Johnson, *Reverse Discrimination and Aggressive Behavior*, 104 J. PSYCHOL. 11 (1980) 23

Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251 (1998) 24

Justin Kruger & David Dunning, *Unskilled and Unaware of It: How Difficulties in Recognizing One's Own Incompetence Lead to Inflated Self-Assessments*, 77 J. PERSONALITY & SOC. PSYCHOL. 1121 (1999) 16

Robert Lerner & Althea K. Nagai, *A Critique of the Expert Report of Patricia Gurin in* Gratz v. Bollinger, *available at* ceousa.org 7

DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS (1991) 11, 26

Peter Schmidt, *Debating the Benefits of Affirmative Action*, THE CHRONICLE OF HIGHER EDUCATION, May 18, 2001, at A25 22

Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1 (2002) 24

PAUL M. SNIDERMAN & EDWARD G. CARMINES, REACHING BEYOND RACE (1997) 23

SHELBY STEELE, THE CONTENT OF OUR CHARACTER (1990) 24

Thomas E. Wood & Malcolm J. Sherman, *Is Campus Racial Diversity Correlated with Educational Benefits?*, ACADEMIC QUESTIONS, Summer 2001, at 72 ..... 20, 21

Thomas E. Wood & Malcolm J. Sherman, *Is Campus Racial Diversity Correlated With Educational Benefits?* (Apr. 4, 2001), *available at* nas.org/rhe.html ..... 2, passim

Thomas E. Wood & Malcolm J. Sherman, *Supplement to Race and Higher Education, available at* nas.org.rhe2.html 12

G.E. Zuriff, *Is Racial and Ethnic Diversity Educationally Beneficial?*, WORLD & I, Aug. 2002, at 271 ..... 11, 23

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No. 02-516

BRIEF FOR *AMICUS CURIAE*
NATIONAL ASSOCIATION OF SCHOLARS
IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The National Association of Scholars is an organization comprising professors, graduate students, administrators, and trustees at accredited institutions of higher education throughout the United States.[1] NAS has more than 4,300 members, organized into 46 state affiliates,

[1] Pursuant to Supreme Court Rule 37.3(a), all parties have filed with the Court their written consent to the filing of all *amicus curiae* briefs. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* NAS certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than NAS, its members, and its counsel has made a monetary contribution to the preparation and submission of this brief.

and includes within its ranks some of the nation's most distinguished and respected scholars in a wide range of academic disciplines.

The purpose of NAS is to encourage, to foster, and to support rational and open discourse as the foundation of academic life. More particularly, NAS seeks, among other things, to support the freedom to teach and to learn in an environment without politicization or coercion, to nourish the free exchange of ideas and tolerance as essential to the pursuit of truth in education, to maintain the highest possible standards in research, teaching, and academic self-governance, and to foster educational policies that further the goal of liberal education.

NAS opposes racial, ethnic, and sex-based preferences in faculty hiring and student admissions because it believe hat such preferences are inimical to the principles to which NAS is dedicated and to the American ideal of equality of opportunity without regard to race or color, to which NAS's members are committed. NAS views with great concern the impact that the institutionalization of racial, ethnic, and sex-based preferences has had on higher education and on American society.

NAS submits this brief, as it did in both the district court and the court of appeals, for the purpose of refuting the Report of Patricia Y. Gurin. That report is the principal evidence submitted by the University of Michigan and relied upon by the district court in support of the University's argument and the Court's conclusion that the pursuit of racial "diversity" in a student body is a compelling governmental interest. NAS has published a study refuting the Gurin Report. *See* Thomas E. Wood & Malcolm J. Sherman, *Is*

Campus Racial Diversity Correlated With Educational Benefits? (Apr. 4, 2001) (the "NAS Study").[2]

NAS has also submitted an *amicus curiae* brief in companion case *Gutter v. Bollinger,* No. 02-241, pointing out that the "educational judgment" claimed to support the University of Michigan's racial-preference admissions policy is unsupported by the facts, inconsistent with the law, and perverse in its results. NAS respectfully requests that the arguments made therein also be taken into consideration in this case.

SUMMARY OF ARGUMENT

The district court concluded that "a racially and ethnically diverse student body produces significant educational benefits such that diversity, in the context of higher education, constitutes a compelling governmental interest under strict scrutiny." Pet. App. 27a-28a. To reach this conclusion, the court relied on what it termed the "solid evidence" provided by the University, and *amici* supporting the University's position, "regarding the educational benefits that flow from a racially and ethnically diverse student body." *Id.* at 22a. That evidence consisted primarily of the Gurin Report – a report solicited specifically for this litigation and prepared by Patricia Y. Gurin, professor of psychology and women's studies at the University of Michigan and interim dean of the University's College of Literature, Science and the Arts. Judge Duggan quoted the Report as concluding that "'[s]tudents learn better in a diverse educational environment, and they are better prepared to become active participants in our pluralistic, democratic

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[2] This study is Part IV of a larger work entitled *Race and Higher Education, available at* nas.org/rhe.html. The NAS submitted Part IV of *Race and Higher Education* to the court of appeals as a separate Addendum to its *amicus curiae* brief in this case.

society once they leave such a setting.'" *Id.* (quoting Gurin Rep., at 3).[3]

No such conclusion can rationally be drawn from Professor Gurin's study. She simply did not assess whether a racially diverse student body affects learning (or citizenship). And her measurements of better learning and citizenship, whatever they may have resulted from, are dubious.

What the Gurin Report actually measures is whether taking race/ethnic studies classes, engaging in conversations about racial issues, and having friendships that cross racial lines affect students' attitudes about a number of things. Some of these might generously be thought to bear on better or worse learning or preparation for citizenship, but they relate much more to students' political views and their assessments of their own worth. Professor Gurin's study might thus be helpful to a university that wanted to know whether ethnic-studies courses affect students' political views and self-esteem. It is quite irrelevant, however, to the question here: whether racial diversity of a student body (let alone racial diversity achieved through racial preferences) results in educational benefits of such a magnitude that the achievement of them can be said to constitute a compelling governmental interest. Moreover, other studies using Gurin's primary database to compare student racial diversity and educational benefits have found no relationship.

Although the district court referred to NAS's critique of the Gurin Report (Pet. App. 27a), it dealt with it only glancingly. The court failed to come to terms with the NAS

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[3] The Gurin Report cited to in this brief appears at the court of appeals record number 84. The Gurin Report also appears in abbreviated form in Patricia Gurin, *Reports Submitted on Behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education*, 5 MICH. J. RACE & L. 363 (1999).

critique and consequently failed to explore the manifold weaknesses of the Gurin Report and, ultimately, to apprehend its irrelevance to the issue presented by this case. Once the Gurin Report is discredited, the main bulwark of the district court's finding that student-body racial diversity yields educational benefits disappears, and with it the court's ultimate conclusion that the racial preferences that produce this diversity are constitutional.

ARGUMENT

I. THE UNIVERSITY BEARS A HEAVY BURDEN TO DEMONSTRATE THAT ITS USE OF RACIAL PREFERENCES SERVES A COMPELLING GOVERNMENTAL INTEREST.

The Fourteenth Amendment to the Constitution provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV § 1. Because the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual," *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948), "a [state's] racial classification causes 'fundamental injury' to the 'individual rights of a person,'" *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (internal citation omitted).

Accordingly, this Court's precedents set a high hurdle for any state actor that wishes to apply a race-based classification: the state actor must demonstrate that its racial classification advances a "compelling governmental interest[ ]" and that its use of race is "narrowly tailored" to meet that interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (plurality opinion) (same).

Mere recital of a compelling governmental interest is not enough; the state must provide a "strong basis in

evidence for its conclusion" that its use of race advances a compelling governmental interest. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion); *Croson*, 488 U.S. at 500. The Gurin Report provides no such evidence: it does not show that student racial diversity (much less that achieved by racial preferences) creates any educational benefits. Because the Gurin Report is irrelevant to this litigation, it cannot help the University meet its burden.

II. THE GURIN REPORT DOES NOT SHOW THAT INCREASED STUDENT RACIAL DIVERSITY YIELDS EDUCATIONAL BENEFITS.

The district court relied on the Gurin Report in finding that student racial diversity results in educational benefits: "Gurin reports that . . . '[s]tudents who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills.'" Pet. App. 23a (quoting Gurin Rep., at 5).

Gurin's report does not support her claims. The Report purports to measure the relationship between student-body racial diversity and educational quality at the University of Michigan. *See* Gurin Rep., at 3-4. It does nothing of the sort.

Gurin did not compare her alleged educational benefits with the number or proportion of Asian, African-American, Hispanic-American, Native American, and white students at the University of Michigan or any other institution. Instead, she relied on students' answers to questions about whether they had enrolled in ethnic studies courses, had discussed racial issues, or had close friends of a different race. Her chosen measurement (or variable, to use

the statistician's phrase) was not the extent of racial diversity in the student's university community but how much that student talked (or was talked to) about race and racial issues, in class and out.

As for the outcome – the educational benefits said to result from this talking about race – it is hard to find any evidence in Professor Gurin's study of the "growth in intellectual and academic skills" that she claims. She did not report effects on grades, standardized test scores, or graduate-school admission rates. Instead, she looked to students' answers to questions such as whether they believe "causes of behavior often form [a] chain that goes back in time" or how important they think it is to "[w]rite original works" or whether they are satisfied with themselves. Because Gurin did not even look at student-body racial diversity and did not measure improvements in educational outcomes, her study says nothing about whether the latter follows from the former. Her study is therefore irrelevant to this case.

A. The Gurin Report Does Not Measure Racial Diversity in Student Bodies.

If Gurin wished to study the effects of racial diversity in college student bodies, her first step should have been to gather information on the number and proportion of Asian, African-American, Hispanic-American, Native American, and white students in a number of different universities or at different times. She had before her, in one of the three databases she used for her study, information that would have enabled her to compare the extent of such diversity at a large number of colleges and universities.[4] She chose not to use

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[4] Gurin used three datasets. The Cooperative Institute Research Program ("CIRP") database records the number of "Asian," "black," "Mexican-American/Chicano," "Puerto Rican American," "American Indian," and "white" students at 184 colleges, *see* Robert Lerner & Althea K. Nagai, A Critique of the Expert Report of Patricia Gurin in *Gratz v. Bollinger*, at (...continued)

this information to measure student racial diversity. Instead, she seized upon student answers to questions about ethnic studies, racial dialogue workshops, and interracial experiences, and named those answers "diversity experiences," even though they are unrelated to actual racial diversity in the student body. The Report asked whether a student:

1. enrolled in the Intergroup Relations, Community, and Conflict Program ("IGRCCP") ethnic studies course;[5]

2. "[e]nrolled in an ethnic studies course" and "discussed racial issues";

3. "[e]nrolled in an ethnic studies course" and "attend[ed] a racial/cultural awareness workshop";

4. "[h]ad a course that had [an] important impact on [his or her] views of racial/ethnic diversity and multiculturalism," and participated in racial "dialogue groups" at the University of Michigan;

5. "[h]ad a course that had [an] important impact on [his or her] views of racial/ethnic diversity and multiculturalism," and was involved "with groups and activities [at the University of the Michigan] reflecting other cultural/ethnic backgrounds";

6. "[h]ad a course that had [an] important impact on [his or her] views of racial/ethnic diversity and multiculturalism," and attended "multiethnic [themed] campus events";

7. "[e]nrolled in an ethnic studies course" and "[s]ocialized with someone from a different racial/ethnic group";

8. "[e]nrolled in an ethnic studies course" and had "close friends in college who were of [a different] race";

9. "[h]ad a course that had [an] important impact on [his or her] views of racial/ethnic diversity and multiculturalism," "[h]ad meaningful, and honest discussions about race and ethnic relations" with other-race students, and "[s]hared personal feelings and problems";

10. "[h]ad a course that had [an] important impact on [his or her] views of racial/ethnic diversity and multiculturalism," and, of his or her "six closest friends at Michigan," how many were of a different race.[6]

(...continued)
24, *available at* ceousa.org, and the percentage of the student body that is non-white, *see* NAS Study, at 88. Gurin performed four separate analyses of the CIRP data, and included approximately sixty CIRP measurements, but she never used the CIRP measurements of student-body racial diversity. *See* Gurin Rep. App. C, at 6.

The other two data sets – the Michigan Student Survey ("MSS") and Intergroup Relations, Community, and Conflict Program ("IGRCCP") – include no such data. They cover one class of students at the University of Michigan. Because racial composition is a constant in these databases, Gurin could not use them to measure changes in racial diversity in the student body. *See* Gurin Rep. App. C, at 7, 9.

[5] Gurin describes this as a course on "the history of group experiences in the United States, a contemporary analysis of group inequalities in the economic, educational, and political arenas, and an analysis of political issues and policies (such as immigration, bilingual education, affirmative action, sexual harassment, Middle East peace initiatives) . . . ." Gurin Rep. App. C, at 9-10.

[6] Measurement (1) is drawn form the IGRCCP database. *See* Gurin Rep. App. C, at 21. Measurements (2), (3), (7), and (8) are drawn from the CIRP databse. *See* Gurin Rep. App. C, at 6-7, 13. Measurements (4), (...continued)

The fact that Gurin labeled these measurements as "classroom diversity" and "informal interactional diversity" experiences, does not make them relevant to this litigation. They tell us nothing about actual student racial diversity at the University of Michigan or elsewhere. The first six – enrolling in an ethnic-studies course, discussing race, participating in workshops or dialogue groups, and attending cultural activities or multi-ethnic events – do not require the presence on campus of *any* students of another race.

As for the last four questions, affirmative answers presuppose the presence of *some* students of another race on campus. But the Gurin Report does not indicate how many such students must be present to achieve the effects reported or what races must be represented or in what proportions. Therefore, affirmative answers to those questions say nothing about the particular form of racial diversity that is fostered by the University. Nor do affirmative answers indicate that the other-race students whose presence is implied will not be there absent racial preferences. As Gurin must concede, some of her claimed benefits are attributable to the presence of students who receive no preferences from the University (*e.g.*, Asians, whites, Arabs).[7] Even though these claimed

(...continued)
(5), (6), (9), and (10) are drawn from the MSS database. *See* Gurin Rep. App. C, at 9, 18-19.

[7] Although Gurin did not reveal what percentage of her outcomes results from the presence of Asian and white students – students who receive no racial preference – her Report estimates that the percentage is quite large. The University's white students, who "come from the most segregated backgrounds and hence have the most to learn from the racial/ethnic diversity they find at Michigan," Gurin Rep. App. E, at 2, report that most of their interaction with other-race students is with Asians, Gurin Rep. App. E, at 3. For "students of color," Gurin attributed their high number of "interracial relationships [to] the predominance of white students on the Michigan campus." Gurin Rep. App. E, at 3-4. Since a large percentage of Gurin's results are thus completely independent of the
(...continued)

benefits are independent of racial preferences, the University erroneously credits them to its admissions programs. *See* G.E. Zuriff, *Is Racial and Ethnic Diversity Educationally Beneficial?*, WORLD & I, Aug. 2002, at 271, 273 (discussing this error).

Perhaps recognizing that her "diversity" measurements are irrelevant to the issue in this litigation, Gurin attempted to save them by claiming that, because student racial diversity correlates with her ten measurements and her ten measurements correlate with educational benefits, student racial diversity must correlate with educational benefits. *See* Gurin Rep., at 30-33.[8] Gurin could not possibly mean to argue that everything that correlates with her "diversity experiences" improves education at the University. For example, two of Gurin's "diversity experiences" include taking an ethnic studies course coupled with participating in a racial-dialogue group or workshop. *See id.* App. C, at 13, 18-19. Many schools, including the University of Michigan, offer such dialogue groups and workshops as a "remedy" for a hostile racial climate.[9] According to Gurin's reasoning, because a hostile racial climate correlates with her measurements, it must improve

(...continued)
University's racial preferences, the district court erred in relying on these results in assessing the effects of the University's racial preferences.

[8] As noted above, one of Gurin's databases includes information on racial diversity of the student body. (The Gurin Report calls this "structural diversity." *See* Gurin Rep., at 30.) But, as also noted above, Gurin never used this information on student racial diversity in her study, *see id.* App. C, at 6; she only noted that it sometimes correlates with her ten "diversity" measurements, *see id.* at 31-32.

[9] *See, e.g.*, DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS 138-41 (1991) (reporting that the University of Michigan instituted racial sensitivity workshops in response to racist incidents at the undergraduate radio station).

education at the University. Not only does Gurin's reasoning violate the rules of logic; it violates the rules of statistics as well. *See* NAS Study, at 82 (providing a mathematical and statistical refutation of Gurin's claims).[10]

If Gurin had wished to measure whether student racial diversity produces educational benefits, she should have actually compared the two not used other, irrelevant measurements. This would not have been difficult; Gurin's primary database includes this information, yet she chose not to use it. The reason why is not hard to find: Using the same database as Gurin, Alexander Astin, Director of the Higher Education Research Institute at UCLA, compared student-body racial diversity and educational benefits and found no relationship between them. *See infra* Part IV.

The district court recited some of NAS's basic criticisms of the Gurin Report without responding to them. *See* Pet. App. 27a. It essayed an answer to just one of the points made by NAS (restated here at p. 10 & n.7 above), that the Gurin Report gives us no idea how many minority students are needed to achieve any beneficial educational results or whether racial preferences are needed to provide the requisite diversity. This argument, the court said, goes

[10] The NAS Study explains that "the argument is unsound, because it can be shown mathematically that if variables A and B are positively correlated, and variables B and C are positively correlated, it is possible that A and C are negatively correlated. To be sure, one can deduce that A and C are positively correlated if one knows that the correlations between A and B and between B and C are very high (near 1). But Gurin's correlations are less (usually much less) than .25, which isn't nearly large enough . . . logically or mathematically." NAS Study, at 82. Wood and Sherman have recently issued a study analyzing the data from the same database Gurin used. Their analysis demonstrates that the indirect correlations Gurin reported are indeed too small for Gurin to claim her "diversity" measurements correlate with her "education" outcomes. *See* Thomas E. Wood & Malcolm J. Sherman, *Supplement to Race and Higher Education*, *available at* nas.org.rhe2.html.

only to "whether the means employed to achieve [the compelling governmental interest of educational benefits] are narrowly tailored." *Id.* Not so. Unless we know how diverse, and in what way diverse, a student body must be to yield the desired educational benefits, we cannot know that the racial preferences chosen to achieve those benefits will survive the strict scrutiny that compelling-interest analysis demands.

B. Gurin's "Learning" and "Democracy Outcomes" Do Not Measure Educational Benefits.

The Gurin Report purports to "confirm[ ] that racial diversity and student involvement in activities related to diversity have a direct and strong effect on learning." Gurin Rep., at 9. But Gurin could not possibly have reached any conclusions on academic outcomes, for the simple reason that she never measured them.

Gurin rejected accepted, traditional measurements of academic outcomes in favor of her own, subjective, ones. Even though her database includes data on such traditional measurements of academic achievement as self-reported grades, graduation rates, admissions to graduate school, and performance on seven standardized tests, *see* ALEXANDER W. ASTIN, WHAT MATTERS IN COLLEGE? 188-99, 218-20 (1993), Gurin chose to include only one of those measurements – self-reported grades (Gurin Rep. App. C, at 14) – which she reported has no "consistent relationship[ ]" with student outcomes. Gurin Rep., at 38.[11] Thus, Gurin found no

[11] Gurin looked for 24 possible relationships between her "diversity" measurements and grades. For only 6 of these did Gurin report results; for the other 18, Gurin found *no* relationship. Moreover, these 6 factors indicate that her "diversity" measurements have almost no impact on grades; even very large increases in these measurements lead to extremely small changes in grades. *See* Gurin Rep. App. D tbl. D1, at 2, (...continued)

consistent link between her purported measurements for racial diversity and the only even arguably objective[12] measurement of academic achievement in her study.

Gurin instead created eleven of her own, subjective measurements of students' political and social attitudes and self-esteem. Although these measurements are unrelated to academic outcomes, Gurin labeled them "learning outcomes." These measurements include:

1. whether students "[e]njoy analyzing reasons for behavior," "[p]refer simple rather than complex explanations," and "[t]ake people's behavior at face value";

2. whether they "[t]hink about the influence of society on other people" and on themselves, and believe "[c]auses of behavior often form [a] chain that goes back in time";

3. how much they valued "[g]eneral knowledge," and "problem-solving," thinking, writing, and foreign language skills;

4. how personally important it was to them to "[w]rite original works (poems, novels, short stories, etc.)" and "[c]reate artistic works (painting, sculptures, decorating, etc.)";

(...continued)
row 1. Finally, Gurin's results are inconsistent with one another, or with any theory of the beneficial effects of student racial diversity adopted by the district court: Gurin found that increases in "diversity courses" correlate with African-Americans reporting *lower* grades and with Hispanics and whites reporting *higher* grades. Gurin Rep., at 38.

[12] The fact that the grades she used are *self-reported* adds an element of subjectivity to that measurement as well.

5. whether they were intellectually satisfied with their education at the University;

6. whether they expected to attend graduate school;

7. whether they wanted to attend graduate school;

8. whether they thought they had a greater "[d]rive to achieve" and intellectual "[s]elf-confidence" than the average person their age;

9. whether they had greater academic, writing, and listening abilities than the average person their age;

10. whether they thought they were more prepared for graduate school than when they entered college;

11. whether they had more "[g]eneral knowledge" and better "problem-solving," thinking, writing, and foreign language skills than when they entered college.[13]

Gurin mislabeled her measurements as "[s]ocial historical thinking," "[c]omplex thinking," and "[i]ntellectual engagement variables," even though, overall, they tell us nothing about students' thinking abilities or intellectual skills.

In measurements (1), (2), (3), and (4), students were asked a little about what they think about, but mostly about what kind of thinking or other intellectual activity they "enjoy" or "value." They certainly did not ask whether students are capable of or engage in Gurin's "complex

[13] Measurements (3), (4), (7), (8), (9), (10), and (11) are drawn from the CIRP database. *See* Gurin Rep. App. C, at 14-16. Measurements (1), (2), (5), and (6) are drawn from the MSS and IGRCCP databases. *See* Gurin Rep. App. C, at 19, 21.

thinking" or even her "social historical thinking." Measurement (5) asked students if they enjoyed their time at the University and found classes satisfying, not whether they did well. Measurements (6) and (7) asked students whether they wish to attend graduate school, not whether and where they were actually admitted. That is a separate measurement in Gurin's database – a measurement that Gurin excluded. *See* ASTIN, *supra*, at 197-98. And measurements (8), (9), (10), and (11) merely assessed students' self-esteem. The fact that students believe they are better writers and "problem solvers" than they were four years earlier does not make it so. Such self-assessments are inherently suspect. *See* Justin Kruger & David Dunning, *Unskilled and Unaware of It: How Difficulties in Recognizing One's Own Incompetence Lead to Inflated Self-Assessments*, 77 J. PERSONALITY & SOC. PSYCHOL. 1121, 1123-24 (1999) (finding that those who were most confident of their abilities were often the least able).

Common sense indicates that these are not valid measurements of educational benefits. Nowhere in society – not in graduate school admissions, college rankings, job recruitment – do we measure a student's academic success by asking him how much he personally values creating artistic works or whether he enjoys guessing the reasons for people's behavior. Very few parents would be likely to accept a transcript that reported not grades, but their child's self-ratings of his abilities and drive to achieve. This Court likewise should not do so.

In addition to her "learning outcomes," Gurin provided over a dozen "democracy outcome" measurements – measurements of students' political and social attitudes and citizenship. These are, on their face, irrelevant; Gurin did not even claim that they measure academic outcomes. Instead they measure how effective the University's courses are in changing students' political and social views.

These measurements range from the extraordinarily bland and uncontroversial (*e.g.*, whether the respondent considers others' perspectives,[14] volunteers in his community,[15] or values "racial understanding"[16]), to the political (*e.g.*, whether the respondent "think[s] about the amount of power people in different segments of society have"[17]). Gurin went so far as to define a positive outcome as a belief that the University's diversity programs are beneficial, and a negative outcome as a response that these programs "foster[ ] more intergroup division than understanding" and lead to tense, uncomfortable discussions on "ethnic, racial, and gender issues."[18] These measurements tell us more about Gurin's political views than they do about education at the University.

Gurin attempted to save her "democracy outcomes" by linking them to education at the University. Education, she explained, "equip[s] students for meaningful participation" in a democracy by making them "better able to understand and consider multiple perspectives, deal with the conflicts that different perspectives sometimes create, and appreciate the common values and integrative forces that harness differences in pursuit of the common good. Students can best develop a capacity to understand the ideas and feelings of others in an environment characterized by diverse others . . . ." Gurin Rep., at 5-6; *accord id.* at 29.

But racial diversity is not necessary to any of these outcomes. Students can listen to "multiple perspectives" and

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[14] Gurin Rep. App. C, at 20 (MSS), 21 (IGRCCP).

[15] Gurin Rep. App. C, at 16 (CIRP).

[16] Gurin Rep. App. C, at 17 (CIRP).

[17] Gurin Rep. App. C, at 21-22 (IGRCCP).

[18] Gurin Rep. App. C, at 20 (MSS).

learn to be considerate of others with or without a racially diverse student body. The diversity Gurin describes as good for democracy – diversity of viewpoint – is very different from the diversity of skin color that the University seeks to achieve.

C. At Most, the Gurin Report Shows Only Tiny Differences in Attitudes Between Students with "Diversity Experiences" and Those Without Them.

The Gurin Report does not even show a significant relationship between students' "diversity experiences" and the educational benefits she purported to measure. This is all the more remarkable because, as discussed later at Part III, Gurin violated basic statistical rules to strengthen such a relationship. In the end, Gurin's own numbers indicate that changes in her "diversity" measurements have either no effect on students[19] or an effect so tiny as to be unnoticeable.

For the vast majority of her measurements, Gurin reported that even extremely large increases in her "diversity" measurements account for less than 1 percent of students' "learning" outcomes. Put differently, Gurin found that more than 99 percent of a student's "learning" is determined by factors other than her "diversity" measurements.[20] *See* Gurin Rep. App. D, tbls.; *see also* NAS Study, at 80. Only in a handful of cases could Gurin report effects as high as 3 or 4 percent, still exceedingly weak

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[19] Phrased in econometric terms, Gurin found no "statistically significant" results. This means that whatever numbers she found were completely unreliable – they were likely due to random chance, and if she repeated her experiment she would just as likely find no result.

[20] In econometric terms, Gurin found an r^2 value of 1% or less. This means that Gurin's model can explain only 1% (or less) of a student's "learning."

findings. Gurin's "democracy" measurements fared only slightly better. For the vast majority of her measurements, Gurin could account for less than 4 percent of students' "democracy" outcomes. *See* Gurin Rep. App. D, tbls.; *see also* NAS Study, at 80-81.

The Gurin Report is therefore irrelevant to this litigation for two independent reasons: first, because it does not compare student racial diversity to accepted measurements of academic outcomes and, second, because it finds that "diversity experiences" have no effect or only a minuscule effect on students.

III. THE GURIN REPORT VIOLATES BASIC RULES OF STATISTICS AND CONSEQUENTLY YIELDS UNRELIABLE AND CONTRADICTORY RESULTS.

Because the Gurin Report does not deal with student racial diversity or objective academic outcomes and because whatever relationships it does show are so tiny as to be all but immeasurable, it would be irrelevant to this case even if it were methodologically perfect. As the NAS Study demonstrates, however, the Gurin Report falls far short of the mark in this regard as well.

The NAS Study shows that Gurin abandoned two major conventions of statistics, in a way that yields unreliable results. First, without explanation, Gurin replaced the accepted margin of error for surveys (5 percent) with one that allowed her to claim more significant results (10 percent).[21] This allowed Gurin to report more relationships between her "diversity" measurements and her student outcomes, relationships most researchers would deem unreliable and

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[21] In econometric terms, the p value.

likely due to random chance. *See* NAS Study, at 80 (providing a detailed, statistical explanation).

Second, Gurin exaggerated the importance and size of her results. As the NAS Study explains, given Gurin's dataset, the accepted rule (and the rule Alexander Astin followed when he analyzed the same data[22]) indicates that only a fraction of her results are reliable. *See id.* (providing a detailed, statistical explanation).[23]

The inconsistency of Gurin's results further suggests their unreliability. As explained above at note 11, Gurin found that increases in "diversity" lead to Hispanic-American and white students reporting higher grades, but African-American students reporting lower grades. *See* Gurin Rep., at 38; NAS Study, at 91-93. It seems peculiar that the mere presence of students of a different race increases the GPAs of Hispanic-American and white students but deflates the GPAs of African-American students. More likely, these are the type of false results that a statistically flawed study such as Gurin's will produce.

Similarly, "Gurin's models lead to the anomalous conclusion that a one-afternoon workshop produces almost twice the [educational] gains of a whole semester's course work." Thomas E. Wood & Malcolm J. Sherman, *Is Campus Racial Diversity Correlated with Educational Benefits?*, ACADEMIC QUESTIONS, Summer 2001, at 72, 82. "According to Gurin's models, if a student took [a semester-long] ethnic studies class, . . . his . . . listening ability would improve by 2

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[22] *See infra* Part IV.

[23] This measurement of importance or predictive power – or *Beta* coefficient – ranges from 0 to 100%. Astin followed statistical convention and held that only results greater than 15% were reliable; Gurin included all positive results, and thus was able to find more effects than was Astin. *See* NAS Study, at 80.

percent." *Id.* If, on the other hand, that student took only a one-afternoon-long workshop, he would gain 3.5 percent in listening ability. *See id.* Thus, according to Gurin, greater exposure to "diversity" may actually lead to *worse* "learning outcomes."

IV. OTHER SCHOLARSHIP USING GURIN'S PRIMARY DATABASE SHOWS NO RELATIONSHIP BETWEEN STUDENT RACIAL DIVERSITY AND EDUCATIONAL BENEFITS.

If Gurin had wished to measure the effects of student-body racial diversity on academic outcomes, she should have done so. As we have said, this would not have been difficult; Gurin's dataset includes accepted, traditional measurements of both. Although Gurin provides no explanation for why she chose not to use these measurements, a look at Alexander Astin's book *What Matters in College?* may explain.

Using the principal database that Gurin uses – the one that records racial diversity and educational outcomes at 184 colleges and universities – Astin compared percentages of Asian-Americans, African-Americans, and Hispanic-Americans at those colleges and universities with self-reported college grades, college graduation rates, admissions to graduate schools, and performance on seven standardized tests. *See* ALEXANDER W. ASTIN, WHAT MATTERS IN COLLEGE? 62, 188-90 (grades), 191-93 (graduation rates), 197-98 (admissions to graduate school), 199-220 (standardized tests). Astin – who is a supporter of racial preferences – reported that academic "outcomes are generally not affected" by student-body racial diversity, and that any effects "are very weak and indirect." *Id.* at 362. From this Astin concluded: "The values, attitudes, self-concept, and socioeconomic status of the peer group are much more important determinants of how the individual student will develop than are the peer group's abilities, religious

orientation, or *racial composition*." *Id.* at 363 (emphasis added).

Gurin must have been aware of Astin's conclusion, for she cited Astin's book four times in her Report. Gurin Rep. App. B, at 24 (listing studies she reviewed for this litigation); Gurin Rep. App. B, at 14, 18 (listing her review of the literature). Yet Gurin never addressed Astin's contradictory findings in her study.

Since his 1993 study, Astin has reaffirmed these findings. In an interview that appeared in the *Chronicle of Higher Education* in 2001, Astin stated again that the correlation between student-body racial diversity and beneficial academic outcomes "is yet to be convincingly demonstrated," and that "[t]he research still needs to be done that would demonstrate that link." *See* Peter Schmidt, *Debating the Benefits of Affirmative Action*, THE CHRONICLE OF HIGHER EDUCATION, May 18, 2001, at A25 (interview with Alexander Astin).

Despite Astin's repeated statements that neither he nor any other researcher has demonstrated a link between student-body racial diversity and academic outcomes, the district court cited Astin's work as "solid evidence" of this link. Pet. App. 24a-25a. But Astin's own statistical findings, published conclusions, and most recent statement on the matter belie reliance on any link between student racial diversity and educational benefits.

V. THE GURIN REPORT FAILS TO CONSIDER THE POSSIBILITY THAT RACIAL PREFERENCES PRODUCE NEGATIVE EDUCATIONAL EFFECTS.

The University bears a double burden in justifying its racial classifications: it not only must show that student-body racial diversity leads to positive educational outcomes; it also must "demonstrate[ ] that racial preferences, which are

designed to artificially increase [student-body racial] diversity, do not themselves have a *negative* impact on student outcomes." NAS Study, at 83 (emphasis in original); *see also* Zuriff, *supra*, at 275.[24] After all, as the NAS Study points out, "it matters *how racial diversity is achieved.*" NAS Study, at 83 (emphasis in original); *accord* Zuriff, *supra*, at 275.

Neither the district court, nor the Gurin Report on which it relied, considered the possibility that using racial preferences in admissions may have negative effects on students and that these negative effects may outweigh any purported benefits. Given the forceful evidence of such negative effects, this is a major error.

For example, a 1980 study by Stephen Johnson of Ball State University indicates that racial preferences may seriously damage race relations on college campuses. White students participated in an experiment in which an African-American student was rewarded after a test even though it was clear that he had not scored as high as his white competitors. White students responded with sharp hostility and derision toward the African-American student and towards African-Americans in general. Nor could this be attributed to white racism against African-Americans: when a white student lost "because of the other's superior ability," he showed *less* hostility when the superior competitor was African-American than when he was white. Stephen D. Johnson, *Reverse Discrimination and Aggressive Behavior*, 104 J. PSYCHOL. 11, 17 (1980); *see also* PAUL M. SNIDERMAN & EDWARD G. CARMINES, REACHING BEYOND

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[24] "[W]e must distinguish between two types of racial diversity: one that occurs under a race-neutral admissions policy . . . and the other resulting from a policy biased in favor of underrepresented racial and ethnic groups . . . . There is good reason to believe that the two have different effects." *Id.* at 275.

RACE 38-40 (1997) ("[Our experiment demonstrates that] the mere mention of affirmative action turns out to sharpen hostility to blacks."). In a second study, Johnson found that preferential treatment led participants "to feel they had less control over the rewards in their lives," and that their principles of "equity, equality, and need" had been violated. Stephen D. Johnson, *Consequences of Reverse Discrimination*, 47 PSYCH. REPS. 1035, 1037 (1980).

These negative effects are not limited to white students. "[T]he stereotypical thinking that prompts [racial preferences] imposes a greater stigma on its supposed beneficiaries," for it labels them as "less qualified in some respect that is identified purely by their race." *Croson*, 488 U.S. at 516-17 (Stevens, J., concurring) (internal quotation marks and citations omitted). This stigma can negatively affect African-American students' perceptions of themselves and their ability to perform. *See* Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1270 (1998); SHELBY STEELE, THE CONTENT OF OUR CHARACTER 117-18 (1990); STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY, 15-16 (1991) (recalling the "insult" he felt when Harvard Law School called to explain that "the school had initially rejected me because 'we assumed from your record you were white,'" but, upon learning his skin color, "was quite happy to scrape me from what it apparently considered somewhere near the bottom of the barrel"); *see also* Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 66-73 (2002) (cataloguing the negative effects of racial preferences on all races).

Even the University's own expert witnesses, William G. Bowen and Derek Bok, have conceded that racial

preferences stigmatize African-American students, both in their own eyes and the eyes of their white classmates.[25]

Despite this forceful evidence, neither the district court, nor the Gurin Report on which it relied, considered the possibility that using racial preferences could have negative effects on students. But Gurin did more than ignore the negative effects of racial preferences; she structured her study to ensure that the negative views of any students who might complain about the University's emphasis on racial diversity are sifted out. First, these students were likely to be categorized as lacking campus "diversity experiences"; then, they were assigned low "democracy outcome" scores. The result is that her study was very unlikely to find students who, despite much exposure to "diversity," reported negative views on, and negative effects from, racial preferences.

For example, one of Gurin's "diversity" measurements asked students if they found that discussions of race with other-race students proved to be "meaningful and honest discussions" in which the student could "[s]hare[ ] personal feelings and problems." Gurin Rep. App. C, at 18. Gurin equated a more positive response with greater exposure to racial diversity at the University. *See*

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[25] *See* WILLIAM G. BOWEN AND DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 265 (1998) ("More than a few black students unquestionably suffer some degree of discomfort from being beneficiaries of the admissions process . . . . It is for this reason that many high-achieving black graduates continue to seek reassurance that they have 'made it on their own' and why they complain when job interviewers presume that even the most outstanding black student may well have been helped in this way."); *id.* ("[S]elective institutions have been reluctant to talk about the degree of preference given black students [for fear that] the standing of black students in the eyes of white classmates would be lowered if differences in test scores and high school grades were publicized.").

Gurin Rep., 41, tbls. M3; & M4; Gurin Rep. App. E, at 4. But this ignores those students at the University of Michigan who may believe that racial preferences and a stifling, politically correct environment lead to tense relationships among students.[26] Even if these are the students who have had the most interaction with other-race students at the University, Gurin labels them as not exposed to racial diversity because of their views.[27]

Gurin then used a similar question for her "democracy outcomes." Students were asked if the "University's focus on diversity puts too much emphasis on group differences," "fosters more intergroup division than understanding," "means [students] can't talk honestly about ethnic, racial, and gender issues," and "makes it hard for [students to be themselves]." Gurin Rep. App. C, at 20 (MSS study). If a student reported a hostile racial climate, answering "yes," he received a lower "democracy outcome"

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[26] In his book *Illiberal Education: The Politics of Race and Sex on Campus*, Dinesh D'Souza reported on the racial climate of the University of Michigan during the mid to late 1980s, the same time period covered in Gurin's primary database. D'Souza included an interview with Andrew Milot, a senior at the University who "identified himself as a political liberal, from a 'progressive' family," and a supporter of racial preferences. D'SOUZA, *supra*, at 129. Milot complained of a tense atmosphere, in which students did not feel free to discuss race openly: "It is a shame that the pros and cons of [affirmative action] cannot really be discussed here. . . . There is a censorship going on that's not written. There's a lot of public intimidation." *Id.*

[27] The example of Michigan Professor Reynolds Farley illustrates the ramifications of Gurin's choices. Professor Farley has been "acknowledged as America's leading demographer in the field of race relations" and has taught sociology courses on "racial and cultural contacts." D'SOUZA, *supra*, at 148-49. Presumably Farley spends great amounts of time with people of other races. Yet, because he believes students and professors at the University cannot have open, honest dialogues about affirmative action and race, *see id.* at 150, Gurin would lower his "diversity" score.

score. *See* Gurin Rep. App. D, final regression table, row 4 (indicating that a student who responded that the University's emphasis on group "[d]ifferences is nondivisive" demonstrated a positive "democracy outcome").

Thus, Gurin's study is structured so that many students who have views on racial preferences that contradict Gurin's will first be deemed under-exposed to "diversity," and then fail Gurin's test of good "democracy outcomes." It is little surprise that Gurin did not find many students who, despite great exposure to "diversity," reported negative views on racial preferences or negative "democracy outcomes."[28]

As the NAS Study explains, "Gurin is actually at two removes from the policies she claims to be defending." First, she disregards actual campus racial diversity, and instead considers measurements "not relevant to the issue before the courts." Then, she ignores the critical question of "*how racial diversity is achieved.*" NAS Study, at 83 (emphasis in original). Either of these errors, standing alone, is sufficient to negate the value of Gurin's study.

VI. GURIN ADMITS IN A SUPPLEMENTAL REPORT THAT SHE FAILED TO SHOW THAT STUDENT RACIAL DIVERSITY PRODUCES EDUCATIONAL BENEFITS.

In a Supplemental Report, dated January 11, 2001,[29] Gurin conceded that, contrary to her prior assertions,[30]

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[28] *See* Gurin Rep. App. E, at 2 (finding that over 95% of students reported positive effects from the University's "diversity" courses).

[29] Submitted in companion case *Grutter v. Bollinger*, No. 02-241.

[30] *See, e.g.*, Gurin Rep., at 3 ("A racially and ethnically diverse university student body has far-ranging and significant benefits for all students . . . . Students learn better in a diverse educational environment, and they are better prepared to become active participants in our pluralistic, democratic society once they leave such a setting. . . . This (...continued)

student-body racial diversity alone does not create educational benefits. What her study shows, her most recent statement explains, is that ethnic-studies courses *plus* racial diversity in the student body create educational benefits:

> [Student-body racial diversity] is essential but, by itself, usually not sufficient to produce substantial benefits . . .[;] students from diverse backgrounds must also learn about each other in the courses that they take and in informal interaction outside of the classroom. *For new learning to occur, institutions of higher education have to make appropriate use of [such racial diversity].*

1/11/2001 Gurin Supp. Rep., at 1 (emphasis in original).

According to Gurin, neither factor alone is enough, but together they produce results. But, as shown above, Gurin's study cannot support any conclusions about student-body racial diversity or educational benefits, not even the weaker ones she now offers. *See supra* Parts II & III. The Gurin Report fails to show that racial diversity in the student body (much less racial diversity achieved through racial preferences), creates any educational benefits. Astin's research also belies Gurin's modified claim. *See supra* Part IV. Astin's findings show that *all* of the effects Gurin reports result from taking ethnic-studies courses; increasing racial diversity in the student body had no effect. *See* NAS Study, at 109. Accordingly, even Gurin's weaker, more qualified conclusion is without foundation.

* * *

(...continued)
report describes the strong evidence supporting these conclusions derived from three parallel empirical analyses . . . .").

The district court's and the University's heavy reliance on the Gurin Report was erroneous.

CONCLUSION

For the foregoing reasons, NAS urges this Court to reverse the judgment of the district court.

Respectfully submitted,

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Supreme Court of the United States

BARBARA GRUTTER,
Petitioner,

v.

LEE BOLLINGER, ET AL.,
Respondents.

and

JENNIFER GRATZ AND
PATRICK HAMACHER,
Petitioners,

v.

LEE BOLLINGER, ET AL.,
Respondents.

ON WRIT OF CERTIORARI AND ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE CENTER FOR EQUAL OPPORTUNITY, THE INDEPENDENT WOMEN'S FORUM, AND THE AMERICAN CIVIL RIGHTS INSTITUTE IN SUPPORT OF PETITIONER

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Bob Jones Univ. v. United States,
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Brown v. Board of Education,
347 U.S. 483 (1954) 22, 24

City of Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) 16, 18

Craig v. Boren, 429 U.S. 190 (1976) 20

Davis v. County School Board of Prince Edward County, Virginia,
142 F. Supp. 616 (1956) 22

Eisenberg v. Montgomery County Pub. Sch.,
197 F.3d 123 (4th Cir. 1999), *cert. denied*,
529 U.S. 1019 (2000) 10-11

Fullilove v. Klutznick, 448 U.S. 534 (1980) 18

Gratz v. Bollinger,
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Grutter v. Bollinger,
288 F.3d 732 (6th Cir. 2002) . . . 1, 4, 5, 6, 13, 30

Grutter v. Bollinger,
137 F. Supp.2d 821 (E.D. Mich. 2001)
. . . . . 2, 4, 11, 14

Heart of Atlanta Motel, Inc. v. United States,
379 U.S. 241 (1964) 19

Hirabayashi v. United States, 320 U.S. 81 (1943) 16

Johnson v. Board of Regents of the Univ. of Ga.,
263 F.3d 1234 (11th Cir. 2001) 25

Korematsu v. United States, 323 U.S. 214 (1944) 16

Lee v. Washington, 390 U.S. 333 (1968) 16

Metro Broadcasting, Inc. v. FCC,
497 U.S. 547 (1990) 15, 16, 17, 18, 20

Mississippi Univ. for Women v. Hogan,
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Norwood v. Harrison, 413 U.S. 455 (1973) 19

Palmore v. Sidoti, 466 U.S. 429 (1984) 16

Regents of the Univ. of Cal. v. Bakke,
438 U.S. 265 (1978) . . . . . passim

Roberts v. United States Jaycees,
468 U.S. 609 (1984) 19

Romer v. Evans, 517 U.S. 620 (1996) 27

Runyon v. McCrary, 427 U.S. 160 (1976) 19

Sweatt v. Painter, 339 U.S. 629 (1950) 5, 24

Taxman v. Piscataway Bd. of Educ.,
91 F.3d 1547 (3d Cir. 1996),
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dismissed per stipulation,
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Tuttle v. Arlington County School Board,
195 F.3d 698 (4th Cir. 1999) 10

University of Pennsylvania v. EEOC,
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United States v. Virginia, 518 U.S. 515 (1996) . . . 20, 25

Wessman v. Gittens, 160 F.3d 790 (1st Cir. 1998) 10

Wygant v. Jackson Bd. of Educ.,
476 U.S. 267 (1986) 16, 17

Constitutional Provisions

U.S. Const. Amdt. XIV, cl. 2 . . . . . passim

Statutes

42 U.S.C. § 1981 . . . . . 2, 26

Rules

Supreme Court Rule 37 1

Miscellaneous Materials

America in Black and White,
Stephan Thernstrom & Abigail Thernstrom,
Touchstone Books: Chicago (1997) 18

"The Class of Prop. 209," James Traub,
New York Times Magazine, May 2, 1999 29

"Classroom Basics: How Environments Affect
Young Children," Laverne Warner,
25 *Tex. Child Care* 2 (Fall 2001) 22

*Classroom Breakfast: Helping Maryland Students
Make the Grade*, Sheila G. Terry & Kimberly Kerry
(2000 report for Maryland State
Department of Education, Baltimore,
available from Library of Congress) 21

*The Class-Size Reduction Program: Boosting
Student Achievement in Schools across the Nation*,
U.S. Dep't of Education (Sept. 2000) 21

The Content of Our Character, Shelby Steele,
Harper Perennial: New York (1990) 18

*A Critique of the Expert Report of Patricia Gurin
in Gratz v. Bollinger*, Drs. Robert Lerner and
Althea K. Nagai 22

"Does Diversity Improve University Education?,"
Stanley Rothman, S.M. Lipset, and Neil Nevitte,
will be published March 2003, *International Journal
of Public Opinion Research* 22

"Does Title VI of the 1964 Civil Rights Act Permit
Racial Preference in Admissions by a University
Receiving Federal Funds," Curtis Crawford,
http://www.debatingracialpreference.org/BAKKEBrennan+
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Education Week, Julie Blair,
February 9, 2000, at 14 28

Education Week, Sean Cavanagh,
April 24, 2002, at 16 28

Education Week, John Gehring,
September 6, 2000, at 34 29

"The Effects of Three Years of Piano Instruction
on Children's Cognitive Development,"
47 J. Res. Music Educ. 198 (Fall 1999) 21

Ending Affirmative Action,
Terry Eastland, 112-15 (1996) 25

"Estimating the Payoff to Attending a More
Selective College: An Application of Selection on
Observables and Unobservables," Stacy Berg Dale &
Alan B. Krueger,
117 Q. J. Econ. 1491 (Nov. 2002) 28

"Federal Policy and the Effectiveness of
Bilingual Education,"
Keith A. Baker & Adriana A. de Kanter,
Bilingual Education (1983) 21

Losing the Race, John H. McWhorter,
Harper Perennial: New York (2000) 18

"Mentor-Supported Literacy Development in Elementary Schools," Julia Ellis et al., 44 *Alberta J. Educ. Res.* 149 (1998) 22

Pervasive Preferences, Robert Lerner & Althea K. Nagai, (2001) 10

"The Politics of Admissions in California," Gail Heriot, Academic Questions (Fall 2001) . . . 29

"Preferences in Higher Education Admissions Policies: An Empirical Overview," Giftedness and Cultural Diversity (Diane Boothe & Julian Stanley eds.) (forthcoming) 10

Race and Higher Education, Drs. Thomas E. Wood and Malcolm J. Sherman 22

Reaching beyond Race, Paul Sniderman & Edward G. Carmines, Harvard University Press: Cambridge, Mass. (1997) 18

"The 'Remedy' Rationale for Requiring or Permitting Otherwise Prohibited Discrimination: How the Court Overcame the Constitution and the 1964 Civil Rights Act," Lino A. Graglia, 22 Suffolk U. L. Rev. 569 (1988) 26-27

"Reverse Discrimination by the Numbers," Robert Lerner & Althea K. Nagai, Academic Questions, vol. 2 (2000) 10

The Scar of Race, Paul Sniderman & Thomas Piazza, Harvard University Press: Cambridge, Mass. (1993) 17

"The Shame of America's One-Party Campuses," *Am. Enterprise*, September 2002 at 18-25 20

The Shape of the River, William G. Bowen and Derek Bok, Princeton University Press: New York (1998) 6, 8, 28

Washington University Daily, Nancy Wick, October 10, 2000, at 4 29

"Winners and Losers in Single-Sex Science and Mathematics Classrooms," Dale Baker & Kathy Jacobs, paper presented to the National Assoc. for Research in Science Teaching (1999) 25

INTEREST OF AMICI CURIAE

This brief *amici curiae* in support of the petitioners is submitted pursuant to Rule 37 of the Rules of this Court. Counsel for petitioners and respondents have consented to the filing of this brief. Their consent letters have been filed with the Clerk of the Court.

Amici are non-profit research, education, and public advocacy organizations. Amici devote significant time and material resources to the study of the prevalence of racial, ethnic, religious, and gender discrimination by the federal government, the several States, and private entities. For instance, the Center for Equal Opportunity has obtained admissions data from public universities across the country and has published a series of studies that document racial and ethnic discrimination at those institutions. Amici expend significant time and money to educate the American public about the prevalence of discrimination in American society. Amici publicly advocate the cessation of racial, ethnic, religious, and gender discrimination by the federal government, the several States, and private entities. No counsel for a party authored this brief in whole or part, and no person or entity other than amici curiae made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

Amici support petitioners' argument that the court of appeals in *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), erred in rejecting Barbara Grutter's constitutional challenges to the University of Michigan Law School's use of racial and ethnic preferences in its admissions process. Amici also submit this brief with regard to Jennifer Gratz's lawsuit against the University of Michigan. The brief is intended: (1) to make the Court aware of the prevalence of racial and ethnic discrimination by State institutions of higher education, (2) to

show the necessity for the Court clearly to reject the diversity rationale used by some States to justify racial and ethnic discrimination in their higher-education admissions, and (3) to demonstrate that discrimination in the form of racial and ethnic preferences is unnecessary for ensuring educational opportunity.

STATEMENT

No. 02-0241.

Petitioner Barbara Grutter applied for admission to the University of Michigan Law School's 1997 entering class but was rejected. She filed suit against the university, alleging that she had been discriminated against because of her race and ethnicity, in violation of the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 1981.

The United States District Court for the Eastern District of Michigan, Friedman, J., following a bench trial, found the following basic facts. In 1992, the faculty of the Law School adopted a new, written admissions policy. *Grutter v. Bollinger*, 137 F. Supp.2d 821, 825 (E.D. Mich. 2001). Under the 1992 policy, the Law School "clearly considers an applicant's race in making admissions decisions," and race is "an enormously important factor" in deciding whether an applicant is accepted or rejected. *Id.* at 839, 841. According to the Law School's expert witness, Dr. Stephen Raudenbusch, racial and ethnic preferences[1] affected

[1] The Law School's 1992 policy provides admissions preferences for "underrepresented minorities," defined by the Law School to be African-American, Hispanic, Native American, and mainland-reared (but not Puerto-Rican-reared) Puerto Rican individuals. *Grutter*, 137 F. Supp.2d. at 841-42. For purposes of this brief, the term "minority" shall be used to describe individuals classified under the 1992 policy as

admissions to the Law School as follows:

Year	Minorities Admitted Using Preferences (%)	Minorities Admissible Without Preferences(%)
1995	26%	4%
1996	31%	8%
1997	33%	8%
1998	34%	9%
1999	37%	8%
2000	35%	10%

Id. at 839-42.

The Law School attempts to have entering classes that contain a "critical mass" of minority students. *Id.* at 840. According to Professor Richard Lempert, the professor who chaired the committee that drafted the 1992 policy, a "critical mass" consists of at least 10 percent minority students in each entering class. *Id.* at 834, 840. To achieve the desired "critical mass," the Law School's admissions office prepares a daily report of applicants, offers, and acceptances, broken down by race and ethnicity, which is used daily by admissions officers to ensure that the desired percentage of minority students in each entering class is achieved. *Id.* at 832, 842. The admissions office's efforts worked; minority students constituted at least 11 percent of each entering class selected under the 1992 admissions policy. *Id.* at 834.

The disparity between the academic qualifications of minority students and other students has existed in each class selected under the 1992 admissions policy. *Id.* at 840. This disparity has fluctuated from year to year, yet the percentage of minority students in each class has remained constant. *Id.*

"under-represented minorities" even though the term "minority" includes members of minority races and ethnicities not given preference in admissions by Michigan Law School.

at 841. Because the Law School's "critical mass" is a definable minimum percentage, and because the 1992 admissions policy resulted in the consistent achievement of that percentage, the district court determined that the 1992 admissions policy was "practically indistinguishable from a quota system." *Grutter*, 137 F. Supp.2d at 851. The district court accordingly held the 1992 policy to be unconstitutional.

In a 5-4 decision, the *en banc* United States Court of Appeals for the Sixth Circuit reversed, holding that the Law School's interest in student-body diversity justified its racial and ethnic discrimination against Barbara Grutter and that the 1992 policy was not an impermissible quota system. *Grutter v. Bollinger*, 288 F.3d 732, 746 (6th Cir. 2002)(*en banc*).

No. 02-0516.

Jennifer Gratz applied to University of Michigan's College of Literature, Science and the Arts as a prospective undergraduate in 1995. *Gratz v. Bollinger*, 122 F. Supp.2d 811 (E.D. Mich. 2000). Over the next four years, the University changed its method of admitting undergraduates four times, each time altering the method for admitting minority students.

In 1995, the University processed applications using four separate grids (grouping students based on high-school grades and admissions-test scores): in-state non-minority students; out-of-state non-minority students; in-state minority students; and out-of-state minority students. *Id.* at 827.

In 1996, only two grids were used: (1) in-state and legacy students; and (2) out-of-state students. "Action codes" were placed at the bottom of each grid providing instructions on how to alter the grids for minority students. *Id.*

In 1997, the same grids were used as in 1996, but this time minority students' high-school grades were simply

increased by half a grade point. *Id.*

In 1998, the University eliminated the grids and replaced them with a 150-point admissions scale. Minority students were given twenty points for their race/ethnicity. Other bonuses were given for socioeconomic status (twenty points); scholarship athletes (twenty points); geographic origin (six points); legacies (four points); and "outstanding" applications essays (three points). *Id.* In addition, the files of minority students were "flagged" during the process to make sure that they were treated differently throughout the application process. *Id.*

Jennifer Gratz sued, *inter alia*, to enjoin the use of racial and ethnic preferences by the University, but that part of her suit was rejected by the district court on summary judgment. *Gratz v. Bollinger*, 122 F. Supp.2d at 811. While her appeal was pending in the court of appeals, this Court granted certiorari to review the decision of the district court.

SUMMARY OF THE ARGUMENT

This Court should reverse the decision of the court of appeals in *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), and it should reverse the decision of the district court in *Gratz v. Bollinger*, 122 F. Supp.2d 811 (E.D. Mich. 2000).

The existence of State discrimination in higher education admissions is a major national problem. Over fifty years ago, this Court unequivocally held that State racial discrimination in law-school admissions violates the Equal Protection Clause of the Fourteenth Amendment. *Sweatt v. Painter*, 339 U.S. 629 (1950). In the wake of this Court's divided, three-way decision in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), however, State discrimination in the form of race preferences has been institutionalized throughout the United States. The widespread nature of this discrimination has been documented in studies published by

the Center for Equal Opportunity– relying on data supplied by State universities themselves–and it is conceded by the leading defense of such "race-sensitive" policies, *The Shape of the River* by William G. Bowen and Derek Bok.

To be sure, this Court's decision in *Bakke* stands for the simple proposition that State institutions of higher education may not use racial quotas in admissions processes. As determined by the trial court in Barbara Grutter's case, the Law School's admissions process violates this basic legal requirement. For this reason alone, the court of appeals' decision in *Grutter v. Bollinger* should be reversed. But the fact that such a transparently discriminatory system was being used twenty-five years after *Bakke* shows that admissions officials cannot be left to "narrowly tailor" the use of racial preferences. Instead, the diversity rationale should be rejected.

These cases are about far more than one university's use of racial quotas in its admissions. The Law School's quota system is but one type of institutionalized racial and ethnic discrimination, in the form of race preferences, that has blossomed in the United States since this Court decided *Bakke*. This Court should clearly hold that a State's desire for greater student-body racial or ethnic diversity does not justify racial and ethnic discrimination, no matter how such discrimination is implemented. In light of the varied, persistent, and tortuous schemes devised by discriminatory States to avoid *Bakke*-impermissible quota systems, while seeking to justify State discrimination with self-professed "good" educational intentions, amici respectfully submit that this Court must not consider only the "narrow tailoring" prong of constitutional strict scrutiny in these cases. Instead, this Court should address whether a State's desire for greater student body diversity is an interest so compelling as to constitutionally permit State racial and ethnic discrimination,

and this Court should clearly and affirmatively hold that it is not.

This Court, in construing the Fourteenth Amendment, has refused to permit State racial or ethnic discrimination *except* as a defined remedial measure constrained by Congressional and federal judicial oversight. It would be the height of folly to overturn this Court's bedrock understanding of the Equal Protection Clause based on States' self-professed "good" educational intentions, particularly when those intentions are buttressed only by dubious social-science research. After all, such research is seldom dispositive; as this brief discusses, for instance, it was cited originally by States in favor of *segregated* schools. Rather, the Equal Protection Clause is too important, too fundamental to our system of government and our system of law, to be laid aside by State officials claiming the mantle of superior expertise or the cloak of good intentions. As Justice Thomas wrote in *Adarand Constr., Inc. v. Pena*, 515 U.S. 200 (1995) (concurring in part and concurring in the judgment), "[G]overnment-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple." Nor can a diversity exception to Title VI be squared with the language of that statute.

Amici respectfully submit that the existing, fundamental principles of the Equal Protection Clause are sufficient for Ms. Grutter and Ms. Gratz to prevail. But it should be emphasized that ending race preferences in State higher education admissions will not close the doors of higher education to African Americans or Hispanics. It has not closed the doors of higher education in those first States – California, Texas, Florida, and Washington (constituting approximately twenty-five percent of the population of the

nation) – to have eliminated admissions race preferences at the instance of voter initiatives, State legislation, or judicial decree. To the contrary, African-American and Hispanic higher-education participation has grown, both quantitatively and qualitatively, in those States. There is no reason to think that African-American and Hispanic students will not similarly thrive in those States that, to date, have massively resisted any change to their institutionalized race preferences, should Ms. Grutter and Ms. Gratz prevail in these cases.

ARGUMENT

I. RACIAL AND ETHNIC DISCRIMINATION IN STATE HIGHER-EDUCATION ADMISSIONS IS A MAJOR NATIONAL PROBLEM.

There is no doubt that, as a result of the lack of clear guidance in this Court's *Bakke* decision, discrimination in the form of racial and ethnic preferences is widespread in American college and university admissions. The ubiquity of such discrimination means it is unlikely to diminish significantly if the Court fails to reject the diversity rationale as "compelling," ruling instead only that the University of Michigan's plans are not "narrowly tailored."

The Shape of the River, a 1998 book by William G. Bowen (former president of Princeton University) and Derek Bok (former president of Harvard University), is frequently cited by those defending "race-sensitive" admission policies, but even it acknowledges studies estimating "a marked degree of racial preference" in 20 percent of all four-year institutions, and a lesser degree of preference in another 20 percent of them. *Id.* at 15 & n.1. Because Bowen and Bok also assert that "only about 20 to 30 percent" of colleges and universities are at all selective, they effectively concede that, prior to the termination of race preferences in California, Texas, Washington, and Florida, the only schools that did not

discriminate on the basis of race and ethnicity were the ones that admitted everyone.

Bowen and Bok also concede that the degree of preference in university admissions is often significant. Race is far from being a mere tiebreaker; "black applicants have had an appreciably greater chance than whites of being admitted," indeed, a "considerably greater" chance. "In the upper-middle ranges of SAT scores, in particular, the admission probability for black applicants was often three times higher than the corresponding probability for white applicants." *Id.* at 26. It is not surprising then that, as Bowen and Bok further concede, the difference in college grades is "very large." *Id.* at 72. "The average rank of black matriculants was at the 23d percentile of the class, the average Hispanic student ranked in the 36th percentile, and the average white student ranked in the 53d percentile." *Id.*

A series of studies conducted by the Center for Equal Opportunity indicates that Bowen and Bok actually understate the pervasiveness and severity of racial and ethnic discrimination in university admissions. To date, CEO has studied undergraduate admissions policies at 57 different schools in eight States across the nation (California, Colorado, Maryland, Michigan, Minnesota, North Carolina, Virginia, and Washington), as well as the service academies at West Point and Annapolis; six medical schools across the country (in Georgia, Maryland, Michigan, Oklahoma, New York, and Washington); and three Virginia law schools.[2] The data subjected to the studies' regression analyses were supplied by the schools themselves, pursuant to state freedom-of-information laws. Every state system studied shows significant amounts of discrimination, and only a

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[2] The studies are available on CEO's website, www.ceousa.org.

relatively few individual schools show no evidence of discrimination.[3]

CEO studies found that black-white gaps in SAT verbal and math scores of 100 points or more are common, as are large odds ratios favoring blacks and, to a lesser extent, Hispanics over whites. The studies have also found corresponding disparities in graduation rates among different groups. Racial and ethnic "diversity" is promoted in some fashion on the websites of every state flagship institution. The diversity rationale is ubiquitous at colleges and universities, and is now spreading into employment, and into primary and secondary education, where it is similarly used to justify preferential treatment on the basis of race and ethnicity.[4]

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[3] All the undergraduate schools except for Maryland's are discussed in Robert Lerner & Althea K. Nagai, *Pervasive Preferences* (2001). All the medical schools, again excepting Maryland, are discussed in *Preferences in Medical Education* (2001). Maryland undergraduate admissions are discussed in Preferences in Maryland Higher Education (2000); Maryland's state medical school is discussed in *Racial and Ethnic Preferences and Consequences at the University of Maryland School of Medicine* (2001). The three Virginia public law schools are discussed in *Racial and Ethnic Preferences at the Three Virginia Public Law Schools* (2002). In addition, the state undergraduate institutions in California, Colorado, Michigan, Minnesota, North Carolina, Virginia, and Washington, and the service academies, were each the subject of one or more separate studies by CEO. All the studies were authored by Robert Lerner and Althea K. Nagai. Material from these studies appears in Robert Lerner & Althea K. Nagai, "Reverse Discrimination by the Numbers," *Academic Questions*, Summer 2000 at 71; Robert Lerner & Althea K. Nagai, "Preferences in Higher Education Admissions Policies: An Empirical Overview," Giftedness and Cultural Diversity (Diane Boothe & Julian Stanley eds.)(forthcoming).

[4] *See, e.g., Wessman v. Gittens*, 160 F.3d 790 (1st Cir. 1998); *Tuttle v. Arlington County School Board*, 195 F.3d 698 (4th Cir. 1999); *Eisenberg*

II. THE UNIVERSITY OF MICHIGAN'S 1992 LAW SCHOOL ADMISSIONS POLICY IS AN UNLAWFUL QUOTA SYSTEM AND SHOWS THAT *BAKKE* IS INEFFECTIVE.

The decision of this Court in *Bakke* is directly applicable to Barbara Grutter's case against the Michigan Law School's 1992 admissions policy. In *Bakke*, this Court ruled that the use of racial or ethnic preferences by a State to assure a desired percentage of students of a particular racial or ethnic group in a federally-funded educational institution is unlawful. *Bakke*, 438 U.S. at 307 (Powell, J.), 412 (Stevens, J., joined by Burger, C.J., and Stewart and Rehnquist, JJ.). In this case, as found by the district court, the Law School uses racial preferences in its admissions process to achieve a minimum ten-percent minority representation within its student body that is "practically indistinguishable from a quota system." *Grutter v. Bollinger*, 137 F. Supp.2d 821, 851 (E.D. Mich. 2001). For this reason, direct application of this Court's decision in *Bakke* should result in affirmance of the decision of the district court in Ms. Grutter's case. But the fact that such a transparently discriminatory system was being used twenty-five years after *Bakke* shows that State admissions officials cannot be left to "narrowly tailor" the use of race preferences. Instead, the diversity rationale must be rejected in its entirety.

As found by the district court following full trial of Ms. Grutter's claims, the Law School desires that each entering class consist of a "critical mass" of minority students. *Grutter*, 137 F. Supp.2d at 840. To achieve a

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v. Montgomery County Public Schools, 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000); *Taxman v. Piscataway Bd. of Educ.*, 91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 521 U.S. 1117, *dismissed per stipulation*, 522 U.S. 1010 (1997).

"critical mass" of minority students, each entering class must have at least ten percent minority students. *Id.* at 834, 840. The Law School's admissions office prepares a daily report of applicants, offers, and acceptances, broken down by race and ethnicity, which is used by that office to ensure that the desired quantum of minority students in each entering class is achieved. *Id.* at 832, 842.

Since 1992, a disparity in the basic academic qualifications, consisting of college grades and LSAT scores, of minority applicants and other applicants has existed, and, importantly, the disparity has fluctuated from year to year. *Id.* at 839. This disparity results from the admissions office's use of its daily, race-identifying admissions reports to assure that each law-school class contains at least ten percent minority students. *Id.* at 842. By achieving a fixed "goal" of minority students in each class, comparable to the ten-percent quota used by the University of California in *Bakke*, the 1992 policy results in a direct quota system, with a disparity in academic qualifications between preferred students and regular students that is quite comparable to the University of California's unlawful quota system rejected by this Court in *Bakke*. *Cf. Bakke*, 438 U.S. at 277, n. 7 (showing disparity in academic qualifications between "regular" and "special" admittees).

Because the Law School's admissions process results in a de facto quota system, simple application of this Court's decision in *Bakke* mandates that the district court's judgment against the University be affirmed. In *Bakke*, this Court held that the University of California's medical-school admissions process, setting aside ten percent of each entering class for particular minority students, was unlawful. The Law School's quota system, entirely comparable in purpose and effect to the quota system of the University of California in *Bakke*, is concomitantly unlawful.

Despite the prohibition against quotas established by this Court in *Bakke*, in Barbara Grutter's case the court of appeals held,

> The record demonstrates that the Law School does not employ a quota for under-represented minority students. The Law School's witnesses, including the current and former admissions directors, all testified that the Law School does not reserve or set aside seats. For example, Dean Lehman testified: "We do not have a portion of the class that is set aside for a critical mass of under-represented minority students." Moreover, the Law School operates a single admissions system; there is no separate track for minority applicants insulating them from comparison with nonminority applicants. Thus, the Law School's admissions policy avoids the critical defect of the Davis admissions program.

Grutter, 288 F.3d at 746.

The court of appeals' rejection of the district court's quota finding completely neglects the intended meaning and intentional vagueness of "critical mass" in the 1992 policy and the persistence and assiduousness with which the policy was enforced. The Law School's admissions office made a *daily* analysis of offers made, offers outstanding, and acceptances by preferred-minority students specifically to affect each day's admissions decisions. The simple fact that the Law School was not so crude as to have separate piles for minority and non-minority student applications, but instead flagged each individual preferred-minority file– favoring each with increasingly more weight when the daily acceptance numbers did not appear to be meeting the "critical mass"

threshold – is irrelevant for purposes of the Equal Protection Clause. *See Bakke*, 438 U.S. at 324, 328 (Brennan, J., concurring in part and dissenting in part).

Similarly, the court of appeals' favorable reliance on Dean Lehman's naked denial of using a quota system overlooks the purpose, operation, and effect of the "critical mass" admissions policy as described by other Law School witnesses. According to Professor Richard Lempert, the professor who chaired the committee that drafted the 1992 policy, "critical mass" has a specific and concrete meaning, which was intentionally not recorded in the admissions policy, of at least 10 percent minority students in each entering class. *Grutter*, 137 F. Supp.2d at 834, 840. An evaluation of the credibility of the Law School's witness testimony is not even necessary (although it was available to the trial judge) to see that Dean Lehman's denial of an actual quota system is entirely inconsistent with the Law School's vigorous, dogged, daily enforcement of its officially ambiguous, but tacitly concrete, admissions policy.

The district court's conclusion that the Law School's 1992 policy is an unlawful quota system should be affirmed. Furthermore, the fact that one of the top *law* schools in the nation was following an admissions policy obviously at odds with this Court's ruling in *Bakke* underscores the need to strengthen and clarify that ruling. After twenty-five years, it is obvious that university officials cannot be allowed to weigh race so long as, in their opinion, they do so in a "narrowly tailored" fashion. University officials cannot in good faith claim that they have been relying on *Bakke*, because, while they seized on that portion of Justice Powell's opinion endorsing the diversity rationale, they have systematically ignored the narrow-tailoring part, as confirmed by the CEO studies generally (part I, *supra*) and the Law School's system specifically. If the door to discrimination is left ajar,

universities will drive a truck through it. As discussed in the next section, the door must be firmly shut by rejecting the university's diversity rationale, which in any event is not "compelling," as a justification for discrimination.

III. THIS COURT SHOULD ADDRESS, AND REJECT, THE "DIVERSITY" JUSTIFICATION FOR RACIAL AND ETHNIC DISCRIMINATION.

A. The "Diversity" Rationale is Not Persuasive, Let Alone Compelling.

A decision by this Court that ruled only on the "narrow tailoring" prong of strict scrutiny, and failed to resolve whether the achievement of student body diversity is a compelling interest justifying State racial and ethnic discrimination, would be unlikely to change the behavior of colleges and universities currently engaged in such discrimination.[5] It would not change the current de facto legal regime. If schools are allowed to take race and ethnicity into account in deciding whom to admit, they likely will continue to do so, and simply hope that no one will sue them or, if they

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[5] The use of strict scrutiny has two distinct but overlapping justifications. Its use is sometimes justified as necessary to determine whether the purported nonracial justification for a policy really is nonracial; other times, the doctrine seems to be that even concededly racial classifications are permissible if the stakes are high enough. The diversity rationale cannot pass muster under either approach. There can be no doubt that what universities like respondent are really after is not a variety of "experiences, outlooks, and ideas," *Bakke* at 314, but "some specified percentage of a particular group merely because of its race or ethnic origin," *id.* at 307. *Cf. Metro*, 497 U.S. at 614 (O'Connor, J., dissenting). And, as discussed below, if the flimsy educational benefits put forward by respondents are a "compelling" justification, then anything is.

are sued, that they can obfuscate precisely how, and how heavily, race and ethnicity are weighed. For the discriminatory behavior of the schools to abate, they must be instructed unequivocally that diversity is not a compelling State interest.

The only justification that this Court has consistently found sufficiently compelling to justify racial and ethnic discrimination is discrete remediation of prior discrimination.[6] There are, perhaps, other governmental interests that might be hypothesized as compelling enough to justify temporary racial and ethnic classifications by the government– such as national security (*see Korematsu v. United States*, 323 U.S. 214, 218 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 100-02 (1943)), or preventing bloodshed in the aftermath of a prison race riot (*see Lee v. Washington*, 390 U.S. 333, 334 (1968) (concurring opinion of Black, Harlan, and Stewart, JJ.)-and it is probably impossible to adduce them all or to state a formula by which they can be derived and limited. But, except in situations literally involving life and death, this Court has been rightly reluctant to accept nonremedial justifications as compelling (*see, e.g., Palmore v. Sidoti*, 466 U.S. 429, 433 (1984); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275-77 (1986) (plurality opinion)), and it should be especially reluctant to accept a justification that is both amorphously grounded and threatens a permanent institutionalization of

[6] *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (race classifications must be "strictly reserved for remedial settings"); *id.* at 524-25 (Scalia, J., concurring). *See also Metro Broadcasting*, 497 U.S. at 612 (O'Connor, J., dissenting) ("Modern equal protection doctrine has recognized only one such [compelling] interest: remedying the effects of racial discrimination."); *id.* at 632 (Kennedy, J., dissenting) (criticizing "the use of racial classifications ... untied to any goal of addressing the effects of past race discrimination").

racial and ethnic discrimination. *See Wygant*, 476 U.S. at 276 ("ageless in [its] reach into the past, and timeless in [its] ability to affect the future"); *Metro Broadcasting*, 497 U.S. at 612, 614 (O'Connor, J., dissenting) (diversity rationale is "too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications" and "would support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the broadcasting spectrum continues to reflect that mixture"). As the petition points out (pp. 28-29), the diversity rationale, if accepted for higher education, could also justify pervasive discrimination in other areas of public life, including primary and secondary education, employment, service on different public boards, jury selection, housing, and so forth.

If education were impossible without racial classifications, then it might be fair to argue that States have a compelling reason to discriminate. But the University of Michigan's claim here is merely that education is improved, to some uncertain and unquantifiable degree, by interracial conversations and comments that occur randomly, sometimes in classrooms and sometimes outside them. Whatever the meaning of "compelling" may be, this falls short.

For an educational interest to be sufficiently compelling to justify race discrimination, it is also logical to require that the purported educational benefits significantly outweigh the various costs to the institution and to the wider society. The value of anything must consider its liabilities. And the liabilities attendant to the use of racial and ethnic preferences are substantial: They are personally unfair *and* set a disturbing legal, political, and moral precedent to allow State racial discrimination; they create resentment;[7] they

[7] *See* Paul M. Sniderman & Thomas Piazza, *The Scar of Race* 8-9,

stigmatize the so-called beneficiaries in the eyes of their classmates, teachers, and themselves;[8] they foster a victim mindset, remove the incentive for academic excellence, and encourage separatism;[9] they compromise the academic mission of the university and lower the academic quality of the student body; they create pressure to discriminate in grading and graduation; they breed hypocrisy within the school; they encourage a scofflaw attitude among college officials; they mismatch students and institutions, guaranteeing failure for many of the former;[10] they obscure the real social problem of why so many African Americans and Hispanics are academically uncompetitive; and they get state actors involved in unsavory[11] activities like deciding which racial and ethnic

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97-104, 109, 130, 133-34, 146-50, 176-77 (1993); and Paul M. Sniderman & Edward G. Carmines, *Reaching beyond Race* 15-58 (1997).

[8] The principle of nondiscrimination serves all Americans, and the use of preferences harms not only those immediately discriminated against but also the supposed beneficiaries. The use of a double standard communicates in this context that some racial and ethnic groups are incapable of competing at the same intellectual level as others. *See Croson*, 488 U.S. at 493 (plurality) ("[c]lassifications based on race carry the danger of stigmatic harm. Unless they are reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to the politics of racial hostility."); *Metro*, 497 U.S. at 636 (Kennedy, J., dissenting). On self-stigmatization, see Shelby Steele, *The Content of Our Character* 111-25 (1990).

[9] *See* John H. McWhorter, *Losing the Race: Self-Sabotage in Black America* (2000)(e.g., pp. 235-38).

[10] *See* Stephan Thernstrom & Abigail Thernstrom, *America in Black and White* 405-11 (1997).

[11] *Cf. Metro Broadcasting*, 497 U.S. at 633 n.1 (Kennedy, J., dissenting) (quoting Justice Stephens' dissent in *Fullilove v. Klutznick*, 448 U.S. 534-535 n.5 (1980), which in turn cited laws from the Third Reich) ("[T]he very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals.").

minorities will be favored and which ones not, and how much blood is needed to establish authentic group membership.[12]

There are superficially a number of benefits that might be claimed for a diverse student body, but on analysis none can justify racial or ethic discrimination. For instance, greater diversity might teach toleration, acceptance, and openmindedness about other racial groups-but this lesson is undermined when there is a gap in the academic ability of the members of the different groups on campus, as there is when admission preferences are used. Greater diversity might lead

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[12] Powell's rationale in *Bakke* appeared to hinge on an assumption that a prohibition on racial discrimination by a university would somehow trench upon the school's First Amendment rights. *Bakke* at 313 ("petitioner invokes a countervailing constitutional interest, that of the First Amendment"). This was dubious at the time, and remains so. *Cf. University of Pennsylvania v. EEOC*, 493 U.S. 184, 198-99 (1990); *Bob Jones University v. United States*, 461 U.S. 574, 603-05 (1983). It could justify policies of segregation as well as affirmative action (*see Runyon v. McCrary*, 427 U.S. 160, 175-77 (1976)) and could be used by many employers– for instance, newspapers– who could wrap themselves in the First Amendment. Nor is it clear how a prohibition of racially discriminatory student admission policies would "abridg[e] the freedom of speech" for anyone. Acts of racial discrimination are simply not a form of expression entitled to constitutional protection, nor are such acts needed for teaching or learning. The "right" to engage in racial discrimination can be limited when the discriminator is not a state actor; a fortiori, it must yield when the discrimination is at odds with the Constitution. *Id.* at 176 ("'the Constitution . . . places no value on discrimination'") (quoting *Norwood v. Harrison*, 413 U.S. 455, 469 (1973)); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 260 (1964)("[I]n a long line of cases this Court has rejected the claim that the prohibition of racial discrimination in public accomodations interferes with personal liberty."); *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984).

to exposure to people with different ideas or backgrounds, but it is very dubious to use race as a proxy for anticipating individuals' thoughts and experiences. There are few ideas or experiences that only members of a particular racial group can have, and fewer still that all members of that group will share. In sum, racial diversity cannot be equated with actual viewpoint diversity[13] (and, indeed, universities show little interest in viewpoint diversity relative to melanin diversity).[14] Contradictorily, it might be argued that greater diversity is needed to teach the specific lesson that not all African Americans, for instance, think alike, but this is a rather obvious and narrow lesson, and it is hard to understand why it can be taught only by using racial and ethnic preferences.

The diversity rationale also posits that the educational effects of random interracial conversations and comments will

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[13] The errors in this approach were convincingly explained by Justice O'Connor in her *Metro* dissent, 497 U.S. at 602: "Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think." It makes more sense to select for the desired qualities rather than rely on increasingly dubious generalizations and stereotypes. *See id.* at 622 ("The FCC could directly advance its interest by requiring licensees to provide programming that the FCC believes would add to diversity."). In sum, "Government may not use race and ethnicity as 'a proxy for other, more germane bases of classification.'" *Hogan*, 458 U.S., at 726, (quoting *Craig v. Boren*, 429 U.S. 190, 198 (1976)). *See also Metro Broadcasting*, 497 U.S. at 632 (Kennedy, J., dissenting) (criticizing "the stereotypical assumption that the race of [station] owners is linked to broadcast content"); *United States v. Virginia*, 518 U.S. 515, 533 (1996)("Supposed 'inherent differences' are no longer accepted as a ground for race or national origin classifications.").

[14] *See e.g.*, "The Shame of America's One-Party Campuses," *Am. Enterprise*, September 2002 at 18-25.

be obtained only by unplanned face-to-face exposure at a university; they cannot be gained in any other way (for example, by studying Martin Luther King, Jr.'s "Letter from a Birmingham Jail" or Ralph Ellison's *Invisible Man*) or any other place (such as the interracial workplace for which the student is being prepared, or the popular culture – where the message of equality and tolerance is ubiquitous – or the student's neighborhood or house of worship, or the student's home). None of this is plausible, let alone compelling.

B. There Should Be No "Social Science" Exception to the Equal Protection Clause.

In these cases, the University proffered social-science evidence to buttress its claim that its interest in a diverse student body is compelling. Such evidence should not be sufficient to justify governmental action as divisive, disturbing, and damaging as racial discrimination. After all, claims of educational benefit arising from a particular teaching technique, or creating a particular school environment, are frequently made, but they are also frequently controversial and disputed.[15] That is certainly the

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[15] For instance, there is considerable controversy over whether bilingual education helps or hurts limited-English-proficient children. *See, e.g.*, Keith A. Baker & Adriana A. de Kanter, "Federal Policy and the Effectiveness of Bilingual Education," in *Bilingual Education* (Keith A. Baker & Adriana A. de Kanter eds. 1983); *The Failure of Bilingual Education* (Jorge Amselle ed. 1996).

All kinds of factors are said to correlate with improved educational performance. *See, e.g.*, Eugenia Costa-Giomi, "The Effects of Three Years of Piano Instruction on Children's Cognitive Development," 47 *J. Res. Music Educ.* 198 (Fall 1999); U.S. Dep't of Education, *The Class-Size Reduction Program: Boosting Student Achievement in Schools across the Nation* (Sept. 2000); Sheila G. Terry & Kimberly Kerry, *Classroom Breakfast: Helping Maryland Students Make the Grade* (2000 report for Maryland State Department of

case here. The evidence presented by Professor Patricia Gurin on behalf of the University has been strongly criticized in at least two studies cited to the court of appeals. *A Critique of the Expert Report of Patricia Gurin in Gratz v. Bollinger*, by Drs. Robert Lerner and Althea K. Nagai, concluded: "There are many design, measurement, sampling, and statistical flaws in this study. The statistical findings are inconsistent and trivially weak. No scientifically valid statistical evidence has been presented to show that racial and ethnic diversity in school benefits students." *Id.* at 1. Likewise, *Race and Higher Education*, by Drs. Thomas E. Wood and Malcolm J. Sherman, painstakingly reviews the data available and concludes: "The central problem that Gurin faced in producing her Expert Report is that the national database on which she had to rely actually *disconfirms* the claim that she was asked by the University to defend." *Id.* at 79 (emphasis in original). Yet another study, "Does Diversity Improve University Education?," by Stanley Rothman, S.M. Lipset, and Neil Nevitte, will be published this March in the peer-reviewed *International Journal of Public Opinion Research*.

When racial segregation was challenged in the 1940s and 1950s, the improved-education argument was made by social-science experts on behalf of the proponents of segregation, as well as its opponents. In *Davis v. County School Board of Prince Edward County, Virginia*, a companion case to *Brown v. Board of Education*, 347 U.S.

Education, Baltimore, available from Library of Congress); Julia Ellis et al., "Mentor-Supported Literacy Development in Elementary Schools," 44 *Alberta J. Educ. Res.* 149 (1998); Laverne Warner, "Classroom Basics: How Environments Affect Young Children," 25 *Tex. Child Care* 2 (Fall 2001) (highlighting the importance of classroom design and organization).

483 (1954), the Supreme Court brief by the State of Virginia attacked the social-science evidence presented by the plaintiffs, arguing that their witnesses "bas[ed] their opinion on a lack of knowledge of Virginia." Brief for Appellees at 24. And besides, "they were by no means the only experts who testified before the Court below." *Id.* To the contrary, the State "presented 4 educators, a psychiatrist and 2 psychologists" (*id.*), all "eminent men" (*id.* at 27) whose work is supported by "other outstanding scholars" (*id.* at 28) and who testified that "segregated education at the high school level is best for the individual students of both races" (*id.* at 29).

One college president concluded that, without segregation, "the general welfare will be definitely harmed" and "the progress of Negro education ... would be set back at least half a century." (*Id.* at 25.) A child psychiatrist testified, "When the two groups are merged, the anxieties of one segment of the group are quite automatically increased and the pattern of the behavior of the group is that the level of group behavior drops." (*Id.* at 26.) And the *chairman of the department of psychology at Columbia University* also had no doubt that separate-but-equal education was superior (*id.* at 27):

> If a Negro child goes to a school as well-equipped as that of his white neighbor, if he had teachers of his own race and friends of his own race, it seems to me he is much less likely to develop tensions, animosities, and hostilities, than if you put him into a mixed school where, in Virginia, inevitably he will be a minority group. Now, not even an Act of Congress could change the fact that a Negro doesn't look like a white person; they are marked off, immediately, and I think, as I

> have said before, that at the adolescent level, children, being what they are, are stratifying themselves with respect to social and economic status, reflect the opinions of their parents, and the Negro would be much more likely to develop tensions, animosities, and hostilities in a mixed high school than in a separate school.

In *Brown*'s predecessor, *Sweatt v. Painter*, 339 U.S. 629 (1950), the State of Texas defended its segregated law schools, arguing that "there is ample evidence today to support the reasonableness of the furnishing of equal facilities to white and Negro students in separate schools." Brief for Respondents at 96. "After much study for the United States Government," continued the State,

> [Dr. Ambrose Calier] found that a very large group of Northern Negroes came South to attend separate colleges, suggesting that the Negro does not secure as well-rounded a college life at a mixed college, and that the separate college offers him positive advantages; that there is a more normal social life for the Negro in a separate college; that there is a greater opportunity for full participation and for the development of leadership; that the Negro is inwardly more "secure" at a college of his own people.

Id. Texas also cited Dr. Charles William Eliot, "President of Harvard for forty years," who concluded after a tour of the South that "if in any Northern state the proportion of Negroes should become large, I should approve of separate schools for Negro children." *Id.* at 97.

It is by no means inconceivable that social scientists and educators can still be produced who will testify that a lack

of diversity will facilitate education. They would testify that there are fewer distractions and more mutual support – indeed, single sex education has its advocates for these reasons, as do historically black colleges.[16]

Furthermore, the diversity rationale could equally be used to justify discrimination *against* formerly disadvantaged groups as well as in their favor. Asians and frequently Hispanics are victims of the preferences given to African Americans. If a State has an interest in having a university's student body approximate the demographic mix of the State, then logically the number of students from any group ought to be capped. For example, women, in *Johnson v. Board of Regents of the University of Georgia*, *supra*, were discriminated against relative to men, apparently because women were thought to be "over-represented." And indeed the federal government has already argued that an improved-education argument based on diversity can be used to justify discrimination *against* African Americans. Terry Eastland, Ending Affirmative Action 112-15 (1996) (Discussing the brief of the United States in *Taxman*, *supra*, and statements by President Clinton).

If a social-science exception to the Fourteenth Amendment is allowed, federal trial judges all over the country will have the authority and obligation to determine whether racial discrimination can be permitted based on the

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[16] *See* Dale Baker & Kathy Jacobs, "Winners and Losers in Single-Sex Science and Mathematics Classrooms" (paper presented at National Association of Research in Science Teaching Annual Meeting 1999, available at Library of Congress). Sexual discrimination has frequently been justified by some evidence similar to that used to justify racial discrimination here. *See, e.g., Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982)(unsuccessful arguments advanced by defendants); *United States v. Virginia*, 518 U.S. 515 (1996)(same).

plausibility of the data presented by social scientists in a wide array of contexts, from jury selection to political appointments to law enforcement. *Cf.* Pet. 28-29.

In the final analysis, however, the diversity rationale is simply too thin to justify as constitutional an action as abhorrent as governmental discrimination based on a person's skin color or country of ancestry.

C. The Court Should Not Create a "Diversity" Exception to Title VI.

It might be objected that the decision whether to use racial and ethnic preferences ought to be left to the political branches. The first answer to this objection is that this is precisely the sort of discrimination that must not be left to politics, academic or otherwise. We have seen institutionalized discrimination in favor of whites be replaced with institutionalized discrimination against whites (and Asians) in less than a generation, and racial spoils will always be attractive to many politicians and other state actors. The Constitution itself makes clear that racial classifications are certainly not a subject to be left to the States. The second answer is that the political system *has* spoken to this issue already. It guaranteed "the equal protection of the laws" in 1868 with the passage of the Fourteenth Amendment, and Congress forbade any recipient of federal money from engaging in racial or ethnic discrimination in 1964 with the passage of the Civil Rights Act. Congress also banned such discrimination in 1866, 1870, and 1991, with the various enactments of 42 U.S.C. § 1981. Congress can hardly make any of these laws, but especially the language in Title VI, clearer. *See Bakke*, 438 U.S. at 412 (Stevens, J., concurring in part and dissenting in part).[17]

[17] *See also* Lino A. Graglia, "The 'Remedy' Rationale for Requiring or Permitting Otherwise Prohibited Discrimination: How the Court Overcame the Constitution and the 1964 Civil Rights Act," 22 Suffolk U. L. Rev. 569 (1988); Curtis Crawford, "Does Title VI of the 1964 Civil Rights Act Permit Racial Preference in Admissions by a University Receiving Federal Funds," http://www.debatingracialpreference.org/BAKKEBrennan+rebuttal.htm.

Either the diversity rationale is interpreted to allow discrimination against racial and ethnic minorities– which is completely at odds with its historical origins– or it means that Title VI literally denies equal protection, absolutely shielding some racial and ethnic groups from discrimination but not others. *See Romer v. Evans*, 517 U.S. 620, 634 (1996) "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." Neither choice is palatable, and so the diversity rationale must be rejected. An interpretation of Title VI that allows discrimination aimed at remedying specific discrimination is barely reconcilable with the statute's antidiscrimination text; any other exception is not. Moreover, it risks opening the door to other, antiminority exceptions.

IV. ENDING PREFERENTIAL TREATMENT DOES NOT DENY EDUCATIONAL OPPORTUNITY.

The studies by Lerner and Nagai document that the elimination of racial and ethnic preferences would not lead to "whites only" State higher education, as some have claimed (even if we are to categorize Asians as "white" and Latinos as "non-white."). *See Preferences in Maryland Higher Education* 17-18 (2000); *Preferences in Virginia Higher Education* 12-14 (1999); *Preferences in Minnesota Higher Education* 11-14 (1999); *Preferences in North Carolina Higher Education* 12-14 (1998); *Racial Preferences in*

Michigan Higher Education 13-16 (1998); *Racial Preferences in Colorado Higher Education* 12-18 (1997). *See also* Bowen and Bok, *The Shape of the River*, *supra* at 35 (positing that African-American enrollment at the most selective schools could decline from 7.1 percent to 3.6 percent with nondiscrimination). Moreover, the students who, because of nonpreferential policies, are not admitted to a more selective school will assuredly be admitted elsewhere, and students who attend less-selective colleges, incidentally, achieve the same income levels as students *of comparable ability who attend more-selective schools*.[18]

Indeed, racial and ethnic preferences have been ended in California, Texas, Florida, and Washington, and there higher-education systems have remained notably diverse in their racial and ethnic participation. In California, minority enrollment in the University of California system increased from 18.8 percent in 1997, the last year in which preferences were used, to 19.1 percent in 2002. Sean Cavanagh, *Education Week*, April 24, 2002, at 16. In Texas, minority enrollment in state colleges and universities increased thirty percent between 1996, the last year in which preferences were used, and 2000. Julie Blair, *Education Week*, February 9, 2000, at 14. In Florida, minority enrollment in state colleges and universities increased twelve percent only seven months after the Florida Legislature ended preferences. John Gehring,

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[18] Stacy Berg Dale & Alan B. Krueger, "Estimating the Payoff to Attending a More Selective College: An Application of Selection on Observables and Unobservables," 117 Q. J. Econ. 1491 (Nov. 2002). Importantly the study also found that children from *low-income* families earned more if they attended selective colleges. But of course preferences based on low-income status would raise no issues under the civil-rights laws, while the current system of racial and ethnic preferences benefits primarily those from non-low-income backgrounds. See Bowen & Bok, *supra*, at 270-71.

Education Week, September 6, 2000, at 34. In Washington, African-American enrollment at the University of Washington's flagship campus decreased a statistically insignificant 1.6 percent (a total drop in enrollment of two individual students) following the elimination of preferences by Washington's voters. Nancy Wick, *Washington University Daily*, October 10, 2000, at 4. At the same time, minority applications to Eastern Washington University increased 36 percent following the preference-banning I-200 ballot initiative, and minority applications to Western Washington University increased 14.5 percent. *Id.*

Furthermore, as one would expect, the academic performance gaps that existed at colleges and universities that formerly used racial and ethnic preferences have been drastically reduced or eliminated with the termination of race preferences. For instance, the disparity at the University of California at San Diego between African-American students and other students has disappeared, with African-American honor-roll participation increasing from minuscule levels to levels mirroring their enrollment. *See* Gail Heriot, "The Politics of Admissions in California," *Academic Questions*, Fall 2001, at 29, 33-34; Gail Heriot, "University of California Admissions under Proposition 209: Unheralded Gains Face an Uncertain Future," 6 *Nexus* 163 (2001).

Finally, the ending of preferential treatment has also forced the States to focus on improving educational opportunities for disadvantaged students at the K-12 level, rather than papering over real differences in academic performance and educational opportunities with university race preferences. *See*, *e.g.*, James Traub, "The Class of Prop. 209," *N.Y. Times Mag.*, May 2, 1999, at 45; Senate Bill 6559 submitted in the Washington Senate by Jeanne Kohl-Welles (proposing and funding numerous improvements in

Washington's secondary schools in the wake of I-200)(reported in *The Seattle Times* at 1, March 1, 2000).

As already shown by the States that have ended racial and ethnic preferences, a ruling on behalf of Ms. Grutter and Ms. Gratz will not close the doors to higher education for African Americans and Hispanics. As the experience in these States shows, the use of racial and ethnic preferences is both unnecessary and counterproductive, as well as impossible to square with the principles of the Equal Protection Clause and the language of Title VI.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals in *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), and the decision of the district court in *Gratz v. Bollinger*, 122 F. Supp.2d 811 (E.D. Mich. 2000), should be reversed.

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In The
Supreme Court of the United States

BARBARA GRUTTER, *Petitioner*,

v.

LEE BOLLINGER, *et al.*, *Respondents*.

JENNIFER GRATZ and PATRICK HAMACHER, *Petitioners*,

v.

LEE BOLLINGER, *et al.*, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICUS CURIAE* CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The Center for Individual Freedom (the "Center") is a non-partisan, non-profit organization with the mission to

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[1] This brief is filed with the written consent of both parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

protect and defend individual freedoms and individual rights guaranteed by the U.S. Constitution, including free expression rights, property rights, equal protection rights, due process rights, privacy rights, and the freedoms of association and religion. Of particular importance to the Center in this case is the constitutional guarantee of equal protection that affords an individual the right to compete for admission to state institutions of higher education on equal footing irrespective of race or ethnicity.

SUMMARY OF ARGUMENT

Dr. Martin Luther King, Jr., famously dreamed that his children would one day live in a nation where they would "not be judged by the color of their skin but by the content of their character." Apparently unmoved by Dr. King's words, the University of Michigan turns that dream on its head by judging its students precisely by the color of their skins and, in doing so, defiles the broader constitutional dream of equal protection of the laws.

The excuse the University gives for judging prospective students by the color of their skin is that it increases "diversity" and thus furthers the educational mission. Whatever the educational merits of a more diverse student body, that interest is simply not *compelling* in a constitutional sense. And where such "diversity" is defined by using race as a proxy for educational worth, nature of opinions, varied life experience, or the content of students' character, it not only fails to raise a compelling interest, it is affirmatively anathema to the Constitution and should be deemed *per se* invalid. Such judgments-by-proxy constitute odious stereotyping based on irrelevant racial criteria that this Court has condemned.

It is thus no surprise that this Court has never recognized racial diversity as a compelling interest justifying racial discrimination. And this Court never should recognize such

an interest. There are ample legitimate criteria for generating diverse student bodies that do not depend on invidious assumptions about the greater or lesser worth of students based on their race. Socio-economic differences are not suspect criteria and are likely to provide a considerable diversity of background, experience, and ideas. Likewise for geographic differences. To the extent that such diversity brings with it ethnic and racial diversity as well, it will have been accomplished through targeting genuine and relevant differences rather than through the targeting of race itself.

Wholly aside from the noxious character of the University's vision of "diversity," the program it has adopted is not narrowly tailored to achieve that interest with the minimum imposition on constitutional values. The nature and size of the racial admissions preferences effectively establish a two-tiered admissions system and a racial quota. Indeed, the admitted desire for a "critical mass" of supposedly under-represented minority students is an open admission of the existence of a quota. Not surprisingly, the University will precisely define neither the magnitude of the "critical mass" (*i.e.*, the minimum quota) nor the percentages of proper "representation" used to determine whether a particular minority group is *under*-represented. The University is thus on the horns of an intractable dilemma: Either it has a hard quota seeking supposedly "correct" representation of minorities—thus elevating race above all else—or it lacks any definable conception of proper representation, a "critical mass," and thus "diversity" itself, making it literally impossible to narrowly tailor its program to an undefinable interest. If the goal of "diversity" and representation is but an amorphous judgment call, then no court could ever apply strict scrutiny or know when the University had crossed the line from narrowly serving its interest to *over* serving that interest at the expense of the highest constitutional values.

ARGUMENT

This Court has long emphasized that racial and ethnic distinctions "'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 214 (1995) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). Consequently, "all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed . . . under strict scrutiny . . . [and] are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors, Inc.*, 515 U.S. at 227.

Despite the fact that racial classifications are almost always constitutionally prohibited, the University of Michigan seeks the approval of this Court in employing racial and ethnic distinctions to admit students to its undergraduate and law schools. However, just as this Court did a quarter century ago in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the affirmative action admissions programs utilized by the University must be struck down as both unlawful and unconstitutional under Title VI of the Civil Rights Act of 1964[2] and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[3] Quite simply, the University's race- and ethnic-based admissions programs serve no compelling interest nor are they narrowly tailored, thus they

[2] Title VI of the Civil Rights Act of 1964, *see* 42 U.S.C. § 2000d, which prohibits racial discrimination in programs receiving federal funds, "'proscribes only those racial classifications that would violate the Equal Protection Clause.'" *Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (opinion of Powell, J.)).

[3] The Equal Protection Clause of the Fourteenth Amendment commands: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

cannot pass muster under this Court's "strictest judicial scrutiny." *Adarand Constructors, Inc.*, 515 U.S. at 224.

I. THE RACIAL AND ETHNIC DIVERSITY SOUGHT THROUGH THE UNIVERSITY OF MICHIGAN'S ADMISSIONS PROGRAMS IS NOT A COMPELLING INTEREST

As detailed by the Petitioner and the court below, under the Law School's admissions program, "[t]he figures indicate that race is worth over one full grade point of college average or at least an 11-point and 20-percentile boost on the LSAT." *Grutter v. Bollinger*, 288 F.3d 732, 796 (6th Cir. 2002) (Boggs, J., dissenting).[4] The situation is almost exactly the same with regard to undergraduate admissions. An applicant's score, ranked on a 150-point scale, is calculated by aggregating the numerical values assigned to each of a variety of factors, including high school grade point average, standardized test score, quality of school, strength of curriculum, an essay, personal achievement or leadership, in-state residency, and, of course, race and ethnicity. "Under-represented minority applicants automatically receive 20 points based upon their membership in one of the identified under-represented [racial or ethnic] categories," *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 827 (E.D. Mich. 2000), a bonus worth one full grade point of high school average or

[4] This means that, "roughly speaking, under-represented minorities with a high C to low B undergraduate average are admitted at the same rate as majority applicants with an A average with roughly the same LSAT scores." *Grutter v. Bollinger*, 288 F.3d 732, 796 (6th Cir. 2002) (Boggs, J., dissenting). It also means that "minority applicants with an A average and an LSAT score down to 156 (the 70th percentile nationally) are admitted at roughly the same rate as majority applicants with an A average and an LSAT score over 167 (the 96th percentile nationally)." *Id.* (Boggs, J., dissenting).

more than the total amount of points that can be earned for a perfect standardized test score.[5]

To justify the affirmative action programs, the University asserts an interest in racial and ethnic diversity, with such diversity purportedly being achieved through admissions preferences that strive to assemble a "critical mass" of under-represented minority students. *See* Br. in Opp'n to Pet. for a Writ of Cert. at 1, 3, *Grutter v. Bollinger*, No. 02-241; Br. in Conditional Opp'n to Pet. for a Writ of Cert. Before J. at 2-3, 8-9, *Gratz v. Bollinger*, No. 02-516. Nevertheless, it would be miraculous if it were true that the University's interest could be reached by assigning such hard numbers to factors that appear quite arbitrary.

The University provides no definition of when a minority group is under-represented, over-represented, or even properly represented. Rather, the University sets forth a vague definition of what constitutes a "critical mass," which turns entirely on the hazy judgment of administrators about whether students will be comfortable among their peers.[6] As best as *Amicus* can tell, the University does not conduct any follow-up of its annual admissions to confirm whether a "critical mass" of students from the under-represented minority groups could be admitted without the race- and ethnic-based preferences. Instead, the University uses the preferences regardless.

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[5] Admittedly, at least the University's undergraduate admissions program gives some weight to criteria other than race, but the elevation of race above all other non-suspect factors demonstrates the admissions program's constitutional infirmity.

[6] *See, e.g.*, Proof Br. of Defs.-Appellants at 10-11, *Grutter v. Bollinger*, No. 01-1447 (6th Cir. filed May 24, 2001) ("The Policy does not define 'meaningful numbers' or a 'critical mass' of underrepresented minority students in terms of minimum percentages or numerical targets. . . . [T]he concept of critical mass is not susceptible to quantitative definition; instead the existence or absence of critical mass is apparent in the nature and quality of student interactions.") (citations omitted).

If the University is going to be permitted to claim that its interest in racial and ethnic diversity is legitimate, it had better be able to justify it. In the absence of being able to do so, the University's asserted interest is not in any sense constitutionally compelling. *Amicus* respectfully suggests that achieving a diverse student body is not compelling when the University cannot even define its goal with any sort of precision. Moreover, the University itself admits as much by acknowledging that racial and ethnic diversity "is merely one educational objective among many that the admissions process seeks to foster" and that the interest *"is constantly balanced and compromised* in the face of competing admissions objectives." Br. in Opp'n to Pet. for a Writ of Cert. at 6, *Grutter v. Bollinger*, No. 02-241 (emphasis added).

This Court has recognized that when an asserted interest is pursued inconsistently, the constitutional weight accorded that interest must be wholly discounted or, at the very least, reduced. Indeed, this Court explained in *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 186-87 (1999), that working at cross purposes undermines any claim that an asserted interest is valid. The University's willingness to "constantly balance and compromise" its asserted interest, therefore, demonstrates that such an interest is *not* constitutionally compelling.

A. The University's Interest in Racial and Ethnic Diversity Frustrates the Fundamental Purpose of Constitutional Equal Protection

This Court has long held that the "central purpose" of constitutional equal protection "is to prevent the States from purposefully discriminating between individuals on the basis of race," *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)), and that classifications "that explicitly distinguish between individuals on racial grounds fall within the core of that

prohibition," *Shaw*, 509 U.S. at 642. Given such a purpose, this Court has repeatedly emphasized "that 'distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality,' and that 'racial discriminations are in most circumstances irrelevant and therefore prohibited.'" *Adarand Constructors, Inc.*, 515 U.S. at 214 (quoting *Hirabayashi*, 320 U.S. at 100).

The fundamental purpose of individual equality irrespective of race or ethnicity applies to all persons with the same full force. As Justice Powell wrote: "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Bakke*, 438 U.S. at 289-90 (opinion of Powell, J.). Thus, "consistency" in the force and application of constitutional equal protection "recognize[s] that *any* individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be." *Adarand Constructors, Inc.*, 515 U.S. at 230 (emphasis added).

There is no question that the University's admissions programs give substantial preferences to applicants identified as coming from under-represented minority groups. These preferences, in turn, are used to further the University's asserted interest in admitting and enrolling a racially and ethnically diverse student body. Thus, by furthering an asserted interest in racial and ethnic diversity, the affirmative action admissions programs "simply replicate[ ] the very harm that the Fourteenth Amendment was designed to eliminate." *Hopwood v. Texas*, 78 F.3d 932, 946 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996). Such a system is the epitome of what Justice Powell, in *Bakke*, explained is constitutionally off-limits: "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution

forbids." *Bakke*, 438 U.S. at 307 (opinion of Powell, J.) (citations omitted).

The Fourteenth Amendment "seeks ultimately to render the issue of race *irrelevant* in government decisionmaking." *Hopwood*, 78 F.3d at 940 (emphasis added) (citing *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) ("A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination.") (footnote omitted)). Nevertheless, the University of Michigan's asserted interest makes the issue of race undeniably *relevant* to admissions decisions into the unforeseeable future. As the Sixth Circuit acknowledged below, the interest asserted by the University "does not have a self-contained stopping point." *Grutter*, 288 F.3d at 752. Thus, sanctioning such an interest as compelling only frustrates the "core purpose" of constitutional equal protection to make race and ethnicity ultimately unimportant and inconsequential to the state.

B. This Court Has Never Recognized and Should Never Recognize Racial and Ethnic Diversity as a Compelling Interest

Both the University of Michigan and the courts below rely on Justice Powell's *Bakke* opinion as support for the notion that achieving a racially and ethnically diverse student body is a compelling interest that passes constitutional muster. *See Grutter*, 288 F.3d at 739; *Gratz*, 122 F. Supp. 2d at 819. However, such support is that of a lone Justice's opinion that has never garnered the assent of a majority of this Court and, as a result, has never achieved precedential value. Moreover, any persuasive authority Justice Powell's *Bakke* opinion may have possessed has long since vanished as this Court has established that there is but one compelling governmental interest to justify racial classifications—remedying specific past wrongs. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality

opinion) (noting that government racial classifications must be "strictly reserved for remedial settings").

Even though Justice Powell observed that "the attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education" in announcing the judgment of this Court in *Bakke*, 438 U.S. at 311-12 (opinion of Powell, J.), the University's dependence on this single proposition to justify its odious stereotyping is extremely disingenuous and disregards the complete teaching of Justice Powell's opinion. Moreover, such a narrow reading ignores the fact that all eight other Justices rejected his position. This is best illustrated by the fact that "the word 'diversity' is mentioned nowhere [in the *Bakke* decision] except in Justice Powell's single-Justice opinion." *Hopwood*, 78 F.3d at 944. An analysis of the various opinions produced by the *Bakke* Court also demonstrates the rejection of his position.

The four Justices who would have upheld the affirmative action admissions program at the Medical School of the University of California-Davis believed that such "benign" racial preferences should only be subject to intermediate scrutiny. *See Bakke*, 438 U.S. at 359 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part). Consequently, those four Justices explained that the Medical School's race-based admissions only had to "'serve important governmental objectives'"—a constitutional standard lower than the compelling interest required under strict scrutiny—and implicitly rejected Justice Powell's position that educational diversity rose to the level of a compelling interest. *Id.* (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part); *see also id.* at 326 n.1 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part) ("We also agree with Mr. Justice Powell that a plan like the 'Harvard' plan . . . is constitutional under our approach, at least so long as the use of race to achieve an integrated

student body is necessitated by the lingering effects of past discrimination.") (citation omitted).

On the other hand, the four remaining Justices declined to even reach the constitutional issue, instead finding that the Medical School's race-based preferences violated Title VI. *See id.* at 412 (Stevens, Stewart, Rehnquist, JJ., and Burger, C.J., concurring in the judgment in part and dissenting in part) (explaining that it was unnecessary to determine "whether the University's admissions program violated the Equal Protection Clause of the Fourteenth Amendment . . . [because] [t]he plain language of the statute . . . requires the affirmance of the judgment below.") As a result, those four Justices also rejected Justice Powell's position by concluding such constitutional analysis was wholly unnecessary.

Likewise, "[i]n the years since *Bakke*, th[is] Court has never returned to whether diversity may be a compelling interest supporting a university's consideration of race in making admissions decisions." *Johnson v. Board of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1249 (11th Cir. 2001). Specifically, "[n]o case [decided by this Court] since *Bakke* has accepted diversity as a compelling state interest under a strict scrutiny analysis." *Hopwood*, 78 F.3d at 944.

Indeed, recent decisions from this Court indicate that an asserted interest in racial or ethnic diversity is *not* a compelling governmental interest and fails to pass constitutional muster under strict scrutiny. As stated by Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, in a dissent that was later vindicated by this Court's decision in *Adarand Constructors*: "Modern equal protection has recognized only one [compelling] interest: remedying the effects of racial discrimination. The interest in . . . diversity . . . is clearly not a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications." *Metro Broad., Inc. v. FCC*,

497 U.S. 547, 612 (1990) (O'Connor, J., dissenting); *accord J.A. Croson Co.*, 488 U.S. at 493 (plurality opinion) ("Unless [racial classifications] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."). Thus, in the end, this Court should continue in its narrow view of what constitutes a compelling interest and should not recognize diversity as compelling.

C. The Interest in Educational Diversity Outlined by Justice Powell in *Bakke* Encompasses Far More Than Just Race and Ethnicity

Even if this Court concludes that the interest in educational diversity articulated by Justice Powell in his *Bakke* opinion is sufficiently compelling to satisfy strict scrutiny, the interest asserted by the University of Michigan is wholly inadequate. Justice Powell's interest in the "attainment of a diverse student body" and "[a]cademic freedom" is founded on the notion that institutions of higher education "must be accorded the right to select those students who will contribute the most to the 'robust exchange of ideas.'" *Bakke*, 438 U.S. at 311, 312, 313 (opinion of Powell, J.). Nevertheless, the University's admissions programs give short shrift to ideas in exchange for an impermissible reliance on race and ethnicity to near exclusivity.

Justice Powell explained that "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single . . . element." *Id.* at 315 (opinion of Powell, J.). His opinion embraced preferences based upon whether "[a]n otherwise qualified . . . student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a[n] [institution of higher learning] experiences, outlooks, and

ideas that enrich the training of its student body and better equip its graduates." *Id.* at 314 (opinion of Powell, J.). Thus, it is not surprising that Justice Powell explicitly rejected the race-based admissions program used by the Medical School of the University of California-Davis because, in his words, an "admissions program, focused . . . on ethnic diversity, would hinder rather than further attainment of genuine diversity." *Id.* at 315 (opinion of Powell, J.).

This Court need only look as far as the admissions figures and policies themselves to see that the University of Michigan's interest in diversity is only as deep as the color of an applicant's skin. The University gives substantial preferences to applicants who come from races and ethnicities deemed under-represented while other factors are valued only slightly, if at all. *See Grutter*, 288 F.3d at 796-800 (Boggs, J., dissenting); *Gratz*, 122 F. Supp. 2d at 826-28. This is precisely what the interest in educational diversity set forth by Justice Powell sought to avoid. Race and ethnicity cannot be used as proxies for other valued distinctions, such as varied viewpoints, experiences, and economic factors, which help to create a truly educationally diverse student body. This is because "[t]he use of a racial characteristic to establish a presumption that the individual also possesses other, and socially relevant, characteristics, exemplifies, encourages, and legitimizes the mode of thought and behavior that underlies most prejudice and bigotry in modern America." Richard A. Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 12 (1974). Therefore, inasmuch as a diversity of views may be valuable, a reliance on racial and ethnic diversity cannot be the means for achieving the ends.

II. The Race- and Ethnic-Based Admissions Programs Are Not Narrowly Tailored

The University's admissions programs also fail to satisfy strict scrutiny because they are not narrowly tailored. The preferences given to applicants from under-represented minority groups are of such a large magnitude that the admissions programs are functionally no different than the race-based two-track admissions system found impermissible by this Court in *Bakke*, 438 U.S. at 315-20 (opinion of Powell, J.). Moreover, since the goal of the policies is to ensure that the favored races and ethnicities represent a "critical mass" in the student body, the preferences both operate and were designed to operate as unlawful and unconstitutional racial quotas. *See id.* In the alternative, even if the goal of a "critical mass" does not establish a quota, then that undefined and amorphous target makes narrow tailoring impossible and leaves too much room for constitutional error.

A. The Size of the Racial and Ethnic Preferences Imposes Two Different Admissions Standards

Even under this Court's decision in *Bakke*, surely the size of the preference—or "plus"—matters. After all, as Justice Powell explained, if some applicants, "[n]o matter how strong their qualifications, . . . are never afforded the chance to compete with applicants from the preferred [racial and ethnic] groups for [some] admissions seats," then the admissions program exposes its facial intent to discriminate because it creates an impermissible racial quota. *Id.* at 319 (opinion of Powell, J.). Thus, the size of the preference cannot be so large that applicants from favored races and ethnicities are essentially being admitted under a wholly separate standard. Instead, a permissible preference may only "tip the balance" in an applicant's favor. *Id.* at 316 (opinion of Powell, J.). The University's racial and ethnic

preferences clearly exceed these limits, and are "just too large to be narrowly tailored." *Grutter*, 288 F.3d at 796 (Boggs, J., dissenting).

The admissions programs create what are, in essence, two different standards for admission—one for applicants from the under-represented minority groups and another for all other applicants. The unfairness of such a system was pointed out by a hypothetical set forth by the dissent in the Sixth Circuit below:

> If confronted a year before they applied to the Law School with the records of two students, whose non-racial credentials were equivalent, [the University of Michigan] might evaluate their prospects for admission as follows: Student A could work harder and raise her GPA by a full point. Student B could reveal the fact of his skin color or ethnicity, it being in one of the preferred categories. The Law School's admissions officer, who before both changes would have rated the students equally, would now find the students equal, the effort of the one being counterbalanced by the [racial or ethnic] background of the other.

Grutter, 288 F.3d at 797 (Boggs, J., dissenting) (footnote omitted); *see also supra* at 5-6 (explaining that race is worth one full grade point of average and a double digit increase in standardized test score and percentile). But, as this Court established in *Bakke*, not only is such a two-track admissions program unfair, it is also both legally and constitutionally invalid because it is not narrowly tailored. *See Bakke*, 438 U.S. at 315-20 (opinion of Powell, J.).

B. The Goal of Admitting a "Critical Mass" of Under-Represented Minority Students Is Nothing More Than a Racial Quota

The size of the racial and ethnic preferences is not the only narrow tailoring concern raised by the University's admissions programs. The goal to admit a "critical mass" of under-represented minority students raises the specter that the admissions programs practically set aside seats for the favored races and ethnicities by functionally creating constitutionally impermissible quotas.

The *Bakke* decision held that university admissions programs "in which a . . . percentage of the student body is in effect [reserved for] members of selected ethnic groups" are not narrowly tailored because such quotas evince a "facial intent to discriminate" on the constitutionally protected bases of race and national origin. *Id.* at 315, 318 (opinion of Powell, J.). Thus, university affirmative action programs may not set aside "a fixed number of places" in the student body for under-represented minority students. *Id.* at 316 (opinion of Powell, J.). Instead, constitutional equal protection requires that each and every applicant is "afforded the chance to compete . . . for every seat in the class." *Id.* at 319-20 (opinion of Powell, J.).

Although the University of Michigan insists that it does not set aside or reserve a certain number of seats or percentage of its student body for certain races or ethnicities, it does "concede[ ] that the [racial and ethnic] preference[s] [are] *designed* to admit a 'critical mass' of under-represented minority students." *Grutter*, 288 F.3d at 800 (Boggs, J., dissenting) (emphasis added). Such a goal is nothing more than the functional equivalent of a constitutionally forbidden racial quota. After all, a "critical mass" is just the University's coded way of saying there is some threshold number of minority students it seeks to admit.

Specifically, the University itself admits that a "critical mass" is the "number sufficient to enable under-represented minority students to contribute to classroom dialogue without feeling isolated" or, put another way, the number necessary "to ensure under-represented minority students do not feel isolated or like spokespersons for their race, and do not feel uncomfortable discussing issues freely based on their personal experiences." *Id.* at 737. Thus, the University's goal of admitting and enrolling a "critical mass" of students from under-represented races and ethnicities, at the very least, establishes some numerical floor or minimum number. Given such a minimum below which the University will not go, the "admissions scheme is functionally, and even nominally, indistinguishable from a [constitutionally impermissible] quota system" because, like the Medical School's admissions scheme in *Bakke*, the University's admissions programs seek to ensure that some minimum number of racially- and ethnically- preferred applicants are admitted. *Id.* at 802-03 (Boggs, J., dissenting). As such, the University's use of racial and ethnic preferences to achieve a "critical mass" of certain under-represented minority students is not narrowly tailored and fails strict scrutiny under the Equal Protection Clause.

C. The Indeterminacy of Diversity Makes Narrow Tailoring Impossible

Even if the University's goal of admitting a "critical mass" of under-represented minority students does not constitute an impermissible racial quota, the University's admissions programs still eviscerate the narrow tailoring requirement because the University has failed to identify what the "right" amount of representation for the preferred races and ethnicities should be. The absence of any clear idea of what constitutes a "critical mass" means that the University is completely unable to determine whether it has

reached its goal of admitting students from the underrepresented races and ethnicities, or even gone beyond it. Thus, neither the University nor a reviewing court could possibly narrowly tailor the preferences to the asserted interest in "diversity" because that interest is too amorphous and undefined.

While there is admittedly an abundance of lip service paid to the University's desire for a "critical mass" of supposedly under-represented minority students, that goal is wholly subject to University discretion and, therefore, represents nothing more than individual predilection. Such an interest raises the constitutional concern that it is literally impossible to narrowly tailor a means to an undefined and constantly changing end. After all, if the University's goal is but an indefinite judgment made by the University and its administrators, then no court could ever determine when or if the University had transgressed the boundary between narrowly serving its interest and *over* serving that interest to the detriment of constitutional equal protection.

Moreover, the proposed interest in racial and ethnic diversity—no doubt well-intentioned—confuses values and facts. An admissions scheme that is not supported by empirical facts but rather philosophical values also makes judicial review either impossible or wholly an *ad hoc* proposition. Indeed, it is exceedingly difficult to imagine how any court could judge the worth of the University's interest in the absence of something more than its bare value-laden assertions to seek racial and ethnic diversity. Accordingly, this Court should not take on faith that the University's amorphous computations will yield constitutionally sound results for all races and ethnicities.

CONCLUSION

For the foregoing reasons, the decisions of the United States Court of Appeals for the Sixth Circuit and the United States District Court for the Eastern District of Michigan should be reversed.

Respectfully submitted,

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Nos. 02-241 and 02-516

IN THE

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v.

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Respondents.

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF NEITHER PARTY

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF NEITHER PARTY

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* pursuant to Rule 37 with the written consent of the parties and intervenors.[1]

[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership now includes approximately 340 of the nation's largest private sector companies, collectively providing employment to more than 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

EEAC's corporate members all are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), *as amended*, 42 U.S.C. § 2000e *et seq.*, and other laws against workplace discrimination. Most also are federal government contractors subject to the affirmative action requirements of Executive Order 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965), as amended by Executive Order 11375, 32 Fed. Reg. 14303 (Oct. 13, 1967) and Executive Order 12086, 43 Fed. Reg. 46501 (Oct. 5, 1978). In addition, many EEAC member companies have voluntary programs to ensure that their workforces are diverse in race, gender, culture, and other characteristics. EEAC's member representatives typically are corporate officials charged with responsibility for implementing and complying with nondiscrimination and affirmative action mandates and diversity initiatives.

The Court of Appeals *en banc* reversed the district court's ruling that the use of race and ethnicity as a factor in admissions decisions by the University of Michigan Law School is both unconstitutional and violates Title VI of the

Civil Rights Act of 1964. *Grutter v. Bollinger*, 288 F.3d 732, 735 (6th Cir. 2002) (reversing 137 F. Supp.2d 821 (E.D. Mich. 2001)). According to the Court of Appeals, the Law School's admissions policy is lawful because efforts to maintain a racially and ethnically diverse student body serve a compelling state interest, *id.* at 739, and the policy is narrowly tailored to serve that interest. *Id.* at 744-47. Petitioners seek reversal of the Court of Appeals decision.

Although the questions now before the Court do not involve issues of employment law, EEAC's member companies nevertheless have a significant interest in the outcome, for two reasons. First, diversity in higher education is of significant value to employers in meeting their business-related diversity needs. Second, EEAC members stand to be affected by the decision in the event that language in the Court's opinion could be read to affect existing law applicable to private sector employers. EEAC's brief thus brings to the attention of the Court relevant matters not already brought to its attention by the parties.

STATEMENT OF THE CASE

Barbara Grutter, Petitioner in No. 02-241, applied for admission to the University of Michigan Law School in 1996. *Grutter v. Bollinger*, 137 F. Supp.2d 821, 823 (E.D. Mich. 2001). Her application was rejected in June 1997. *Id.* at 823-24. Grutter is Caucasian. *Id.* She sued the Law School, contending that it had discriminated against her because of her race, in violation of her right to equal protection of the laws under the Fourteenth Amendment to the Constitution and Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, which prohibits race discrimination by recipients of federal funds. *Id.* The Law School does use race as a factor in the admissions process. *Id.* at 836.

The district court concluded that the Law School's race-conscious admissions policy was unlawful, *id.* at 853, and the

Law School appealed. The Sixth Circuit heard the case initially *en banc*, and reversed. *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002). The court concluded that (1) the goal of a diverse student body is a compelling state interest; and (2) the Law School's admissions policy is appropriately "narrowly tailored" to serve that interest.

The Sixth Circuit relied on this Court's unusually fragmented opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). *Bakke* involved the admissions policy of the Medical School of the University of California at Davis (UCD), which maintained, at the time, a specified number of "special admissions slots" reserved for minorities. *Id.* at 275. The California Supreme Court had held that race can never be used as a factor in admissions and ordered that the white applicant be admitted to the medical school. *Id.* at 280-81.

This Court reversed the portion of the California court's ruling that race can *never* be a factor but affirmed the judgment that Bakke be admitted to the school. The Court did not, however, reach a consensus on a rationale for this outcome. A total of six Justices filed opinions in the *Bakke* case. None of these six opinions was supported by a majority of the Justices.

Justice Powell announced the Court's ruling, and wrote one of the opinions. Justice Powell concluded that race-based admissions can be constitutional if they serve a "compelling governmental interest," using a "strict scrutiny" test. *Id.* at 289-90. One such justification, he said, could be "the attainment of a diverse student body." *Id.* at 311-12. Even so, Justice Powell said, the UCD program was unconstitutional because it used an "explicit racial classification" and "totally excluded" non-minority applicants from a percentage of available seats solely because of their skin color, and UCD failed to show that such a stark distinction was "necessary to promote" the governmental interest

involved. *Id.* at 319-20. In an appendix to his opinion, Justice Powell attached and referred favorably to a description of the race-conscious Harvard College admissions program, which did not assign a specific percentage of admissions to minorities. Rather, the Harvard plan considered race a "plus" but did not make it decisive. *Id.* at 321-24.

No other Justice agreed completely with Justice Powell. In fact, the eight other Justices divided evenly on totally opposite approaches. Justice Stevens, then-Chief Justice Burger, then-Justice Rehnquist, and Justice Stewart, declined to reach the constitutional issue, holding simply that the UCD program violated Title VI because it discriminated against Bakke because of his race. *Id.* at 421. This created a five-Justice majority that Bakke should be admitted to UCD (albeit for different reasons), and that became the judgment of the Court. *Id.* at 271.

At the same time, Justice Brennan, joined by Justices White, Marshall, and Blackmun, concluded that race-based classifications could be used constitutionally for remedial purposes (*i.e.*, to remedy the effects of past discrimination), but that such classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 359 (citations omitted). Thus, the idea that race *sometimes* can be a legitimate factor *also* garnered a five-Justice majority. The Brennan opinion included a footnote saying that those four Justices also thought the Harvard plan was constitutional "at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination." *Id.* at 326 n.1.

Justice Powell's opinion thus provided the "swing" vote that allowed the court to reach two specific conclusions in the case: (1) that Bakke was discriminated against based on his race and should be admitted to medical school; and (2) that

the California Supreme Court was wrong in holding that race could never be a factor in admissions decisions. None of the other eight Justices, however, said that they agreed with Justice Powell that student body diversity (as opposed to providing a remedy for the effects of past discrimination) was a sufficiently compelling governmental interest to justify the use of race.

The Sixth Circuit majority concluded that the *Bakke* decision established that student body diversity is a compelling government interest, 288 F.3d at 739, that can justify race-conscious decisionmaking if it is done in a way that is "narrowly tailored" to serve that interest. *Id.* at 744-47. The majority reasoned that the four Justices who agreed with Justice Powell's conclusion in *Bakke* that race could sometimes be a legitimate factor also agreed with him that the goal of student body diversity would justify using race. *Id.* at 741.

The majority relied on a previous decision of this Court that details how its decisions should be interpreted when there are many opinions and no clear holding. *Marks v. United States*, 430 U.S. 188, 193 (1977). In that case, the Court said, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* at 193 (citation and internal quotation omitted). The Sixth Circuit majority reasoned that because the four Justices who agreed with Powell called for a less demanding test for race-conscious decisionmaking and Powell called for "strict scrutiny," Powell's was therefore the narrowest ground, making it the official holding of the Court. *Grutter*, 288 F.3d at 741.

Relying again on Justice Powell's *Bakke* opinion, the Sixth Circuit also concluded that the Michigan Law School admissions policy considering race as a factor is sufficiently

"narrowly tailored." The court below compared the Michigan policy to the Harvard program that Justice Powell mentioned approvingly in his *Bakke* opinion, and found that it "closely tracks the Harvard plan." *Id.* at 746. Considering race as a "plus," but maintaining a degree of competition, Judge Martin said, is significantly different from a quota system. *Id.*

The primary dissenting opinion in the case disputed Judge Martin's reading of the *Bakke* opinions. The dissent noted that the opinion in *Bakke* which the Sixth Circuit majority read as supporting Justice Powell, actually confined its approval of race-conscious decisionmaking to *remedial* programs designed to remedy past discrimination. *Id.* at 781. In the dissenters' view, no other member of the Court joined Justice Powell's conclusion that student body diversity alone was enough to justify a race-based program absent a history of discrimination. *Id.* at 782.

Grutter petitioned this Court for a writ of *certiorari* which was granted on December 2, 2002.

Jennifer Gratz and Patrick Hamacher, Petitioners in No. 02-516, are Caucasians who applied for admission to the undergraduate program of the University of Michigan, College of Literature, Science and the Arts. *Gratz v. Bollinger*, 122 F. Supp.2d 811, 815 (E.D. Mich. 2000). Like Grutter's, their applications were rejected, and they brought suit against the University under the Equal Protection Clause of the U.S. Constitution and Title VI. *Id.* The University also takes race into account in admissions, both by assigning applicants from under-represented minority groups an extra twenty points in an "index score" because of their race, and by using race as a "plus" for minority applicants who might not otherwise meet the University's threshold requirements. *Id.* at 827. In addition, during the period from 1995-1998, the University also reserved a number of seats in the entering class for under-represented minority applicants. *Id.* at 831.

The district court concluded that the University's current program was lawful under *Bakke*, because it uses race merely as a "plus" and still requires minority candidates to compete with other applicants. *Id.* at 831. Because the process used in 1995-1998 actually set aside seats for minority applicants, however, the district court found "no significant difference" between that process and the UCD quota system struck down by this Court in *Bakke*, and granted summary judgment to Petitioners regarding that system. *Id.* at 832.

Both sides appealed to the Sixth Circuit, which had not yet rendered a decision when the Petition was filed with this Court in *Grutter*. Petitioners Gratz and Hamacher sought from this Court a writ of *certiorari* before judgment, which was granted on December 2, 2002.

SUMMARY OF ARGUMENT

Progressive and conscientious U.S. employers have recognized that diversity in the workforce offers significant business advantages. Not only is the domestic consumer market becoming more diverse, but companies entering the global marketplace have new challenges as they seek to communicate with and market to different cultures. Internally, maintaining and cultivating a diverse workforce not only results in better business decisions, but leads to increased retention as employees of differing backgrounds feel included, respected and valued. As employers draw many of their employees and future leaders from our nation's colleges and universities, diversity among the student bodies of those institutions is an important component of these efforts.

U.S. employers have implemented numerous and various lawful programs designed to foster equal employment opportunity, comply with affirmative action requirements, and promote workforce diversity. While many of these programs are entirely race-neutral, this Court also has

sanctioned race-based decisionmaking in employment under certain circumstances. *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987); *United Steelworkers v. Weber*, 443 U.S. 193 (1979). If the Court rules in this case that race-conscious decisionmaking for the purpose of achieving and maintaining student body diversity is unlawful, EEAC urges the Court to craft its opinion carefully so as not to invalidate existing legitimate activities by employers.

Moreover, if this Court rules that race-conscious decisionmaking is lawful for the purpose of achieving student body diversity, and language in the Court's opinion could be read to somehow affect workplace diversity, EEAC urges the court to provide guidance as to how its decision should be applied in the employment context.

ARGUMENT

I. DIVERSITY IN HIGHER EDUCATION IS ESSENTIAL TO EMPLOYERS IN MEETING THEIR BUSINESS-RELATED DIVERSITY NEEDS

American corporations today operate in an extraordinarily diverse environment. Internally, that diversity is reflected in employee populations that consist increasingly of individuals drawn from widely varied backgrounds, reflecting the growing diversity of the nation as a whole. Externally, that diversity is reflected in diverse consumers often spread across global marketplaces. To be successful, American companies must be able to operate effectively in such an environment. This will occur only if the corporate leaders of tomorrow are themselves diverse and are comfortable living and working with individuals having different backgrounds and experiences.

A significant number of these corporate leaders have been and will continue to be drawn from the graduating classes of our nation's public colleges and universities. Accordingly, America's corporations look to these institutions to provide candidates with the skills necessary to succeed in today's business environment. If these graduates are not diverse, and if their academic training has not been enriched through exposure to students of different backgrounds, then our corporations will be deprived of the leadership necessary to make them successful. For this reason diversity in higher education is essential to employers in meeting their business-related diversity needs.

The economic well-being of our country is linked, in significant measure, to the competitiveness of our nation's corporations. If a "business case" can be made that corporate diversity drives such competitiveness, then it follows that the federal government has a compelling governmental interest in ensuring a higher education system that will grow the talent that enhances the ability of U.S. companies to compete internationally.[2]

A. The Business Case for Diversity

The "business case for diversity" is strong and well-documented. Its basis is threefold. First, changing national demographics will require companies increasingly to fill key management positions with diverse candidates, both to communicate with potential customers and to manage effectively a workforce composed of employees of differing backgrounds. Second, U.S. companies increasingly are entering the global marketplace, creating a need for

[2] The *amicus curiae* takes no position on whether the admissions program of either the University of Michigan or the Law School is sufficiently "narrowly tailored" to serve that interest. Nor does the *amicus curiae* advocate the use of quotas or numerical set-asides in any diversity program.

employees at all levels who are skilled in dealing with the culture of each customer country. Third, companies have recognized that individuals from diverse backgrounds bring valuable differences in perspective and experience to all aspects of corporate decisionmaking, from operations to marketing to communications to human resources. For all of these reasons, cultivating a diverse workforce leads to a demonstrable increase in the "bottom line," as discussed below.

1. Demographic Changes Translate to Diversity in the Consumer Population

The face of the United States is changing. In 2001 alone, over 1 million people immigrated to the United States, compared to, for example, just over 270,000 in 1961.[3] Of the million new U.S. consumers, over 200,000 came from Mexico, over 70,000 from India, over 56,400 from the People's Republic of China, over 53,000 from the Philippines, and over 35,000 from Vietnam.[4] All told, U.S. immigrants in 2001 came from more than 48 countries around the world.[5] As of 1990, almost 29 million Americans over the age of 5 spoke a language other than English at home.[6]

[3] *Immigration to the United States: Fiscal Years 1820 to 2001*, 2001 Statistical Yearbook of the Immigration and Naturalization Service, Table 1, *available at* http://www.ins.usdoj.gov/graphics/aboutins/statistics/IMM01yrbk/IMM2001list.htm

[4] *Immigrants, Fiscal Year 2001*, 2001 Statistical Yearbook of the Immigration and Naturalization Service, 3, *available at* http://www.ins.gov/graphics/aboutins/statistics/IMM01yrbk/IMM2001.pdf

[5] *Immigration to the United States: Fiscal Years 1820 to 2001*, 2001 Statistical Yearbook of the Immigration and Naturalization Service, Table 2, *available at* http://www.ins.usdoj.gov/graphics/aboutins/statistics/IMM01yrbk/IMM2001list.htm

[6] 2000 Statistical Abstract of the United States, Table 51, p. 50, *available at* http://www.census.gov/prod/2001pubs/statab/sec01.pdf

Americans belong to a wide variety of organized religions,[7] and of course some belong to none at all. About a third live in rural areas; the other two-thirds live in or around cities.[8]

Although traditional racial classifications tell only part of the story, this too is changing. According to the Current Population Survey (Mar. 2002), household survey data maintained by the Bureau of Labor Statistics, in 1980, 80.4% of the U.S. population was White, 11.5% Black, 6.4% Hispanic, 1.5% Asian, and 0.6% Native American. By 2000, the White population had dropped to 71.8% and the Black, Hispanic and Asian populations had increased to 12.2%, 11.4% and 3.9%, respectively. Indeed, the Census Bureau predicts that by the year 2030, only 60.5% of the population will be White, and 13.1% will be Black, 18.9% Hispanic, and 6.7% Asian.

As a result, the many U.S. companies that market their products and services to consumers have recognized that few of their potential customers meet some archetypal model of the "typical" American, if indeed any ever did. Rather, along with targeted marketing to particular age groups and interest sectors, these companies are aware of the need to communicate effectively to various cultural groups with differing customs and preferences for various goods and services, from automobiles to laundry soap and beyond. Employees with direct experience in these markets, whether through personal participation or other contacts, provide invaluable insight into the best ways to present the company's product.

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[7] *Id.* at Table 74, p. 61, *available at* http://www.census.gov/prod/2001pubs/statab/sec01.pdf

[8] *Id.* at Table 31, p. 31, *available at* http://www.census.gov/prod/2001pubs/statab/sec01.pdf

2. Entering the Global Marketplace Creates a Need for Diversity Skills

In addition, more and more U.S.-based companies are competing globally for customers worldwide. According to statistics compiled by the World Trade Organization, the United States was the leading world exporter of merchandise in 2001, with nearly a 12% market share amounting to over $730 billion.[9] Nearly $200 billion dollars of U.S. merchandise were sold in Asia, $175 billion in Western Europe, $159 billion in Latin America, and almost $20 billion in the Middle East.[10]

The United States also led other countries in world trade in commercial services, commanding greater than a 18% share for over $263 billion.[11] Its closest competitor, the United Kingdom, had only a 7.4% share in comparison.[12]

Expanding into the global marketplace necessitates developing an ability to communicate in every chosen market. Each country has cultural norms and customs that differ from those in the United States, some more dramatically than others. Besides the need to advertise—and do so accurately—in local languages and in common usage, each company must be able to gauge the demand for each

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[9] World Trade Organization, International Trade Statistics 2002,Table I.5, *Leading exporters in world merchandise trade, 2001, available at* http://www.wto.org/english/res_e/statis_e/its2002_e/section1_e/i05.xls

[10] World Trade Organization, International Trade Statistics 2002,Table III.17, *Merchandise trade of the United States by region and economy, 2001, available at* http://www.wto.org/english/res_e/statis_e/its2002_e/section3_e/iii17.xls

[11] World Trade Organization, International Trade Statistics 2002, Table I.7, *Leading exporters in world trade in commercial services, 2001, available at* http://www.wto.org/english/res_e/statis_e/its2002_e/section1_e/i07.xls

[12] *Id.*

product, and identify ways to increase that demand. Employees who have experience with other cultures supply a key component of a globally competitive company's ability to meet its needs in this area.

3. Workforce Diversity Improves Internal Performance

Equally important is the recognition that cultural diversity exists within the workforce itself. Like the general population demographics, the distribution among the working population by race and ethnicity is changing as well. While 77.7% of the civilian work force in 1990 was White, 10.8% Black, 8.5% Hispanic and 3.0% Asian or other non-Hispanic, by 2000 the minority populations had grown to 11.5%, 10.9% and 4.5% respectively, while the percentage of Whites in the workforce had dropped to 73.1.% By 2010, the U.S. Department of Labor Bureau of Labor Statistics predicts that only 69.2% of the U.S. workforce will be White, 12% Black, 13.3% Hispanic, and 5.5% Asian and other non-Hispanic.[13]

Accordingly, there is increasing diversity among the pool of applicants available for every job, resulting necessarily in each company's own workforce becoming more diverse. Accordingly, being able to work with and manage individuals of diverse backgrounds has become an increasingly important professional skill in U.S. businesses, so much so that some companies consider this skill in evaluating managerial performance. As discussed in more detail below, moreover, many forward-thinking companies have undertaken affirmative efforts not only to recruit a diverse workforce as well as to adopt programs and policies designed to make individuals of varying cultural backgrounds feel welcomed and valued. Indeed, companies that fail to effectively manage

[13] United States Department of Labor, Bureau of Labor Statistics, Office of Occupational Statistics and Employment Projections, Table 9, *available at* http://stats.bls.gov/emp/emplab2000-09.pdf

and nurture diversity are likely to face attrition, as employees who feel that they do not "fit in" go elsewhere, resulting in a waste of recruiting and training dollars and a loss of good employees.

Moreover, company leadership itself is becoming more diverse. In 2001, of nearly 20 million people employed in executive, administrative and managerial occupations, 8.3% were Black and 5.1% were of Hispanic origin.[14] Companies that expect to compete successfully to attract talented leaders must recognize and embrace this fact.

Indeed, companies that have made efforts to recruit and cultivate individuals of diverse backgrounds have reaped significant rewards. Where there is diversity of background and experience, there is variety in perspective and opinion, leading to more informed judgments.

4. Workforce Diversity Improves the Bottom Line

Companies that strive to embrace diversity in the workforce have seen a measurable impact on the "bottom line." Fortune Magazine found that the businesses that made its 1999 list of "America's 50 Best Companies for Asians, Blacks and Hispanics" outperformed the S&P 500 over the prior three and five years.[15] Similarly, companies that have received the U.S. Department of Labor's "Exemplary Voluntary Efforts" Award[16] also have seen improved stock

[14] United States Department of Labor, Bureau of Labor Statistics, Annual Averages—Household Data, Table 11 (2001), *available at* http://stats.bls.gov/cps/cpsaat11.pdf

[15] Geoffrey Colvin, *The 50 Best Companies for Asians, Blacks, & Hispanics: Companies that pursue diversity outperform the S&P 500. Coincidence?* (Fortune Magazine, July 19, 1999).

[16] According to the Department of Labor, its Exemplary Voluntary Efforts (EVE) AWARD "honors federal contractors that have

performance, resulting in a conclusion that "announcements of quality affirmative action programs are associated with significant and positive excess returns that represent the capitalization of positive information concerning improved business prospects."[17] Indeed, the federal Equal Employment Opportunity Commission (EEOC) also is on record that "[i]nclusive hiring and promotion practices bring into the organization segments of the workforce that may well provide competitive advantage in the increasingly global economy." *Best Practices of Private Sector Employers* (Equal Employment Opportunity Comm'n, 1997), at 6-7.

Companies agree. According to a 2001 survey of human resources professionals from Fortune 100 Companies and companies listed on Fortune's "Top 100 Companies to Work For" list, co-sponsored by the Society for Human Resource Management and Fortune Magazine, 91% of the respondents said that diversity initiatives "help the organization keep a competitive advantage."[18] A 1998 survey conducted by the American Management Association of its member companies revealed "strong evidence" that "a mixture of genders, ethnic backgrounds, and ages in senior management teams consistently correlates to superior corporate performance."[19] In 1995, the federal Glass Ceiling Commission reported that corporate executives they had surveyed confirmed "the

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demonstrated through programs or activities, exemplary and innovative efforts to increase the employment opportunities of employees, including minorities, women, individuals with disabilities, and veterans." *See* http://www.dol.gov/esa/media/reports/ofccp/eveint.htm

[17] Peter Wright, Stephen P. Ferris, Janine S. Hiller, Mark Kroll, *Competitiveness through management of diversity: effects on stock price valuation* (Academy of Mgmt. Journal, Feb. 1, 1995).

[18] *Impact of Diversity Initiatives on the Bottom Line* (Society for Human Res. Mgmt., 2001), at 16.

[19] Senior Management Teams: Profiles and Performance (American Management Ass'n, 1998), at 1.

bottom-line value and economic imperative of including minorities and women in senior corporate management."[20]

Accordingly, there is a strong "business case" that having —and keeping—individuals of diverse cultural backgrounds in a company's workforce provides significant advantages to the company.

B. Student Body Diversity in Higher Education Contributes Significantly to Companies' Efforts To Meet Their Need for Workforce Diversity

Many jobs require a college degree, although some will allow for equivalent experience. According to data for the year 2000 compiled by the Equal Employment Opportunity Commission (EEOC) from statistical reports from nearly 40,000 private sector employers[21], seven million of the 53 million employees covered by the reports, or about 13.2%, were in jobs that required a college degree or equivalent experience."[22] In the EEOC's own words, these jobs include "accountants and auditors, airplane pilots and navigators,

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[20] *Good For Business: Making Full Use of the Nation's Human Capital* (Federal Glass Ceiling Comm'n, Mar. 1995), at 7.

[21] Job Patterns For Minorities And Women In Private Industry (EEO-1), *Introductory Note* (Equal Employment Opportunity Comm'n, 2002), *available at* http://www.eeoc.gov/stats/jobpat/jobpat.html. The Equal Employment Opportunity Employer Information Report (EEO-1) is required annually by the Equal Employment Opportunity Commission from employers with 100 or more employees. 29 C.F.R. § 1602.7.

[22] Occupational Employment in Private Industry by Race/Ethnic Group/Sex, and by Industry, United States, 2000 (Equal Employment Opportunity Comm'n, 2002), *available at* http://www.eeoc.gov/stats/jobpat/2000/national.html. The "professionals" category is defined in the EEOC's instructions for the report as "[o]ccupations requiring either college graduation or experience of such kind and amount as to provide a comparable background." *See* http://www.eeoc.gov/stats/jobpat/e1instruct.html

architects, artists, chemists, designers, dietitians, editors, engineers, lawyers, librarians, mathematicians, natural scientists, registered professional nurses, personnel and labor relations specialists, physical scientists, physicians, social scientists, teachers, surveyors [and the like]."[23] Another reporting category covers "[o]fficials and managers," defined as "[o]ccupations requiring administrative and managerial personnel who set broad policies, exercise overall responsibility for execution of these policies, and direct individual departments or special phases of a firm's operations," and including "officials, executives, middle management," and others.[24] Companies reported 4.7 million workers in the "officials and managers" category in 2000, at least some of whom would have college degrees. These numbers, of course, account for only about a third of the civilian workforce, which numbered nearly 141 million in 2000,[25] since only employers with 100 or more employees are required to file the annual EEO-1 report.

Accordingly, EEAC's members and other companies necessarily recruit workers for positions requiring undergraduate or graduate degrees from colleges and universities throughout the country. Along with obtaining candidates who possess specific qualifications required for a particular job, such as a degree in mechanical engineering, companies benefit, for the reasons identified above, from having candidates who matriculate from an institute with a culturally diverse student body.

First, such an institution produces graduates of varied cultural backgrounds who themselves possess the diversity of

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[23] *Id.*

[24] *Id.*

[25] United States Department of Labor, Bureau of Labor Statistics, Office of Occupational Statistics and Employment Projections, Table 9 (2000), *available at* http://stats.bls.gov/emp/emplab2000-09.pdf

perspective so valuable to business. Second, students who have attended such an institution necessarily have obtained experience in relating to people from other backgrounds. This experience translates well to a diverse workforce and makes the ability to build such relationships one less new skill the employee must learn on the job.

Accordingly, a culturally diverse student body at an institution of higher learning directly contributes to diversity in the workforce at each American business that recruits from that institution. Given the strong business case for diversity in the workforce, student body diversity within our colleges and universities, institutions that will provide the corporate leaders of tomorrow, is a compelling state interest.

II. IF THIS COURT CONCLUDES THAT RACE-CONSCIOUS ADMISSIONS ARE UNLAWFUL OR UNCONSTITUTIONAL, THE COURT SHOULD STATE ITS HOLDING SO AS NOT TO INVALIDATE THE AFFIRMATIVE ACTION AND DIVERSITY PROGRAMS LAWFULLY IN USE BY PRIVATE SECTOR EMPLOYERS

A. Conscientious Companies Maintain Various Legitimate Programs To Promote Equal Employment Opportunities, Practice Affirmative Action, and Promote and Manage Workforce Diversity

Public discourse about "affirmative action" and "diversity initiatives" tends to be conducted in language that is imprecise and unnecessarily provocative. Frequently, these terms are used repeatedly as if they were synonymous with "race-based preferential treatment." They are not, and such casual usage only spreads confusion and controversy. U.S. employers practice, on a daily basis, affirmative action and diversity initiatives that do not even arguably involve any

race-based preference. Accordingly, to the extent that the Court's decision could be read in any way to affect private sector employment, it is vitally important that this Court, in framing its decision in this case, use clear language to describe the practice or practices it seeks to address.

For a variety of reasons, U.S. employers, particularly larger ones, have instituted programs designed to ensure that individuals of diverse backgrounds receive equal opportunities, treatment and equal respect in the workplace. One fundamental reason, albeit not the only one, is the recognition of an employer's statutory obligation under Title VII of the Civil Rights Act of 1964 (Title VII) not to discriminate on the basis of race, color, national origin, gender or religion in any aspect of the employment relationship.

In addition, businesses that contract with the federal government are subject to affirmative action obligations under Executive Order 11246, which requires them to agree that they:

> will not discriminate against any employee or applicant because of race, color, religion, sex, or national origin, . . . [and] will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin.

Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965) (quoting subpart B, § 202(1)). *See also* 41 C.F.R. § 60-1.4(a)(1).[26]

[26] Covered federal contractors also have a responsibility to take affirmative action to hire and promote individuals with disabilities, 29 U.S.C. § 793 and 41 C.F.R. § 60-741.5, and certain veterans, 38 U.S.C. § 4212 and 41 C.F.R. § 60-250.5.

Affirmative action typically involves reviewing employment practices and workplace conditions to see whether any of them may pose an obstacle to equal opportunity for minorities and women. *See* 41 C.F.R. § 60-2.17(b). When such an obstacle is found, the contractor is expected to make good faith efforts to remove it. 41 C.F.R. § 60-2.17(c).

Broadening the company recruiting efforts to reach out to a more diverse talent pool has been the cornerstone of successful affirmative action efforts for many years. 41 C.F.R. § 60-2.10(a)(1) and (3). Accordingly, federal contractors frequently recruit from such organizations as the National Society of Black Engineers,[27] the Society of Hispanic Professional Engineers,[28] the American Indian Science and Engineer Society,[29] the National Association of Black Accountants, [30] local affiliates of the National Urban League,[31] the NAACP,[32] and many others, as well as historically black colleges and universities.

Affirmative action does not stop at the hiring stage, however. The implementing regulations address the total employment process, referring not only to the initial stages of recruitment and selection but also to compensation, promotions, development and advancement, to ensure that the company's nondiscrimination and affirmative action obligations are effectively carried out at all levels of the organization and across all aspects of the employer-employee relationship. 41 C.F.R. §§ 60-2.17(b), 2.17(d)(1). As a

[27] www.nsbe.org

[28] www.shpe.org

[29] www.aises.org

[30] www.nabainc.org

[31] www.nul.org

[32] www.naacp.org

result, companies monitor by demographic characteristics the results not only of their recruitment and hiring decisions, but also of their promotion or advancement decisions, how they pay their employees, the distribution of developmental assignments, the impact of the employer's performance management process, and adverse personnel actions such as discipline and termination. *Id.*

These common forms of affirmative action programs usually need not—and typically *do* not—involve any use of race-based preferences or quotas. Although federal affirmative action requirements mandate the establishment of placement goals if the expected minority or female representation falls short in a particular job group or groups, 41 C.F.R. § 60-2.15, they expressly forbid the use of quotas. 41 C.F.R. § 60-2.16(e). As a practical matter, having made affirmative efforts to bring plenty of qualified minorities and women into the pools from which they hire and promote, employers that practice these non-preferential forms of affirmative action generally are able to meet their goals without making selections based on race, and without lowering their standards.

In addition to complying with affirmative action requirements, progressive companies that recognize the business advantages of recruiting and retaining a diverse workforce frequently expand the breadth and depth of their efforts into full-fledged "diversity initiatives." In general, diversity initiatives often extend well beyond legally mandated compliance efforts and seek to develop and implement business practices geared towards promoting an inclusive work environment, with the goal of attracting and keeping qualified employees of various backgrounds and experiences. *See generally* Gladys Gossett Hankins, Ph.D., *Diversity Blues: How To Shake 'Em* (Telvic Press, Inc., 2000), at 9-11. Diversity initiatives address a much broader range of demographic characteristics than are covered by federal affirmative action regulations. For example, they may

extend to differences in age, cultural background, family responsibilities, sexual orientation, and religion.[33]

Although diversity programs operate within the law, they are not otherwise compelled or regulated. Not surprisingly, diversity initiatives tend to vary widely from company to company. Typically, however, they feature several components. At a minimum, the company will provide diversity education to members of management and in some cases non-management employees, to enhance their ability to value differences, afford dignity and respect, and practice inclusiveness toward individuals from diverse backgrounds.[34] Companies also may recognize and support "affinity groups" that provide forums for employees to discuss issues of common interest and address common problems through a combination of mentoring, self-help, and mutual support.[35] Some companies also include in their diversity initiatives work-life balance programs such as flexible work arrangements, onsite day care, elder care assistance, and the like.[36] The federal Equal Employment Opportunity Commission has commended many such initiatives as "best practices." *Best Practices of Private Sector Employers* (Equal Employment Opportunity Comm'n, 1997). In short, the terms "affirmative action" and "diversity initiative," used properly, include many worthwhile programs that have nothing whatever to do with selecting or preferring employees on the basis of race.

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[33] *Diversity Today: Corporate Recruiting Creates Inclusive Workplaces* (Society for Human Res. Mgmt., Sept. 30, 2002), at S2.

[34] Helen Lippman, *Variety is the spice of a great workforce*, (Business and Health, May 1, 2000), at 4, *available at* 2000 WL 33410370.

[35] Raymond A. Friedman and Erika Bogar, *Trends in Corporate Policy Development for Employee Network Groups*, Working Paper #99-18, Owen Graduate Sch. of Mgmt., Vanderbilt Univ. (1999), at 4.

[36] *Diversity Today: Corporate Recruiting Creates Inclusive Workplaces* (Society for Human Res. Mgmt., Sept. 30, 2002), at S2.

B. This Court's Decision Should Not Disturb Legitimate Equal Employment Opportunity Efforts, Affirmative Action Programs, and Diversity Initiatives

The programs described above are unquestionably lawful, and should remain so. Indeed, when Congress passed the Civil Rights Act of 1991, making a number of amendments to Title VII, it provided specifically that "[n]othing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law." Pub. L. 102-166 (1991), § 116, codified as 42 U.S.C. § 1981 note (internal quotation marks omitted). The Equal Employment Opportunity Commission also confirmed this point in affirmative action guidelines issued many years ago. *See* 29 C.F.R. pt. 1608.

Moreover, this Court more than twenty years ago afforded employers an area of discretion within which they may take race into account lawfully, without running afoul of the statutory bans on discrimination. *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987); *United Steelworkers v. Weber*, 443 U.S. 193 (1979). Under *Johnson* and *Weber*, an employer *may* take race into account pursuant to an affirmative action plan in order to "eliminate a manifest racial imbalance" in traditionally segregated job categories, provided that it is a "temporary measure" that does not "unnecessarily trammel the interests of the white employees." *Weber*, 443 U.S. at 208; *Johnson*, 480 U.S. at 628-30 (internal quotation marks omitted).

For the sake of organizations throughout the United States that regularly practice the noncontroversial forms of affirmative action and diversity described above, it is important that this Court not paint with too broad a brush in addressing the particular practice involved in this case.

III. IF THIS COURT CONCLUDES THAT RACE-CONSCIOUS DECISIONMAKING IS PERMISSIBLE FOR THE PURPOSE OF MAINTAINING STUDENT BODY DIVERSITY, THE COURT SHOULD DESCRIBE AS CLEARLY AS POSSIBLE THE CIRCUMSTANCES, IF ANY, IN WHICH THE SAME REASONING MAY APPLY TO THE USE OF RACE IN EMPLOYMENT DECISIONS

This Court and others have commented repeatedly on the dilemma that employers face when they attempt to take race into account in lawful ways to assure minorities equal employment opportunity, while not unduly interfering with the rights or opportunities of nonminorities. Judge Wisdom described this dilemma in his dissenting opinion in *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 230 (5th Cir. 1977), when that case was before the Fifth Circuit:

> The employer and the union are made to walk a high tightrope without a net beneath them. On one side lies the possibility of liability to minorities in private actions, federal pattern and practice suits, and sanctions under Executive Order 11246. On the other side is the threat of private suits by white employees and potentially, federal action. If the privately imposed remedy is either excessive or inadequate, the defendants are liable. Their good faith in attempting to comply with the law will not save them from liability, including liability for back pay (citation omitted).

When the *Weber* case reached this Court, Justice Blackmun commented similarly, in his concurring opinion, on the predicament that employers face when Title VII is read literally:

> If Title VII is read literally, on the one hand they face liability for past discrimination against blacks, and on the other they face liability to whites for any voluntary

> preferences adopted to mitigate the effects of prior discrimination against blacks.

443 U.S. at 210 (Blackmun, J., concurring). *See also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 291 (1986) (O'Connor, J., concurring) (observing that under an unduly narrow approach, employers are "trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action *is* taken") (emphasis in original).

Reasoning that Congress could not have intended Title VII to place employers in such an untenable position, this Court in *Johnson* eschewed a literal reading of Title VII and construed it instead to afford employers an area of discretion within which they may take race and/or gender into account lawfully. Yet, as Justice O'Connor has pointed out, even such a flexible approach is unsatisfactory if it "gives insufficient guidance to courts and litigants." 480 U.S. at 648 (O'Connor, J., concurring). Thus, Justice O'Connor was critical of what she described as "an expansive and ill-defined approach to voluntary affirmative action." *Id.*

If there are non-remedial justifications for using race as a factor in making admissions decisions to ensure student body diversity, and this Court intends to extend those justifications to employment decisions—such as a desire to maintain a diverse workforce—employers need to know what standards should apply. The *amicus* strongly urges, therefore, that if the Court concludes that race ever may be used for a non-remedial purpose in employment, the Court spell out, as clearly as possible, the principles governing that determination, so that employers will have a set of standards to follow in designing and implementing their affirmative action and diversity programs.

For example, this Court has made clear through past decisions that, to pass muster under Title VII (and the

Constitution, where applicable), an employer's use of race as a factor in an employment decision made pursuant to an affirmative action plan not only must serve a compelling interest, but also must be "narrowly tailored" so that it does not "unnecessarily trammel the interests" of those not benefiting directly from the plan." *Weber*, 443 U.S. at 208; *Johnson*, 480 U.S. at 630 (internal quotation marks omitted). In the context of race-conscious decisions designed to remedy a manifest imbalance, this requirement may be met by evidence showing that an affirmative action plan does not require the discharge of nonminority employees nor create an absolute bar to their advancement, and that the plan is a "temporary measure, not designed to maintain racial balance." *Johnson* at 630 (citing *Weber*). If this Court now concludes that Title VII permits uses of race for the sake of promoting workforce diversity, then we urge that it address whether the same or a similar set of requirements of "narrow tailoring" also apply in that context.

It is particularly important to know whether programs using race for the sake of workforce diversity must be temporary in duration. The conclusion that remedial uses of race are impermissible for the purpose of *maintaining* racial balance appears to rest on the premise that, once balance has been achieved, remedial action no longer is needed. But it is debatable whether that premise is sound when applied to most diversity programs. To the extent that a private business determines that a diverse workforce is essential to its ability to compete effectively or to serve a diverse customer population, its need for diversity also is likely to be continuing in nature. For this reason, it becomes essential to know whether an employer's need for workforce diversity *ever* can justify programs in which race or gender is used on an *ongoing* or *recurrent* basis in making employment decisions. Again, guidance from the Court on this issue would be extremely helpful.

CONCLUSION

Progressive employers have a business need for a qualified diverse workforce, which can be supplied, at least in part, by institutions of higher education that have a diverse student body. These employers, through lawful affirmative action programs and diversity initiatives, have made considerable progress toward recruiting and retaining employees of diverse backgrounds. Moreover, this Court's decisions in *Weber* and *Johnson* provide reasonably clear guidelines that have allowed employers voluntarily to give limited consideration to race and gender pursuant to properly designed affirmative action plans aimed at remedying manifest imbalances in their workforces, without running an undue risk of liability under Title VII. However the Court answers the questions presented in this case, in the event any part of the Court's decision is applicable to private sector employment, then employers, lower courts, and employment law enforcement agencies will need additional guidance on the issues addressed in this *amicus curiae* brief. We urge the Court to keep this need for guidance and direction in mind in framing its opinion.

Respectfully submitted,

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IN THE

Supreme Court of the United States

BARBARA GRUTTER,
Petitioner,

v.

LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, and the BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, *et al.*,
Respondents.

JENNIFER GRATZ AND PATRICK HAMACHER,
Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, and the BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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OTHER AUTHORITIES

Alan M. Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext*, 1 CARDOZO L. REV. 379 (1979) 24
Daniel A. Farber & Suzanna Sherry, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW (1997) 24
Martin Luther King, Jr., *I Have a Dream* (available at http://web66.coled.umn.edu/new/MLK/MLK.html) 7
Sanford Levinson, *Diversity*, 2 J. CONSTIT. L. 529 (2000) 26
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Allen J. Meese, *Reinventing* Bakke, 1 GREEN BAG 2d 381 (Summer 1998) 15
Terrance Sandalow, *Book Review*, 97 MICH. L. REV. 1874 (1999) 25, 27

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INTEREST OF *AMICUS CURIAE*

The Cato Institute was established in 1977 as a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government, especially the idea that the U.S. Constitution establishes a government of delegated, enumerated, and thus limited powers. Toward that end, the Institute and the Center undertake a wide range of publications and programs.

Cato also has had a longstanding interest in circumscribing the use by government of racial and ethnic classifications—a practice fundamentally at odds with constitutional principles of ordered liberty and impartial government, as enshrined in the equal protection and due process guarantees of the Fifth and Fourteenth Amendments. The instant cases raise squarely the continued legality of such racial and ethnic preferences for admission to state universities and colleges and thus are of central concern to Cato and the Center.[1]

SUMMARY OF ARGUMENT

This litigation involves not a challenge to "affirmative action" *simpliciter*, whether understood as the use of race-conscious remedies for proven race-based discrimination by state actors or outreach efforts to communicate the University of Michigan's equal opportunity and non-discrimination policies as a means of enlarging the pool of applicants. Rather, seizing on Justice Powell's endorsement of "educational

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[1] In conformity with Supreme Court Rule 37.6, *amicus* has obtained the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk. *Amicus* also states that no party or counsel for a party has authored this brief in whole or in part; and no person or entities other than *amicus*, its members and counsel have made a monetary contribution to the preparation and submission of this brief.

diversity" as a possible compelling state interest for equal protection purposes in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978), the University and its Law School have sought to justify an admissions scheme that explicitly seeks to ensure the admission each year of a "critical mass" of students from selected minority and ethnic groups. The University's undergraduate schools strive to accomplish this objective by automatically awarding 20 points (out of a total of 150 points) for membership in particular minority groups; the Law School pursues this end by monitoring applications to ensure that members from favored minority groups comprise 10-17 percent of its student body. Expert opinion, credited below, indicated that membership in certain racial and ethnic groups increased the odds of Law School acceptance "many, many (tens to hundreds) times" that of similarly situated non-minority applicants.

Respondents' reliance on Justice Powell's *Bakke* position is problematic because Powell's discussion of diversity reflected the views of only one member of the Court and did not state a holding even in that case since a program of the type he suggested he would favor was not before the Court. Moreover, his position that educational diversity might provide a compelling justification for government use of race has never commanded the support of a majority of the Court. But even under the terms of the Powell opinion, the University's pursuit of a "critical mass" of minority students through racial and ethnic preferences cannot be squared with Justice Powell's insistence on a truly individualized assessment of the merits of applicants in which individuals are treated as individuals; race serves as only one among many factors potentially contributing to a diverse educational experience; and all applicants are placed "on the same footing for consideration" irrespective of race or ethnicity.

Respondents' "critical mass" rationale is entirely at odds with the very notion of an individualized consideration as

envisioned in the Powell opinion. Respondents justify the need for a "critical mass" in order to provide a supportive environment to enable minority students to discuss freely their experience. Whatever its merits as a pedagogic tool, "critical mass" calculations inevitably elide into notions of appropriate group representation. They have "no logical stopping place," a critical deficiency under "strict scrutiny" analysis as Justice Powell emphasized in his opinion for the plurality in *Wygant v. Jackson Board of Educ.*, 467 U.S. 267 (1986), and Justice O'Connor reaffirmed in her opinion for the plurality in *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989). Indeed, if sustained as a matter of equal protection, they provide the very path to a societal "spoils system," the avoidance of which prompted Justice Powell in *Bakke* and *Wygant*, the plurality in *Croson*, and the Court in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), to insist on "strict scrutiny" whenever government uses race or ethnicity to allocate public resources or burdens.

Twenty-five years after *Bakke*, it may be time for the Court to make clear that educational or pedagogic diversity, while a desirable objective, cannot be pursued through government awards of racial or ethnic preferences. Because such preferences reflect outright racial stereotyping about how people will (or should) think or behave on account of their skin color or ethnicity, they cut against bedrock constitutional principle that forbids government to judge individuals as members of racial or ethnic groups. Whether or not individuals from historically disadvantaged groups may derive some advantage from these programs, the state's awarding of valuable opportunities on the basis of skin color or ancestry necessarily diminishes those who are not benefited and, more importantly, erodes the national fabric and commitment to equality of opportunity.

Respondents' position is no less constitutionally infirm even if it were to abandon its doubtful claim that race is an

appropriate proxy for viewpoint diversity and predicate its preferential admissions scheme on the need to provide useful lessons in group tolerance for non-minority students or, more likely, appropriate representation of certain minority groups in selective institutions of higher learning. Because of the availability of a great many race-neutral means of furthering a message of tolerance, the University's empathy/tolerance rationale simply does not exhibit the element of necessity, of overriding justification, required of a "compelling" justification that comports with equal protection.

The University's group-representation rationale is likely what animates preferential admissions policies in the nation's elite institutions of higher learning. Here, preferences serve principally not to enlarge the supply of qualified minority students but, rather, to distribute that supply in favor of the more selective schools. In any event, the use of race and ethnicity simply to ensure a desired racial and ethnic representation plainly fails "strict scrutiny" review, as this Court has made clear in *Croson, Adarand*, and Voting Rights Act cases like *Miller v. Johnson*, 515 U.S. 900 (1995).

Respondents and their amici are likely to argue that legitimate reliance interests will be unraveled by a ruling striking down the University's racial and ethnic preferential admissions program. This claim lacks all merit as (1) Justice Powell's discussion of the "Harvard Plan" in *Bakke* was not necessary to resolve the merits of the "reserved places" or "set aside" plan struck down in that case; (2) respondents' use of race and ethnic preferences exceeds, by a good margin, the limited consideration of race envisioned in the Powell opinion; (3) respondents and other public universities have been put on notice at least since this Court's 1995 ruling in *Adarand* that all government classifications based on race would receive "strict scrutiny" and, in light of its prior rulings in *Wygant and Croson*, nonremedial use of race would likely trigger an especially heavy burden of justification; and (4) the

constitutionality of public university use of race and ethnicity in admissions decisions has been heavily contested in the lower courts. In short, respondents simply have taken an aggressive view of what the Constitution permits, hardly a basis for arguing reliance on well-established constitutional precedent in their favor.

STATEMENT OF FACTS

The instant cases challenge government's use of racial and ethnic preferences in allocating valuable economic and personal benefits, here admissions to state universities and colleges. This challenge does not necessarily place in question every practice that has come to be labeled "affirmative action," a term that is widely used but rarely defined. There is nothing in the constitutional provisions or relevant statutes (Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and 42 U.S.C. 1981) invoked by petitioners that bars the state from remedying past discrimination practiced by its universities, colleges, or other units, even where, on an appropriate record, such remedies involve redress to individuals of a particular race or ethnicity who have been victimized by such discrimination. *See, e.g., Teamsters v. United States*, 431 U.S. 324 (1977); *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976). The University of Michigan and its Law School, respondents in the instant cases, candidly eschew any reliance on such remedial use of race and ethnic classifications.[2]

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[2] The District Court in the *Gratz* case found: "The University Defendants have never justified the [University of Michigan's College of Literature, Science, and the Arts ("LSA")'s] race-conscious admissions policies on remedial grounds." 122 F.Supp. 2d 811 (E.D. Mo. 2000); App. to Pet. for Writ of Cert., No. 02-516, App. A, p. 33a [hereinafter cited as "*Gratz* Pet. App."] To like effect, the District Court in the *Grutter* litigation noted that Professor Richard Lempert, the University of Michigan Law School professor who chaired the faculty committee that drafted the Law School's 1992 admissions policy, "stated that this was not

Nor should this challenge raise any doubts over the validity of what might be termed "affirmative outreach," that is, practices whereby the University of Michigan communicates to all potential students, including students from under-served groups or regions, its policy of equal opportunity and non-discrimination, or otherwise engages in race-neutral recruitment aimed at its enlarging its pool of qualified candidates, including minority candidates. But respondents' preferential admissions programs go well beyond such efforts to improve the overall pool of applicants.

Rather, invoking Justice Powell's opinion announcing the judgment of the Court in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978), the University of Michigan and its Law School have seized upon the rationale of "educational diversity" to justify an admissions scheme that explicitly seeks to ensure the admission each year of a "critical mass" of members of selected minority and ethnic groups—for the Law School, in the range of 10-17 percent of the student body. The Law School boldly states: "It is obvious that *race matters* to a great many issues that the Law School considers central to its chosen pedagogical mission," Br. in Oppos., No. 02-241, p. 2 (emphasis in original). In fact, the Law School and its parent institution act to ensure that "race matters"—and that it will continue to "matter" in Michigan's publicly funded colleges and universities—by allocating valuable, state-subsidized opportunities on the basis of one's race, and by premising those awards on the proposition that individuals with a particular skin color or ethnic background are likely to articulate particular views in the classroom. Respondents'

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intended as a remedy for past discrimination, but as a means of including students who may bring to the law school a perspective different from that of members of groups which have not been the victims of such discrimination." 137 F.Supp. 2d 821 (E.D. Mich. 2001), reversed *en banc*, 288 F.3d 732 (6th Cir. 2002); App. to Pet. for Writ of Cert., No. 02-241, App. G, p. 213a [hereinafter cited as "*Grutter* Pet. App."]

preferential admissions policies, if upheld, can only serve further to delay realization of the sacred constitutional promise of equal opportunity: the "dream that my four children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character."[3]

Respondents' opposition papers imply that their use of racial and ethnic preferences share some similarity to the individualized review of the merits of applicants that Justice Powell endorsed in his *Bakke* opinion. We believe that respondents' view cannot be squared with the findings of the trial courts below, which respondents have not challenged as instances of clear error.

The Gratz *Litigation*

In *Gratz v. Bollinger*, 122 F.Supp. 2d 811 (E.D. Mich. 2000) (No, 02-516) [hereinafter cited as "*Gratz*"], the District Court made the following pertinent findings:

- "From 1998 through the present, the [University of Michigan's College of Literature, Science, and the Arts ("LSA")] has used a 150 point system, under which admissions decisions were generally determined by the applicant's rank on the 150 point scale. Under-represented minority applicants *automatically receive 20 points based upon their membership in one of the identified under-represented minority categories*." 122 F.Supp. 2d at 827 (emphasis supplied); App. to Pet. for Writ of Cert., No. 02-516, p. 33a [hereinafter cited as "*Gratz* Pet. App."][4]

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[3] Martin Luther King, Jr., *I Have a Dream*, available at http://web66.coled.umn.edu/new/MLK/MLK.html

[4] In addition, all applicants, *including* minority applicants, can receive "six points awarded for geographic factors, four points awarded for alumni relationship, three points awarded for an outstanding essay, five points awarded for leadership and service skills, twenty points awarded for socioeconomic status, or twenty points awarded for athletes." 122

- "In 1999 and 2000, the LSA also added a system whereby certain applicants, including under-represented minority applicants, could be 'flagged,' thereby keeping such applicants in the review pool for further consideration," 122 F.Supp. 2d at 827; *id.* at 33a-34a, even though such applicants "may not necessarily pass the LSA's initial admit threshold," 122 F.Supp. 2d at 827; *id.* at 35a.[5]
- The University's LSA "prior practice" reserved places for "qualified" minority candidates—a practice the District Court found unconstitutional under the rationale of Justice Powell's opinion in *Bakke*. 122 F.Supp. 2d at 832-33; *Gratz* Pet. App., p. 45a. From 1995 through 1997, the LSA used 'facially different grids and action codes based solely upon an applicant's race," under

F.Supp. 2d at 828; *Gratz* Pet. App., p. 36a. The District Court in *Gratz* did not specifically identify the "under-represented minority categories" that called for the 20-point boost. However, the "Joint Proposed Summary of Undisputed Facts Regarding Admissions Process [hereinafter cited as "Joint Summary of Undisputed Facts"], filed with the District Court, states: "The University considers African-Americans, Hispanic-Americans, and Native Americans to be under-represented minorities." *Gratz* Pet. App., p. 111a.

[5] Admissions counselors are automatically authorized, but not required, to "flag" applicants who are members of the designated "under-represented minority categories," although other applicants may also be flagged if they are in the top of their class, reside in a preferred county of Michigan, or exhibit any "unique life experiences, challenges, circumstances, interests, or talents," or certain other factors. 122 F.Supp. 2d at 829-30; *Gratz* Pet. App., pp. 39a-40a.. This change in the "flagging" practice to include non-racial criteria appears to have begun only with respect to the 1999 and 2000 academic years. *See* Joint Summary of Undisputed Facts, *Gratz* Pet. App., p. 117a. Also, "starting with the academic year 1999, the University abandoned its prior approach of immediately admitting all qualified under-represented minorities, and now defers or postpones some of these applications. Similarly, the University has discontinued its use of 'protected seats.'" *Id.* at 118a.

which "non-preferred applicants were automatically excluded from competing for a seat in the class without any type of individualized counselor review solely on account of their race, whereas, preferred minority applicants were never automatically rejected, regardless of their grades and test scores. Rather, all minority applicants received some type of individualized counselor review," 122 F.2d at 832; *id.* at 46a. This practice, too, was found invalid under Justice Powell's opinion in *Bakke*. *See* 122 F.Supp. 2d at 833; *id.* at 47a-48a.

The University respondents did not contest these findings, most of which are also contained in a "Joint Proposed Summary of Undisputed Facts Regarding Admissions Process," filed with the District Court. *See Gratz* Pet. App., App. J.

The District Court granted the plaintiffs' motion for summary judgment with respect to LSA's admissions programs in effect from 1995 through 1998, and granted the University's motion for summary judgment with respect to LSA's admissions programs for 1999 and 2000. *Gratz* Pet. App., App. B. On December 2, 2002, this Court granted *certiorari* before judgment.

The Grutter *Litigation*

In *Grutter v. Bollinger*, 137 F.Supp. 2d 821 (E.D. Mich. 2001), reversed en banc, 288 F.3d 732 (6th Cir. 2002) (No. 02-241) [hereinafter cited as "*Grutter*"], the District Court, in striking down the Law School's racial/ethnic preference admissions program for African American, Native American, Mexican American, and mainland Puerto Rican students, made the following pertinent findings of fact:

- The Law School highlights its "*commitment to one particular type of diversity* . . . . This is a commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been

historically discriminated against, like African-Americans, Hispanics and Native-Americans, who without this commitment might not be represented in our student body in meaningful numbers. These students are particularly likely to have experiences and perspectives of special importance to our mission." 137 F.Supp. 2d at 827-28 (emphasis supplied; quoting from Law School's extant admissions policy adopted in April 1992); App. to Pet. for Writ of Cert., No. 02-241, p. 198a [hereinafter cited as "*Grutter* Pet. App."].

- The Law School's "commitment" embraces the notion of admitting a "'critical mass' of minority students," 137 F.Supp. 2d at 828; *id.* Its formal admissions documents do not specify what percentage of the student body would constitute the desired "critical mass." However, the trial court quoted testimony from admissions officials that the Law School's "goal" or "target" was increased in the 1970s from 10% to 10-12%. *See* 137 F.Supp. 2d at 830-31; *id.* at 205a. Dean Jeffrey Lehman testified that while he could not quantify "critical mass," "he acknowledged that minority students have constituted at least 11% of every entering class since 1992." 137 F.Supp. 2d at 834; *id.* at 211a. Indeed, the District Court found that the upper range was closer to 17%: "The actual admissions and graduation statistics confirm the law school's commitment to enroll African American, Native American and Hispanic students in the 10-17% range," 137 F.Supp. 2d at 840; *id.* at 225a.; "the written and unwritten policy at the law school charges the admissions office with assembling entering classes which consist of between 10% and 17% African American, Native American, and Hispanic students. Over the years this target has been achieved, and even exceeded despite the underrepresented minority students' generally lower LSAT scores and undergraduate GPA's." 137 F.Supp. 2d at 842; *id.* at 229a-230a.

- The Law School, in practice, adopted considerably lower admissions standards for minority candidates. Thus, for example, for the 1995 academic year, Dean Lehman "acknowledged that all African American applicants with an LSAT score of 159-60 and [a grade point average, termed "UGPA"] of 3.00 were admitted, whereas only one of 54 Asian applicants and four of 190 Caucasian applicants with these qualifications were admitted." 137 F.Supp. 2d at 834 n.13; *id.* at 211a-212 a, n. 13. Expert testimony, credited by the trial court,[6] indicated that "membership in certain ethnic groups is an extremely strong factor in the decision for acceptance," as applicants from the preferred minority categories "in the same LSAT x GPA grid cell as a Caucasian American applicant have odds of acceptance that is [sic] *many, many (tens to hundreds) times that of a similarly situated Caucasian American applicant*." 137 F.Supp. 2d at 837; *id.* at 218a-219a (emphasis supplied; quoting testimony of plaintiffs' expert Dr. Kinley Larntz, professor emeritus, department of applied statistics, University of Minnesota). *See* also 137 F.Supp. 2d at 837-39; *id.* at 219a-222a.[7]

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[6] "The court specifically adopts Dr. Larntz's analysis and his conclusion that 'membership in certain ethnic groups is an extremely strong factor in the decision for acceptance."137 F.Supp. 2d at 841; *Grutter* Pet. App, p. 227a.

[7] Judge Bogg's dissent in *Grutter* notes: "[U]nder-represented minorities with a high C to low B undergraduate average are admitted at the same rate as majority applicants with an A average with roughly the same LSAT scores. Along a different axis, minority applicants with an A average and an LSAT score down to 156 (the 70th percentile nationally) are admitted at roughly the same rate as majority applicants with an A average and an LSAT score over a 167 (the 96th percentile nationally). The figures indicate that *race is worth over one full grade point of college average or at least an 11-point and 20-percentile boost on the LSAT*." 288 F.3d at 796 (emphasis supplied); *Grutter* Pet. App., pp. 131a-132a.

- The trial court also found it "significant that the dean and admissions director monitor the law school's 'daily admissions reports,' which classify applicants by race. These reports inform the reader how many students from various racial groups have applied, how many have been accepted, how many have been placed on the waiting list, and how many have paid a deposit. There would be no need for this information to be categorized by race unless it were being used to ensure that the target percentage is achieved." 137 F.Supp. 2d at 842; *id.* at 230a.
- The District Court further found that "[t]he evidence shows that race is not, as defendants have argued, merely one factor which is considered among many others in the admissions process. Rather, the evidence indisputably demonstrates that the law school places a very heavy emphasis on an applicant's race in deciding whether to accept or reject." 137 F.Supp. 2d at 840; *id.* at 225a.

The District Court ruled that the Law School's racial and ethnic preferential admission policy violated the Equal Protection Clause and Title VI of the Civil Rights Act of 1964.[8] The court reasoned that—notwithstanding the Powell opinion in *Bakke*—educational diversity did not provide a "compelling" justification for the Law School's use of race and ethnicity. Moreover, even if diversity could in some circumstances supply a compelling interest, the Law School's program was not "narrowly tailored" to serve that interest. The trial court noted (1) the failure to define the "critical mass" concept and connect the desired percentage to the purported goal of achieving greater viewpoint diversity in the classroom; (2) the absence of any durational limit on the Law

[8] Cato takes no position in this litigation regarding the application of Title VI to private institutions.

School's use of race; (3) the fact that the Law School's use of race to achieve certain minimum percentages of desired minority enrollment was "practically indistinguishable from a quota system," 137 F.Supp. 2d at 851; *id.* at 248a; (4) the absence of a "logical basis for the law school to have chosen the particular racial groups which receive special attention," 137 F.Supp. 2d at 851; *id.* at 249a[9]; and (5) the Law School's "apparent failure to investigate alternative means for increasing minority enrollment," 137 F.Supp. 2d at 852; *id.* at 251a.

On appeal, a divided U.S. Court of Appeals for the Sixth Circuit, sitting *en banc*, reversed. The court of appeals based its decision largely on the ground that the pursuit of viewpoint diversity provided sufficient justification for the Law School's use of racial and ethnic preferences; and that the Law School had amply shown that race-neutral admissions could not yield the desired "critical mass" of minority students. *See* 288 F.3d 732 (6th Cir. 2002) (*en banc*); *Grutter* Pet. App., App. A. On December 2, 2002, this Court granted *certiorari*.

[9] The court questioned, *inter alia*, the exclusion of Hispanics who originate from countries other than Mexico, Puerto Ricans who are not raised on the U.S. mainland, other groups such as Arabs and southern and eastern Europeans who may have similar histories of discrimination, and blacks from other parts of the world. *See* 137 F.Supp. 2d at 851-52; *Grutter* Pet. App., pp. 249a-250a. *See* note 24 *infra*.

ARGUMENT

I. THE USE OF RACIAL OR ETHNIC PREFERENCES TO ACHIEVE A "CRITICAL MASS" OF MINORITY ADMISSIONS EXCEEDS THE LIMITED PRIVILEGE, RECOGNIZED IN JUSTICE POWELL'S OPINION IN *BAKKE*, PERMITTING CONSIDERATION OF RACE AS ONLY ONE FACTOR IN A TRULY INDIVIDUALIZED DETERMINATION OF THE MERITS OF APPLICANTS.

Justice Powell's opinion in *Bakke* reflects the now-established view of the Court that any use by the state of racial and ethnic classifications is subject to the "strict scrutiny" standard of judicial review, even where such classifications purportedly work to the "benefit" of members of minority groups.[10] *See, e.g., Adarand Constructors, Inc. v.*

[10] Whether such classifications in fact "benefit" the claimed beneficiaries of such programs is highly contested, even among members of those groups. *See*, e.g., John H. McWhorter, LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA 225-26 (2000) (supporting temporary preferences in employment as a response to discrimination, but disapproving their use in university admissions where "the evidence suggests that most of the black-white disparity is today due to a sense of separation from scholarly endeavor internal to African-American culture."); Shelby Steele, A DREAM DEFERRED: THE SECOND BETRAYAL OF BLACK FREEDOM IN AMERICA 34 (1998) ("Double standards, preferential treatment, provisions for 'cultural difference,'. . . all constitute a form of exceptionalism that keeps blacks (and other minorities) down by tolerating weakness at every juncture where strength is expected of others."); *see also* Steele, *The Age of White Guilt (and the Disappearance of the Black Individual)*, HARPER'S MAGAZINE, Nov. 2002, pp. 33 ff. Moreover, recent poll data suggest that minority communities generally express similar disquiet over the use of racial and ethnic preferences. Thus, for example, a 2001 survey, conducted by the *Washington Post*, the Henry J. Kaiser Family Foundation, and Harvard University, indicates that 86% of African-Americans and 84% of Hispanic Americans believe that employment and university admissions decisions

Pena, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989). There is, however, a substantial question whether that portion of Justice Powell's opinion stating that educational diversity could supply a "compelling" justification for a state university's consideration of the racial and ethnic backgrounds of applicants—a view embraced by none of the other Justices in *Bakke*[11]—constituted a holding even in that case. Because the University of California at Davis set aside specific places for minority students, Justice Powell (and four other members of the Court) voted to strike down the Davis program. A university program that used race or ethnicity as only one factor among many was not before the Court in *Bakke*.[12]

Moreover, it is doubtful that Justice Powell's position on the diversity question has ever commanded the support of a majority of the Court. Indeed, the Court's past rejection of a number of nonremedial justifications for race-based preferences casts considerable doubt on the viability of the diversity rationale. *See Croson*, 488 U.S. at 506 (rejecting "societal discrimination" rationale for use of race which, if sustained, would produce a "mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs"); *Wygant v. Jackson Board of Educ.*, 467 U.S. 267 (1986) (rejecting "role model" theory for race-based protection of

should be based strictly on merit and not include use of race or ethnicity as a factor. *See Washington Post/Kaiser/Harvard Racial Attitudes Survey, Question 50*, available at http://www.washingtonpost.com/wp-srv/nation/sidebars/polls/race071101.htm

[11] Judge Boggs, dissenting in the Court of Appeals' ruling in *Grutter*, pointedly observed: "Nowhere in Justice Brennan's opinion does he mention the diversity rationale, and he explicitly did not join Part IV-D of Justice Powell's opinion, discussing the diversity rationale." 288 F.3d at 781; *Grutter* Pet. App., p. 100a.

[12] *See* Alan J. Meese, *Reinventing* Bakke, 1 GREEN BAG 2d 381 (Summer 1998).

black teachers from layoffs not tied to ~~d~~demonstrated employment discrimination); *Rice v. Cayetano*, 528 U.S. 495 (2000) (rejecting under the Fifteenth Amendment "self-governance" and fiduciary-beneficiary theories for limiting voting rights to individuals of Hawaiian ancestry concerning elections for state agency administering programs for the benefit of Hawaiian citizenry).[13]

We further note that Justice Powell's *Bakke* opinion was significantly informed by a perceived First Amendment interest in according a measure of "academic freedom" in the running of public institutions of higher learning. *See Bakke*, 438 U.S. at 311-13. That aspect of Justice Powell's opinion is difficult to square, however, with longstanding federal legislation, consistent with the Fourteenth Amendment's Equal Protection Clause, insisting on non-discrimination in all decisions taken by state actors, including universities. *See, e.g.*, Title VI and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d & 2000e *et seq*. It would also seem at least implicitly rejected in *Bob Jones University v. United States*, 461 U.S. 574 (1982). In that case, seven members of the Court (including Justice Powell) rejected a First Amendment challenge to the federal government's denial of tax-exempt status to a private university that maintained racially discriminatory admissions standards on the basis of religious doctrine. Noting statutes such as Title VI, *see id.* at 594, Chief Justice Burger stated for the Court: "Whatever may be the rationale for such private schools' policies, and however sincere the rationale may be, racial discrimination in

[13] In *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), a 5-4 majority of the Court sustained two FCC race-based programs. That decision, involving a Fifth Amendment challenge, used an "intermediate" standard of scrutiny later rejected in *Adarand*. Although the Court in *Adarand* expressly overruled only *Metro Broadcasting*'s failure to engage in the "strict scrutiny" analysis required of all government use of race in allocating economic opportunities, *see* 515 U.S. at 227, it is doubtful that a similar agency program would be sustained after *Adarand*.

education is contrary to public policy. Racially discriminatory educational institutions cannot be viewed as conferring a public benefit within the 'charitable' concept [underlying the federal tax law]." *Id.* at 595-96.

Nevertheless, because respondents and the Court of Appeals below relied principally on Justice Powell's *Bakke* opinion, and that opinion marks the constitutional frontier respecting the allowable consideration of race in state-university admissions decisions, we assume for purposes of this part of the brief that Justice Powell's view—that a state university's pursuit of educational or pedagogic "diversity" can justify some consideration of the race or ethnic status of applicants—does reflect a majority position on the Court.

Even under Justice Powell's view, however, the University of Michigan's admissions system violates the Equal Protection Clause. Even if diversity can supply a compelling justification for some consideration of race, respondents' preferential admissions programs fail the constitutional test because the means chosen are not "narrowly tailored" to achieving the stated educational objective.

Respondents properly note that, at least in its current form, their deployment of racial and ethnic preferences is subtler than the University of California at Davis's "set aside" or "reserved spaces" approach struck down in *Bakke*. However, they and the appeals court below fail to appreciate that Justice Powell's limited endorsement of the consideration of race presupposed a particular framework for university admissions decisions. Justice Powell assumed such consideration would take place only as part of a truly individualized assessment of the merits of each applicant, including the individual's potential contribution to a diverse student body broadly understood to include all aspects of diversity. The state interest that "would justify consideration of race or ethnic background," Justice Powell wrote, is "*not an interest in simple ethnic diversity*," but rather "encompasses a far

broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." 438 U.S. at 315 (emphasis supplied).

For Justice Powell, the use of race might be justified when it operates as a tie-breaker among otherwise equally qualified applicants enjoying the same measure of individualized assessment. Endorsing Harvard College's self-description of its diversity admissions program (discussed as a matter of judicial notice), Justice Powell observed:

> "This kind of program treats each applicant as *an individual in the admissions process*. The applicant that loses out on the last available seat to another candidate receiving a 'plus' will not have been foreclosed from all consideration for that seat because he was not of the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment." *Id.* at 318 emphasis supplied.[14]

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[14] Although coming to the issue with a very different political and judicial philosophy, Justice Douglas, dissenting in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), held a similar view on the essentially *individualized* nature of the educational-diversity inquiry permitted under equal protection principles:

"The key to the problem is consideration of such applications *in a racially neutral way* . . . . There is . . . no bar to considering an individual's prior achievements in light of the racial discrimination that barred his way, as a factor in attempting to assess his true potential for a successful legal career. Nor is there any bar to considering on an individual basis, rather than according to racial classifications, the likelihood that a particular candidate will be more likely to employ his legal skills to service communities that are not now adequately represented than will competing candidates. Not every student benefited by such an expanded admissions program would fall into one of the four racial groups involved here, but it is no drawback that other deserving applicants will also get an opportunity they would otherwise have been denied." original emphasis *Id.* at 340-41.

The key, for Justice Powell, was individualized review of the merits of applicants, each placed "on the same footing for consideration":

> "The file of a particular black student may be examined for his potential contribution for diversity when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities likely to promote beneficial educational pluralism . . . . In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them *on the same footing for consideration*, although not necessarily according them the same weight." *Id.* at 317 (emphasis supplied).

Respondents and the Court of Appeals stress the fact that, unlike the program in *Bakke*, the University's preferential admissions programs (as presently structured) do not reserve slots for particular minority groups; there is no "set aside" as such; and at all times the merits of applicants from preferred minority groups are assessed against those from non-preferred groups. But, given the findings below, this is merely a formalistic point. Here, there is no dispute that

> The University's LSA automatically gives each applicant from preferred minority groups an extra 20 points (out of a total of 150 points) that non-minorities do not receive solely because of their race or ethnic origin; the Law School is committed to admitting a "critical mass" of preferred minority students, somewhere along the range of 10 to 17% of the student

> body every year; and the record evidence is clear that being of a preferred race or ethnic group boosts the odds of acceptance "many (tens to hundreds) times" that of a similarly situated applicant from non-favored groups.

It is thus clear that for the University of Michigan, all applicants are not on "the same footing for consideration" regardless of their race or ethnicity.

Were the situation reversed and, say, a historically black college employed a similar commitment to admitting a "critical mass" of Caucasian students, it would seem highly doubtful that such an admissions program would pass constitutional muster. As Justice Powell made clear in *Bakke*, and as expressly affirmed in *Croson*, 488 U.S. at 494, and *Adarand*, 515 U.S. at 218, "[t]he guarantee of equal protection cannot mean one thing when applied to one individual, and something else when applied to a person of another color." *Bakke*, 438 U.S. at 289-90 (opinion of Powell, J.).

Whereas the University's LSA practice of automatically awarding favored minority applicants an extra 20 points is quite difficult to reconcile with the tie-breaking, individualized consideration envisioned by Justice Powell, the Law School's "critical mass" concept is entirely at odds with the very notion of *individualized* consideration. If we put aside for later discussion whether the epistemic or other pedagogic benefits of ensuring classroom representation of members of particular minority groups hold up under analysis, the Law School plainly has engaged in a use of race and ethnicity that cannot plausibly be justified in terms of Justice Powell's *Bakke* opinion.

Respondents' own expert testified in the *Grutter* litigation that if the Law School could not consider race, minority students from the preferred under-represented minority categories would have constituted "only 4% of the entering class instead of the actual enrollment of 14.5%." 288 F.3d at 732; *Grutter* Pet. App., pp. 8a-9a. Given the elusive nature of

the diversity rationale, it is difficult to say whether 4% of the entering class would be sufficient to achieve the desired pedagogic benefits. There is no finding below—indeed, respondents do not argue—that it would be insufficient.

Rather, respondents argue that a "critical mass" of minority students is needed to create a protective environment so that those students "do not feel isolated or like spokespersons for their race, and feel comfortable discussing issues freely based on their own personal experiences,"137 F.Supp. 2d at 834; *id.* at 211a (referring to testimony of Dean Lehman). Of course, this stated concern for the comfort level of preferred minority students, viewed as members of groups, is a bit at loggerheads with an individualized conception of the contribution to viewpoint diversity thought to inhere in an individual of a particular race or ethnicity. Moreover, contrary to respondents' sociological assumption, other educators have found that the use of racial preferences to ensure the presence of a "critical mass" of presumably like-minded minority students may serve more to reinforce race-based thinking on the part of those students than to liberate them to consider themselves as individuals.[15] But even if we assume that respondents' views on the pedagogic benefits of achieving a "critical mass" must be accepted, we have moved quite a distance from the individualized inquiry into the content of the character of each applicant approved in Justice Powell's opinion.

"Critical mass" calculations inevitably elide into notions of appropriate group representation. Is every minority group in the student body equally entitled to "critical mass"

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[15] *See*, e.g., McWhorter, LOSING THE RACE, *supra*, at 80 (discussing a black student who "spiritually had ensconced himself in 'black Berkeley,' living on a black dormitory floor and majoring in African-American Studies . . . [S]o determinedly reserving his sincere and open engagement for interactions with blacks only, he, too, is likely to have some trouble getting internships and jobs, and will be warmly supported by his friends in attributing this to racism.").

representation so that those students also do not feel isolated or that they must act as spokespersons for their group? As Judge Boggs, dissenting in *Grutter*, observed:

> "Since the Law School gives no principles, sociological or otherwise, by which the 'non-representativeness' of individual group members can be judged, we have to assume that a 'critical mass' would be of approximately the same size for any designated group. Thus, Afghans, Orthodox Jews, Appalachian Celts, or fundamentalist Christians might also feel that their remarks were being taken as representative, rather than individually, unless they, too, had a 'critical mass.' Then, the makeup of the entering class could be wholly determined by these groups that the Law School chose to classify as appropriate for worrying about their 'under-represented status.'" 288 F.3d at 806; *Grutter* Pet. App., p. 151a (Boggs, J., dissenting).

There is "no logical stopping point" for such use of race, a critical deficiency under "strict scrutiny" analysis, as Justice Powell stressed, writing for the plurality in *Wygant*, 476 U.S. at 275, and Justice O'Connor reaffirmed in her opinion for the plurality in *Croson*, 488 U.S. at 498. Herein lies the very path to a societal "spoils system," the avoidance of which prompted Justice Powell in *Bakke and Wygant*, the plurality in *Croson*, and the Court in *Adarand* to insist on "strict scrutiny" whenever government uses race or ethnicity to allocate public resources or burdens.

II. PURSUIT OF EDUCATIONAL OR PEDAGOGIC DIVERSITY DOES NOT PROVIDE A COMPELLING JUSTIFICATION FOR THE USE OF RACIAL OR ETHNIC PREFERENCES UNDER THE EQUAL PROTECTION CLAUSE.

Twenty-five years after Justice Powell's opinion in *Bakke*, it may be time for the Court to make clear that educational or pedagogic diversity, while a desirable objective, cannot be

pursued through government awards of racial or ethnic preferences. This is so even if the Court is not prepared to implement fully the plurality's suggestion in *Croson* that nonremedial use of race is a per se violation of equal protection: "Classifications based on race carry a danger of stigmatic harm. Unless they are *strictly reserved for remedial settings*, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." 488 U.S. at 493-94 (emphasis supplied), citing *Bakke*, 438 U.S. at 298 (opinion of Powell, J.).

The "diversity" justification is based on a host of assumptions that reflect outright racial stereotyping—that only black students can provide the necessary critical perspective on the nation's racist past, that only black instructors can teach African-American studies, that only black policemen can instill confidence and evoke a cooperative spirit in minority neighborhoods, that tolerance and the virtues of cultural diversity can be effectively communicated only by persons of the requisite skin color or ethnicity.[16] State action "'based on the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens'" presents "*the precise use of race as a proxy the Constitution prohibits.*" *Miller v. Johnson*, 515 U.S. 900, 914 (1995) (emphasis added), quoting *Metro Broadcasting*, 497 U.S. at 636 (Kennedy, J., dissenting). The Constitution, simply put, "provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think." *Metro Broadcasting*, 497 U.S. at 602 (O'Connor, J., dissenting).[17]

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[16] Race-conscious action for remedial purposes need not embody such race-based assumptions about how people (should) think and act. *See* generally Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 U.C.L.A. L. REV. 2059 (1996).

[17] Even in the context of otherwise wholly discretionary peremptory

After this Court's clear message in *Croson and Adarand*, it is no longer adequate to say that the University's use of race as a proxy for desired viewpoints embodies no element of invidious discrimination or stigma simply because it operates for the presumed benefit of previously disadvantaged groups.[18] Invidious comparisons are necessarily made when the state assumes that some people bring more value to an institution than others who are equally if not more qualified (as determined by the institution's own generally applicable standards) simply because they have a certain skin color or ethnicity.[19] Such group-based assumptions about how

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challenges of jurors, the Court has made clear that "[r]ace cannot be a proxy for determining juror bias or competence. We may not accept as a defense to racial discrimination the very stereotype the law condemns." *Powers v. Ohio*, 499 U.S. 400, 410 (1991) (citations omitted).

[18] *But see* note 10 *supra*.

[19] Diversity rationales often embody comparative judgments of the presumed differing contributions of particular groups. While Justice Powell in *Bakke* endorsed the modern, enlightened "Harvard Plan," an earlier Harvard admissions policy also spoke in terms of the cultural values of diversity:

> "Race is a part of the record. It is by no means the whole record, and no man will be kept out on grounds of race; but those racial characteristics which make for race isolation will, if they are borne by the individual, be taken into consideration as part of that individual's characteristics under the test of character, personality, and promise."

The New Admissions Plan, THE GADFLY (May 1926), p. 4, quoted in Alan M. Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm Or Pretext*, 1 CARDOZO L. REV. 379 , 391 (1979); *see* 288 F.3d at 793-94; *Grutter* Pet. App. 125a-126a (Boggs, J., dissenting) (quoting then Harvard president Lowell's "hauntingly similar" views). As Judge Boggs noted in his *Grutter* dissent, "race" and "character" were used by Harvard as code words for limiting the number of Jewish students: "Harvard in the 1930's did not have to say that exactly 87 percent of the seats were set aside for Gentiles—it just had to apply an admissions system based on 'character' that achieved roughly the same result." 288 F.3d at 801 & n.28; *id.* at

individuals act or think, however plausible in particular cases, cut against bedrock constitutional principle:

> "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with a respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens." *Rice v. Cayetano*, 528 U.S. at 517.

The University's preferential admissions programs are constitutionally infirm even if, in an unguarded moment, it is revealed that students from particular minority groups are preferred, not because they are likely to articulate particular views,[20] but because their very presence in the classroom

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141a & n.28. *See generally* Daniel A. Farber & Suzanna Sherry, BEYOND ALL REASON: THE RADICIAL ASSAULT ON TRUTH IN AMERICAN LAW (1997).

[20] Former University of Michigan Law School Dean Terrance Sandalow, a noted constitutional scholar in his own right, acknowledges:

> "My own experience and that of colleagues with whom I have discussed the question, experience that concededly is limited to the classroom setting, is that racial diversity is not responsible for generating ideas unfamiliar to some members of the class. Students do, of course, quite frequently express and develop ideas that others in the class have not previously encountered, but even though the subjects I teach deal extensively with racial issues, I cannot recall an instance in which, for example, ideas were expressed by a black student that have not also been expressed by white students. Black students do, at times, call attention to the racial implications of issues that are not facially concerned with race, but white and Asian-American students are in my experience no less likely to do so."

Terrance Sandalow, *Book Review*, 97 MICH. L. REV. 1874, 1906-07 (1999). Rather, Dean Sandalow adds, the contribution that representation of minority groups in the classroom may make to the educational experience "depends less upon the idea expressed than upon the identity of the speaker and the manner of expression." *Id.* at 1907. While "useful,"

teaches useful lessons in empathy or tolerance for non-minority students, or to ensure appropriate representation of minority groups in selective institutions of higher learning.[21]

As for the empathy/tolerance rationale, it is not clear whether racial preferences are more likely to promote tolerance or foster racial or group cleavage.[22] More important for present purposes, given the variety of racially neutral means available to the modern university to promote tolerance and emphatic understanding of differing ideas and experiences, reliance on race and ethnicity to promote this objective does not exhibit the element of necessity, of overriding justification, required of a "compelling" justification that comports with equal protection. "Strict scrutiny," the Court in *Adarand* made clear, is not "'strict in theory, but fatal in fact,'" 500 U.S. at 237. But neither can it be "strict in theory, but feeble in fact." To survive strict scrutiny, governments "must show that they had to do something and had no alternative to what they did,"[23] for "the Fourteenth Amendment requires us to look with suspicion on the excessive use of racial considerations by the government." *Bush v. Vera*, 517 U.S.

"the extent of the contribution needs to be kept in perspective," for "the development of a capacity for empathic understanding of ideas and experiences different from one's own . . . does not depend upon it [*i.e.*, representation of particular minority groups in the classroom]." *Id.*

[21] Both rationales are stated in the Law School's bulletin for the 1996-1997 academic year. *See* 137 F.Supp. at 829; *Grutter* Pet. App. 201a.

[22] Although this litigation should be decided on the basis of constitutional principles, not empirical judgments, some studies suggest that "diversity is most likely to impede group functioning." Katherine Y. Williams & Charles A. O'Reilly, III, *Demography & Diversity in Organizations: A Review of 40 Years of Research*, 20 RES IN ORGANIZATIONAL BEHAV. 77, 120 (1998), quoted in Sanford Levinson, *Diversity*, 2 J. CONSTIT. L. 529, 550 & n.76 (2000).

[23] *Wittmer v. Peters*, 87 F.3d 916, 918 (7th Cir. 1996), *cert. denied*, 117 S.Ct. 949 (1997) (Posner, J.).

952, 995 (1996) (O'Connor, J., concurring). Such a showing respondents have not made (and likely cannot make). [24]

The University's group-representation rationale is likely what animates preferential admissions policies in the nation's "elite" institutions of higher learning.[25] One may question the underlying empirical assumption that, in the absence of racial preferences, there would be a significantly diminished representation of blacks or other minorities in particular professions. This is due in part to the fact that racial preferences are not likely to enlarge appreciably, if at all, the overall supply of qualified minority applications to the nation's universities, but, rather, distribute that supply in favor of the more selective institutions.

In any event, the use of race and ethnicity simply to ensure a desired racial and ethnic representation plainly fails "strict scrutiny" review, as this Court has made clear in *Croson*, *Adarand*, and Voting Rights Act cases like *Miller v. Johnson*, 515 U.S. 900 (1995). "At the same time that we combat the symptoms of racial polarization in politics" or society at large, "we must strive to eliminate unnecessary race-based

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[24] There is also a fatal under-inclusiveness to the University of Michigan's focus on selected minority groups. *See* 137 F.Supp. 2d at 851-52; *Grutter* Pet. App. 249a-51a; also note 9, *supra*. As the Court observed in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993): "Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling." The same skepticism should apply also as a matter of equal protection.

[25] See, e.g., Sandalow, *supra*, 97 MICH. L. REV. at 1911 ("the presence of other members of their race in selective colleges and universities and in the positions to which graduation from those institutions leads may, for many, offer meaningful assurance that blacks are valued members of American society—that they have become, or at least have a realistic prospect of becoming, full participants in American life.").

state action that appears to endorse the disease." *Bush v. Vera*, 517 U.S. at 993 (O'Connor, J., concurring).

The University of Michigan is, of course, not tied to any particular admissions criteria. As long as it acts in race-neutral manner, and consistent with its pedagogic mission, it can alter its emphasis on aptitude test scores and grade point averages in any way it sees fit. The University also may act to modify criteria that are shown, on an appropriate record, to poorly predict success in college. Cf. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 435-36 (1975) (discussing concept of "differential validation" in employment testing context).

But that is not what respondents seek to accomplish here. They wish to retain their emphasis on particular combinations of aptitude test scores and grade point averages, but to vary downward the standard for applicants from preferred minority groups—the University's LSA by awarding an automatic 20 points to "qualified" minorities, the Law School through its pursuit of a "critical mass" of desired minority students. The short answer, as Justice Douglas recognized, dissenting in *DeFunis v. Odegaard*, 416 U.S. 312, 342-43 (1974), is that:

> "The State . . . may not proceed by racial classification to force strict population equivalencies for every group in every occupation, overriding individual preferences. The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. The purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans . . . . A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce that result despite its contrary intentions."

If the University of Michigan's preferential admissions policies are upheld on the basis of the justifications it has offered, such reasoning can readily be employed to "'justify' race-based decisionmaking essentially limitless in scope and duration." *Croson*, 488 U.S. at 495 (opinion of O'Connor, J., for the plurality).

III. NO LEGITIMATE RELIANCE INTEREST PRIVILEGES THE UNIVERSITY'S POST-1995 USE OF RACIAL AND ETHNIC PREFERENCES.

Respondents and their *amici* are likely to argue that they have legitimately relied on this Court's *Bakke* ruling, and that respect for their settled expectations since 1978 should inform this Court's constitutional ruling. To put this contention in proper perspective, it should be noted that the instant cases do not involve class actions, and the claims of the individual plaintiffs go no further back than Jennifer Gratz's 1995 application for admission to the University's LSA. *See* 122 F.Supp. 2d at 814; *Gratz* Pet. Supp. 5a.

Respondents' reliance claim lacks merit for several reasons.

First, as previously noted, Justice Powell's discussion of the diversity rationale in *Bakke* reflected the views of only one member of the Court; and his discussion of the "Harvard Plan" was not a holding necessary to resolve the merits of the "reserved places" or "set aside" plan struck down in that case.

Second, as we have attempted to show in Part I above, the University of Michigan's use of racial and ethnic preferences exceeds, by a good margin, the limited consideration of race as part of a truly individualized assessment of the merits of applicants envisioned in Justice Powell's opinion. Hence, Justice Powell's view provides no warrant for respondents' aggressive use of race, as evidenced by the University LSA's automatic conferral of 20 (out of 150 points) to applicants

from preferred minority groups and the Law School's pursuit of a "critical mass" of students from such groups amounting to 10-17 percent of each entering class.

Third, respondents, and other state universities employing similar preferential admissions programs, have been put on notice at least since the Court's June 12, 1995 ruling in *Adarand* that all government classifications based on race would receive "strict scrutiny" review, and that under this Court's prior rulings in *Wygant and Croson* nonremedial use of racial classifications would likely trigger an especially heavy burden of justification.

Fourth, the permissible use of race and ethnicity in public university admissions decisions has been heavily contested in the lower courts, resulting in rulings of unconstitutionality by the Fifth Circuit in *Hopwood v. Texas*, 78 F.3d 932, *cert. denied*, 518 U.S. 1033 (1996), and Eleventh Circuit in *Johnson v. Board of Regents of Univ. of Georgia*, 263 F.2d 1234 (2001).

In sum, respondents can offer no sound basis for arguing that they should not be held accountable for admissions decisions made in 1995 and thereafter. Absent a controlling decision of this Court, respondents certainly had every right to litigate their view of allowable constitutional limits on the use of race and ethnicity in admissions decisions. But like all litigants, they cannot avoid appropriate remedial consequences when their position is not sustained in the courts.

CONCLUSION

For the foregoing reasons, the decisions of the district court in *Gratz* and of the court of appeals in *Grutter* should be reversed.

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IN THE

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BARBARA GRUTTER,

Petitioner,

-and-

JENNIFER GRATZ and PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF ANTI-DEFAMATION LEAGUE IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS*

The Anti-Defamation League ("ADL"), as *amicus curiae*, submits this brief in support of neither petitioners nor respondents in the within cases.[1]

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[1] Pursuant to Rule 37.3(a) of the Rules of this Court, the parties have lodged letters with the Court consenting generally to the filing of briefs *amicus curiae*. Pursuant to

(Continued...)

ADL was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, to combat racial, ethnic, and religious discrimination in the United States, and to fight hate, bigotry, and anti-Semitism. It is today one of the world's leading civil and human rights organizations. ADL's 90-year history is marked by a commitment to protecting the civil rights of all persons, whether they are members of a minority group or of a non-minority group, and to assuring that each person receives equal treatment under the law. ADL believes that each person in our country has a constitutional right to be treated as an individual, rather than as simply part of a racial, ethnic, religious, or gender-defined group. In this connection, ADL has often filed briefs *amicus–curiae* in this Court urging that laws or practices are unconstitutional or illegal under the Equal Protection Clause of the Fourteenth Amendment to the Constitution or the nation's civil rights laws.[2]

Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person, other than *amicus* and its counsel, made a monetary contribution to its preparation or submission.

[2] *See, e.g.*, ADL briefs *amicus curiae* filed in *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Cardona v. Power*, 384 U.S. 672 (1966); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *DeFunis v. Odegaard*, 416

(Continued...)

ADL has long sought to reconcile its core mission—"to secure justice and fair treatment to all citizens alike . . . [and] put an end forever to unjust and unfair discrimination against . . . any sect or body of citizens"—with the use of racial preferences in access to social opportunity such as employment and education. ANTI-DEFAMATION LEAGUE 1913 CHARTER (1913). While ADL has endorsed limited racial preferences in order to remedy specific discrimination, it has consistently opposed the non-remedial use of race-based criteria, believing that the eradication of discrimination in our society is best achieved through strict assurance of equal treatment to all. Thus, while strongly sympathetic to the goal of increasing the

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U.S. 312 (1974); *Runyon v. McCrary*, 427 U.S. 160 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *United Jewish Orgs. of Williamsburg, Inc. v. Carey*, 430 U.S. 144 (1977); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP*, 461 U.S. 477 (1983); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Miller v. Johnson*, 515 U.S. 900 (1995); *Taxman v. Bd. of Educ.*, 92 F.3d 1547 (3d Cir. 1996), *cert. granted*, 521 U.S. 1117, *appeal dismissed per stipulation*, 522 U.S. 1010 (1997); and *Alexander v. Sandoval*, 532 U.S. 275 (2001).

numbers of minority students in our nation's selective universities and professional schools through the pursuit of diverse viewpoints, life experience, and outlooks, ADL continues to adhere to the principle that school admissions programs must be race-neutral.

In the context presented here, ADL agrees with the University of Michigan and its Law School that diversity in higher education is an appropriate and legitimate educational goal. ADL believes in the importance of diversity in education, not only because of its contribution to the educational experience but as a factor in the positive evolution of a fully integrated society which honors inclusiveness and which is free of racial and ethnic hatred and the discrimination which flows from it. But while we approve of the ends sought by the University and its Law School, we cannot agree with their methods. The admissions systems before this Court deny to applicants who are not members of designated minority groups fundamental equal protection because those systems value persons for their race, not for relevant individual characteristics. In doing so, they violate this nation's core constitutional precepts and its civil rights laws.

STATEMENT

The University of Michigan and its Law School are selective state institutions of higher education. Each employs an admissions system in which college or law school applicants who declare themselves to be African-Americans, Hispanics, or Native Americans receive a preference in admissions over those who are

not within these specified "minority" groups. This categorical racial preference is effected by viewing the race of an applicant as a "plus" factor in the evaluation of the applicant for admission. The University and the Law School implemented these systems in response to this Court's decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). *Grutter v. Bollinger*, 288 F.3d 732, 735 (6th Cir. 2002); *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 816-17 (E.D. Mich. 2001).

In making their admissions choices, the schools evaluate applicants' scores on standardized tests such as the SAT and LSAT, in combination with, respectively, their high school or undergraduate grade-point averages. As the composite of these scores increases, the chances of acceptance also increase. *Grutter*, 288 F.3d at 736. In addition to these "hard" data, however, the schools consider "soft" variables. In the Law School, these include "the enthusiasm of the [applicant's] recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, residency, leadership and work experience, unique talents or interests, and the areas and difficulty of undergraduate course selection." *Id.* The schools view these "soft" factors as indicators of ability to excel academically notwithstanding composite "hard" data lower than other applicants.[3]

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[3] There is no evidence, however, that in assigning less weight to the index-based "hard" data, either the University or the Law School admit students who are unqualified because they fail to satisfy the minimum qualifications fixed

(Continued...)

Specifically, the law school's admissions process seeks to identify those "for whom [there is] good reason to be skeptical of an index score based prediction," and those who "may help achieve that diversity which has the potential to enrich everyone's education and thus make a . . . class stronger than the sum of its parts." *Id.*

Such "diversity admissions," according to the Law School's admissions policy, have "many possible bases." In defending the *Grutter* action, for example, the Law School pointed to individualized cases where students might bring unique or extraordinary experiences or viewpoints to a classroom. Illustratively, it identified applicants who had achieved "an Olympic gold medal, [or] a Ph.D. in physics," or who had had the experience of having been a Vietnamese boat person. *Id.* Similarly, the Law School pointed to actual examples of "diversity admissions." One was a person who was born in Bangladesh, graduated from Harvard College (although with a relatively low grade-point average), and scored relatively low on the LSAT, but who also had "outstanding references" from his college professors, and an "exceptional record" of extracurricular activity. *Id.* Another also had low

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for admission. Nor does the record indicate the degree to which applicants who are less qualified on the basis of race-neutral standards were admitted over applicants who were more "qualified" based solely on consideration of "hard" data.

LSAT scores, but "was an Argentinian single mother with extensive business experience, who graduated *summa cum laude* from the University of Cincinnati, [and] . . . was fluent in four languages . . . ." *Id.* A third had a high grade-point average (3.99 from the University of Florida) and an LSAT score at the 90th percentile, but was selected because as the daughter of Greek immigrants she was "'immersed in a significantly ethnic home life' and fluent in three languages." *Id.*

In contrast to *these* "diversity admissions," however, all of which are marked by individualized attention to the specific human characteristics of the applicant, the University and Law School conceded that self-declared membership in one of the so-called "minority" groups alone is sufficient to confer a "plus" for diversity purposes. The Law School's admissions policy describes "'a commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers.'" *Id.* at 737.

The Law School believes that such students "'are particularly likely to have experiences and perspectives of special importance to [its] mission,'" *id.*, and thus grants a preference to such students. It does so solely on the basis of their declared membership in the particular group. It does so without regard to whether individualized scrutiny would support the conclusion that their life experience

and the outlooks and perspectives they bring to an academic institution are in fact different from those of other applicants in any way that is either meaningful or relevant to the purposes of the institution.[4]

Neither the Law School nor the University has sought to justify these racial preferences in admissions policy as remedial—that is, neither argues that its commitment to diversity is intended to remedy past discrimination in its admissions policies or in its schools generally. *Id.* at 737. Rather, the sole justification advanced is the interest in "diversity." While the policies reflect the belief that members of the designated minority groups are "particularly likely" to bring with them that diversity of viewpoints the institutions wish to achieve, they do not seek to justify their admissions procedures by any interest in racial diversity *per se*. Neither the Law School nor the University admit using a "quota" system in which a set number of places in their classes is reserved for minority students; instead, both assert that they strive to achieve a "critical mass" of such minority students through the preferences granted. (In the Law School that "critical mass" has varied within a narrow range between 1993 and 1998, the last years for which data were available, from 13.5 % to 13.7 % of the entering class. *Id.* at 801-02.) Finally, both schools contend,

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[4] The University admissions system similarly awards a possible 150 points to applicants, and automatically assigns 20 points to "minority" applicants, without regard to other, individualized factors. *Gratz*, 122 F. Supp. 2d at 827.

and there is little dispute, that the proportion of such minority students in their classes in the most recent decade would have declined precipitously without the use of these racial preferences. *Id.* at 737; *Gratz*, 122 F. Supp. 2d at 830.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the Constitution provides that no State "shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. Amend. XIV, § 1.

Section 601 of Title VI of the Civil Rights Act of 1964 provides that:

> No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

42 U.S.C. § 2000d-1 (1994).

SUMMARY OF ARGUMENT

1. Because they classify applicants by race, the University and Law School admissions systems at issue must be subjected to searching inquiry. An integral part of that inquiry is whether the classification is narrowly tailored to a legitimate

governmental purpose. Here, that asserted purpose is the interest in assembling a class of students with diverse life experience, viewpoints, and outlooks; the purpose is not the creation of racial diversity in itself, but rather the composition of classes in which racial diversity informs and furthers educational diversity.

2. The University and Law School systems at issue, however, do not adequately provide for the individualized consideration of applicants that is necessary to demonstrate that they are narrowly tailored to the ends sought. In assigning to race or ethnicity an automatic presumption of diversity in life experience, outlook, and viewpoint, they substitute a racial classification for treatment of applicants as individuals. This use of race as a proxy for diversity violates constitutional and statutory mandates.

3. Because the programs under review fail narrow tailoring, the Court need not reach the question of whether diversity in education is a compelling governmental interest for equal protection purposes. Similarly, because the issues before the Court relate only to the Michigan systems, it is neither necessary nor desirable to enunciate fixed rules or boundaries in this area; it is enough to nullify Michigan's systems. There may well be university and professional school admissions systems in which race may appropriately be considered in the admissions process, but such systems are not before the Court.

* * *

ARGUMENT

THE UNIVERSITY OF MICHIGAN UNDERGRADUATE AND LAW SCHOOL ADMISSIONS SYSTEMS VIOLATE THE EQUAL PROTECTION CLAUSE AND TITLE VI

The central commands of the Equal Protection Clause and of Title VI are unequivocal, forbidding unequal treatment by the states and in programs receiving federal assistance, in the first instance by denial of equal application of the laws' protections, and in the second by denial of equal access based on race, color, or national origin to federally-funded educational opportunities. While diversity in the composition of the student bodies of colleges and professional schools is a constitutionally permissible goal (*Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978)), that diversity must be accomplished without abrogation of the paramount right to individualized consideration that is enunciated in the Equal Protection Clause and codified in Title VI. *Id.* at 318. When it is not, the central commands of these provisions are violated.

In analyzing the cases before the Court, we start with three well-established principles. *First*, the analysis under the Equal Protection Clause and the analysis under Title VI are identical. *Id.* at 287. *Second*, all racial classifications "must be analyzed by a reviewing court under [constitutional] strict scrutiny." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). *Third*, in order to satisfy

constitutional strict scrutiny, the racial classification must "serve a compelling governmental interest, and must be narrowly tailored to further that interest." *Id.* at 235.

A. Governmental Racial Classifications Are Presumptively Unlawful.

It is axiomatic that "[t]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). As Justice Powell has said, "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Bakke*, 438 U.S. at 317. Thus, the Court has "consistently repudiated '[distinctions] between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). Stated differently, under equal protection the notion of individual meritocracy mandates that every individual in our society is entitled to compete for opportunities on his or her own merits, without regard to membership in a racial or ethnic group.

Consistent with these bedrock principles, the Court has historically recognized only one justification for racial classifications—they may be used, sparingly, in remedial circumstances. *See, e.g., Fullilove v. Klutznick*, 448 U.S. 448 (1980) (racial classification in local government contracting sustained to remedy past

discrimination but subjected to the "most searching" scrutiny). It is not societal discrimination that is being corrected by remedial preferences (for this end is too amorphous and unlimited to be reached in this manner), but rather a specific, demonstrable history of discrimination in a workplace, a system of employment, or an educational institution.

The Court's precedents make the point forcefully. In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), a school board and teachers union negotiated a collective bargaining agreement which provided for a preference to minority teachers in the order of lay-offs. The preference was not tied to a specific history of discrimination in the school system. Instead, the school board argued that it was permissible as a remedy for societal discrimination because it enabled the school board to provide role models for its schoolchildren of their own race or ethnicity.

The Court held that the school board could not resort to such a system of race-based employment decisions in an attempt to remedy society-wide ills stemming from discrimination. *Id.* at 274. The Court noted that, "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Id.* at 276. Rather, as the Court held, Equal Protection Clause strict scrutiny requires that an employer demonstrate both "prior discrimination . . . before allowing limited use of racial classifications," and "convincing evidence that remedial action is warranted." *Id.* at 277.

Similarly, in *Bakke*, Justice Brennan expressed what he termed the "central holding" of the Court as follows: that "Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area." *Bakke*, 438 U.S. at 325 (Brennan, J., concurring).[5]

Finally, of course, narrow tailoring is an indispensable condition of any permissible racial classification. Thus, even when the compelling governmental interest in remedying specific existing discrimination or the lingering effects of past discrimination justifies the use of race-conscious means, those means must still satisfy the test of narrow tailoring. *Adarand*, 515 U.S. at 227. The means chosen must be closely suited to the permissible ends sought, and must not impinge on others' competing rights. Unless the means is narrowly tailored, race-conscious classifications remain odious and impermissible, however salutary their goals.

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[5] Both the University and the Law School, although not the Intervenors, specifically disclaim any reliance on a remedial justification. *See Grutter*, 288 F.3d at 737, 795; *Gratz*, 122 F. Supp. 2d at 816.

In short, racial classifications in the granting or withholding of government benefits, including access to educational opportunities, are presumptively unconstitutional, and may be justified under current law only when used in remedial circumstances and only when narrowly tailored to that end.

B. The University And Law School Programs Are Not Narrowly Tailored.

The central contention before the Court is that the racial preferences here are justified, not by the interest in remedying existing or past harms, but by something else, by the interest in educational "diversity"—that is, the interest in assembling college and law school classes whose members bring to the classroom and campus diverse viewpoints, life experience, outlooks, and thinking. It is said that such "diversity" is of great value to the educational process, and this can be taken as a given. The defect in the argument, however, is that where race alone is used as a proxy for diversity, as it is here, that use runs afoul of the Equal Protection Clause.[6]

Thus, while the Law School, for instance, provides examples of "diversity admissions" that

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[6] ADL takes no position on the question of whether diversity *vel non* is a compelling governmental interest, as we do not believe that an answer to the question is necessary to the resolution of this case. We do note that ADL supports diversity as a legitimate and appropriate educational goal.

plainly involve individualized scrutiny of applicants (*Grutter*, 288 F.3d at 736), the admissions system that it actually uses belies the examples. It may well be lawful to admit a minority student because the totality of the student's relevant characteristics (family background, life experience, exposure to several societies, national origin, race, overcoming adversity resulting uniquely from discrimination, knowledge of languages other than English, extra-curricular accomplishments, leadership skills, etc.) leads an admissions officer to a specific articulable conclusion that the applicant will bring views to the classroom that other candidates will not. It is quite another thing to presumptively assign such a conclusion to an applicant because the applicant has declared herself an African-American. The former does no violence to the expectation of other applicants that they will be evaluated as individuals, just as it does not diminish the dignity of the minority applicant. The latter serves only to assign persons to categories based on their race—the very evil the Equal Protection Clause forbids.[7]

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[7] Nor would it be permissible to argue that an institution's resources do not permit individualized consideration of applicants. It is not an answer to a constitutional violation to say that constitutional compliance is too costly. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989) ("administrative convenience" cannot justify denial of individualized procedures).

In short, by their use of race as a proxy for individualized consideration the admissions programs here fail narrow tailoring, and thus pass neither constitutional nor statutory muster. As conceived and applied, they cannot be sustained.

C. A "Bright-Line" Test Is Neither Necessary Nor Desirable, And Should Be Avoided.

Notwithstanding our disagreement with respondents' admissions systems, it is unnecessary to decide this case in a manner that would establish a "bright-line" test for *all* university and professional school admissions systems. In the first instance, the only systems before the Court are those of Michigan; a decision on systems (real or hypothetical) that are not before the Court would be a prohibited advisory opinion. *See United States v. Freuhauf*, 365 U.S. 146, 157 (1961). More to the point, consistent with the Court's precedents, the narrowest possible ground of decision should be preferred. *See Bakke*, 438 U.S. at 411; *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-69 (1947) (constitutional issues will not be determined "in broader terms than are required by the precise facts to which the ruling is to be applied")). Since the systems here fail the narrow tailoring test, they may be disallowed on that narrow ground alone, and other challenges and considerations left for another day and for other, concrete cases.

On policy grounds as well, it would be unfortunate if this case were used, as petitioners ask, as a vehicle for the wholesale rejection of "diversity" as a legitimate concern of university and professional

school admissions. The evil here is not consideration of race alone, but the lack of narrow tailoring and the resulting failure to provide individualized consideration of applicants. Stated otherwise, while we agree that the University's and Law School's admissions policies, in the quest for "diversity," deny to non-minority applicants the individualized consideration that is at the core of equal protection, we cannot say that in all cases any consciousness of the race of applicants would constitutionally nullify an admissions system.

ADL endorses only race-neutral means to achieve diversity in higher education, but this does not inevitably mean that all consciousness of race in admissions must always be unlawful. It is unrealistic to believe that university and professional school admissions officers will always be blind to the race of an applicant. The fault lies in the use of race as a proxy for something else—in this case, diversity—without any showing that it bears any real relationship to the type of diverse viewpoints, life perspectives, and experience that our institutions of higher education seek to bring to their classrooms. This Court need go no further to decide these cases.

* * *

While ADL supports the promotion of diversity in higher education, we as a society do not promote racial justice by subjecting some of our citizens to unequal treatment. Such race-conscious decisions embrace the very harm they are designed to cure, and in doing so run the risk of perpetuating racial

stereotypes and of fostering racial enmity. Our society disserves critical goals when it permits its institutions of higher education to allocate opportunity on the basis of race or ethnicity in an effort to achieve "critical mass," as the Michigan systems do. As Justice Douglas wrote in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), the Equal Protection Clause "commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized." *Id.* at 342 (Douglas, J., dissenting).

We do not doubt the good faith of the University and its Law School, either in their motives or their ends, but their strategies simply do not pass constitutional muster. ADL submits that the non-remedial racial preferences they employ, though well-intentioned, are antithetical to the Constitution and civil rights laws of the United States, and are contrary to the principles of equality on which our society is based.

* * *

CONCLUSION

By their use of race as a proxy for individualized consideration, the University of Michigan's and its Law School's admission systems fail narrow tailoring and thus violate the Equal Protection Clause and Title VI.

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BRIEF OF THE ASIAN AMERICAN LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Brown v. Bd. of Educ., 347 U.S. 483 (1954) 17, 20

Gong Lum v. Rice, 275 U.S. 78 (1927) 16

Gratz v. Bollinger, 122 F. Supp. 2d 811, 820, 825 (E.D. Mich. 2000) 22, 25

Grutter v. Bollinger, 288 F.3d 732, 749-52 (6th Cir. 2002) 7, 17, 22, 25-27

Ho Ah Kow v. Nunan, 12 F. Cas. 252 (C.C.D. Cal. 1879) 15

Ho v. San Francisco Unified Sch. Dist., San Francisco NAACP v. San Francisco Unified Sch. Dist., 59 F. Supp. 2d 1021 (N.D. Cal. 1999) 1, 4, 9, 13-16

Ho v. San Francisco Unified Sch. Dist., 147 F.3d 854, 864 (N.D. Cal. 1998) 1, 3, 4, 9-13, 16

Ho v. San Francisco Unified Sch. Dist., 965 F. Supp. 1316 (1997) 9, 10

In re Ah Chong, 2 F. 733 (C.C.D. Cal. 1880) 15

In re Lee Sing, 43 F. 359 (C.C.D. Cal. 1890) 16

In re Tiburcio Parrott, 1 F. 481 (C.C.D. Cal. 1880) 15

Lee v. Johnson, 404 U.S. 1215 (1971) 17

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) 2, 21, 24

New York City Transit Auth. v. Beazer, 440 U.S. 568, 582 n.22 (1979) 23

Northeastern Fla. Ch. of Assoc. Gen. Contractors of America v. City of Jacksonville, 508 U.S. 656, 666 (1993) 23

Plessy v. Ferguson, 163 U.S. 537 (1896) 16

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Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)	22, 23
Richmond v. Croson, 488 U.S. 469, 493 (1989)	6, 8, 20, 24-27
San Francisco NAACP v. San Francisco Unified Sch. Dist., 576 F. Supp. 34 (N.D. Cal. 1983)	9, 10
Shaw v. Reno, 509 U.S. 630, 643 (1993)	8, 26, 28
Shelley v. Kraemer, 334 U.S. 1, 22 (1948)	6, 21, 22
Tape v. Hurley, 66 Cal. 473, 6 P. 12 (1885)	4, 16
Unified States v. Wong Kim Ark, 169 U.S. 649 (1898)	16
Wong Him v. Callahan, 119 F. 381 (C.C.N.D. Cal. 1902)	16
Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 (1986)	24, 26
Yick Wo v. Hopkins, 118 U.S. 356 (1886)	15, 17

OTHER AUTHORITIES

	Page
James E. Bowman, *Anthropology: From Bones to the Human Genome*, 568 Annals Am. Acad. Pol. & Soc. Sci., 140, 141 (March 2000	25
Lee Cheng, *Group Preferences and the Law*, U.S. House of Representatives Sub-Committee on the Constitution Hearings (June 1, 1995), at *http://www.house.gov/judiciary/274.htm.*	11
Pat K. Chew, *Asian Americans: The "Reticent" Minority And Their Paradoxes*, 36 Wm. & Mary L. Rev. 1, 28-31 (Oct. 1994)	19, 20
Alan M. Dershowitz and Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext*, 1 Cardozo L. Rev. 379, 385-399 (1979)	18

TABLE OF AUTHORITIES—Continued

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Selana Dong, *"Too Many Asians": Challenge of Fighting Discrimination Against Asian-Americans and Preserving Affirmative Action*, 47 Stan. L. Rev. 1027, 1057 n.36 (May 1995)	19, 23
Michael Dorgan, *Desegregation or Racial Bias?*, San Jose Mercury, June 5, 1995, at 1A	12
Nathan Glazer, *Diversity Dilemma*, The New Republic, June 22, 1998, at http://www.tnr.com/archive/0698/062298/glazer062298.html	18
Julian Guthrie, *S.F. School Race-Bias Case Trial Starts Soon*, San Francisco Examiner, Feb. 14, 1999	11
Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability Of Dworkin's Defense Of Affirmative Action*, 31 Harv. C.R.-C.L. L. Rev. 1, 36 (Winter 1996)	5, 6, 18
Joyce Kuo, *Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools*, 5 Asian L.J. 181, 207-208 (May 1998)	4
David I. Levine, *The Chinese American Challenge to Court-Mandated Quotas in San Francisco's Public Schools: Notes from a (Partisan) Participant-Observer*, 16 Harv. Blackletter L.J. 39, 54 (Spring 2000)	4
Victor Low, *The Unimpressible Race* (East/West Publishing Co. 1982)	4
Charles McClain, *In Search of Equality* (Univ. of Cal. Press 1994)	4
Leo Rennert, *President Embraces Minority Programs,* Sacramento Bee (Metro Final), Apr. 7, 1995, at A1	19

TABLE OF AUTHORITIES—Continued

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Elmer Clarence Sandmeyer, *The Anti-Chinese Movement in California* (Univ. of Ill. Press 1991)	4
Evan P. Schultz, *Group Rights, American Jews, and the Failure of Group Libel Laws*, 66 Brook. L. Rev. 71, 111-12 (Spring 2000)	18
Lawrence Siskind, *Racial Quotas Didn't Work in SF Schools*, op-ed, San Francisco Examiner, July 6, 1994	4, 6
Stephan Thernstorm and Abigail Thernstrom, *Reflections on The Shape of the River*, 46 UCLA L. Rev. 1583, 1608 (June 1999)	28, 29

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Respondents,

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE ASIAN AMERICAN LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST

The Asian American Legal Foundation ("AALF"), based in San Francisco, California, was founded to protect and promote the civil rights of Asian Americans.[1] Americans of

[1] Letters of consent by all parties to the filing of this brief have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity, other than Amicus Curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

Asian origin have a particular interest in the law governing the use by public officials of race and ethnicity in admissions to state-supported academic institutions. Despite the fact that Asian Americans are considered culturally "different" from other Americans and have historically experienced—and continue to experience—overt racial and ethnic prejudice, diversity-based admission schemes are almost always used to exclude Asian Americans from educational institutions.

Diversity has been invoked as a justification for infringing upon the constitutional rights of San Francisco's Chinese American children. In *Ho v. San Francisco Unified School District*, 147 F.3d 854, 864 (N.D. Cal. 1998), schoolchildren of Chinese descent sued to end a consent decree that mandated racial and ethnic admissions quotas to achieve diversity. In *Ho*, after five years of litigation, and after the court found that the defendants had almost no chance of demonstrating a remedial purpose for their race-conscious admissions scheme, rather than face trial, the San Francisco Unified School District and the San Francisco NAACP abandoned the defense of the racial classification scheme and agreed to modify the consent decree that required the assignment of students to schools based on race. *See Ho v. San Francisco Unified Sch. Dist., San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1021 (N.D. Cal. 1999). AALF members supported the *Ho* litigation from the outset.

AALF is deeply concerned about the issues presently before this Court in *Gratz v. Bollinger*, No. 02-516, and *Grutter v. Bollinger*, No. 02-241. By granting preferences to applicants from certain ethnic groups, the admissions programs of the University of Michigan college and law school (together, the "University") place racial barriers before Chinese Americans and other "non-preferred" individuals that are unjustified by any remedial purpose. With the University unable to articulate any such remedial purpose, its ability to use race in admissions stands or falls on whether creation of

an ethnically diverse student body is a compelling government interest. A decision by this Court that diversity is a compelling government interest will have implications far beyond this case, however. Among other things, such a decision would strongly encourage the San Francisco Unified School District to return to a system of race-based assignments, which the plaintiffs in *Ho* fought so long to end.

If this Court rules that race-conscious treatment can be justified by the goal of diversity, the San Francisco school district will likely reimpose its racial quotas. Moreover, upon graduation from high school, members of the *Ho* plaintiff class will face a proliferation of similar barriers as they apply to college and, later, graduate and professional schools. Not that *any* person should be disfavored because of his or her race, but it would be ironic indeed were Chinese Americans to find themselves classified as a "non-preferred" ethnicity in the 21st century, when a dominant theme of their history in this country has been one of *de jure* discrimination.

Amicus curiae AALF submits that the examples of both this history and the *Ho* case caution against allowing equal-protection rights to be eroded in the name of social agendas that, no matter how well-intentioned, would subordinate the rights of the individual to the purported good of some greater whole. Accordingly, AALF and its constituents respectfully ask this Court to hear their arguments in favor of Petitioners.

SUMMARY OF ARGUMENT

In furtherance of the goal of a diverse student body, the University of Michigan has enacted race-based admissions programs at its college and law school which, unchecked by any remedial purpose, will continue in perpetuity. This use of race violates the Fourteenth Amendment right of University applicants to the equal protection of the laws. If the Court upholds the University's consideration of race in admissions, the decision will reawaken race-based treatment of individuals in settings far beyond the halls of higher education.

In San Francisco, for instance, such a ruling would threaten that, after a century-and-a-half-long struggle to be treated as individuals, children of Chinese descent might again be singled out for unequal treatment by the city's school system. In particular, any holding that elevated racial diversity to a compelling state interest would endanger the remedy recently secured in *Ho v. San Francisco Unified School District*. In that case, the school district sought to prevent "racial isolation" through a consent decree which classified all children in the district into nine arbitrarily-defined ethnic groups, and required that members of four ethnic groups be present at each of the city's schools. *Ho*, 147 F.3d 854, 856 (9th Cir. 1998). Furthermore, no one group could constitute more than 45 percent of the student body at any "regular" school or 40 percent at any "alternative" school, with the result that Chinese American children, who were the most numerous of the defined groups, faced formidable obstacles in gaining admission to schools of their choice. *See id.* at 856-59; David I. Levine, *The Chinese American Challenge to Court-Mandated Quotas in San Francisco's Public Schools: Notes from a (Partisan) Participant-Observer*, 16 Harv. BlackLetter J. 39, 54 (Spring 2000).

The *Ho* case demonstrates the modern-day dangers of Kafkaesque social engineering in a multi-racial society. It also came against the backdrop of a long history of *de jure* discrimination against individuals of Chinese descent in San Francisco. Viewed by many as faceless members of a "yellow horde," these individuals were often the victims of state action aimed at protecting others from the supposed numbers of their race. *See, e.g.*, Charles McClain, *In Search of Equality* (Univ. of Cal. Press 1994); Elmer Clarence Sandmeyer, *The Anti-Chinese Movement in California* (Univ. of Ill. Press 1991); Victor Low, *The Unimpressible Race* (East/West Publishing Co. 1982). The onus extended to Chinese American children who sought to attend the state's schools. *See id.*; Joyce Kuo, *Excluded, Segregated and Forgotten: A*

Historical View of the Discrimination of Chinese Americans in Public Schools, 5 Asian L.J. 181, 207-208 (May 1998). In one such example, in *Tape v. Hurley*, 66 Cal. 473, 6 P. 12 (1885), the court had to order San Francisco public schools to admit a Chinese American girl. In response, the State of California established separate "Chinese" schools, to which Chinese American schoolchildren were restricted by law until well into the twentieth century. *See Ho*, 147 F.3d at 864.

As discussed more fully below, in case after case, the rights of people of Chinese descent were vindicated only by strict application of the Fourteenth Amendment's protection of individual rather than group rights. In *Ho*, for example, defendants agreed to cease assigning students by race only after the court made clear that they were unlikely to succeed in proving, under strict scrutiny, that their assignment scheme furthered any remedial purpose. *See Ho*, 59 F. Supp. 2d at 1024, 1025. The right secured in *Ho*—essentially the right of all Americans to be free of racial classification by the government—will again be endangered if this Court issues a ruling allowing state institutions to adopt race-based diversity programs, freed from the constraints of any remedial purpose.

There is ample reason to look askance at any program that classifies people by ethnicity to achieve some "ideal" racial composition. There is no difference between a policy of admitting some people because there are "not enough" of their race and a policy of excluding others because there are "too many" of theirs. This country's most respected universities have a shameful history of such policies, namely, the admission ceilings first adopted for Jewish students in the 1920s, out of concerns over Jewish "over-representation" at those schools. Indeed, the arguments the University now makes about the salutary effects of its race-conscious admissions policies here were eerily foreshadowed by Harvard University's claims about its Jewish quotas back then. "Harvard initiated its diversity-discretion program to decrease the number of Jewish students; President Lowell of Harvard

called it a 'benign' cap, which would help the University get beyond race." Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability Of Dworkin's Defense Of Affirmative Action*, 31 Harv. C.R.-C.L. L. Rev. 1, 36 (Winter 1996).

The San Francisco admissions policy challenged by the *Ho* litigants similarly reduced "over-representation" in the city's schools by Chinese Americans. Strictly limited to 45 or 40 percent of any school's student body (for regular and alternative schools), Chinese Americans were, because of their numbers, "capped out" at the most desirable schools. *See Levine, supra*, at 55-56. A notorious manifestation of this racial ceiling was at Lowell High School, considered the best high school in the district and one of the best in California. Lowell was the only school in the district that accepted and rejected applicants on the basis of numerical qualifications, i.e., grades and test scores. *See id.* Because admission on a strictly by-the-numbers basis would have caused Lowell's student body to be more than 40 percent Chinese American, the San Francisco school district required Chinese American applicants to score higher than members of any other racial group, including White, Korean and Japanese, to gain admission. *See id.*; Lawrence Siskind, *Racial Quotas Didn't Work in SF Schools*, op-ed, San Francisco Examiner, July 6, 1994. Thus, like Jewish applicants to American universities in the past, Chinese American applicants to Lowell throughout the 1980s and 1990s were being penalized for their ethnicity and success, until the *Ho* case finally brought these practices to an end.

As the jurisprudence of this Court makes clear, state use of race is always suspect and should be strictly reserved for remedial settings. That limitation is mandated by the personal nature of the right in question—a right that vests solely in the individual. *See Shelley v. Kraemer*, 334 U.S. 1, 22 (1948); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200,

227 (1995). Accordingly, the personal right not to be burdened by racial classification should be abridged only in the narrow circumstance where such action is unavoidable in restoring to other individuals *their* usurped constitutional rights. Otherwise, as this Court warned in *Richmond v. Croson*, 488 U.S. 469, 493 (1989), the state's interference threatens to subvert the goals of the Fourteenth Amendment, promoting feelings of "racial inferiority" and "racial hostility."

Also demonstrating that diversity cannot rise to a compelling government interest is the impossible task the University faced in narrowly tailoring its admissions programs to its vague goal of diversity. As the Sixth Circuit noted in this matter, to be narrowly tailored, a race-conscious remedial program must be limited in scope and time, and must have been adopted only after consideration of race-neutral alternatives. *Grutter v. Bollinger*, 288 F.3d 732, 749-52 (6th Cir. 2002). At best, however, race is an unhappy proxy for the personal attributes the University believes constitute diversity. It is thus not strange that the University's diversity programs, enacted for pedagogical purposes, are capricious with respect to those that are favored, and formless, in that they will shift with every change in the pedagogical perception of diversity and will continue without end.

The Sixth Circuit implicitly recognized the impossibility of narrowly tailoring a diversity program. It accorded "deference" to the University with respect to "which groups to target" for its race-determinative admissions plans *Id.* at 751. It found that, unlike in a remedial setting, a diversity program "does not have a self-contained stopping point." *Id.* at 752. But there is nothing in equal-protection jurisprudence to support the notion that, under the strict-scrutiny test, a remedial program enacted to *restore* constitutional rights should be held to a higher standard than a diversity program that *deprives* disfavored individuals of their constitutional rights. Such logic would also fly in the face of the rule that, in exam-

ining use of race, there should be "consistency" and application of the "same standard of justification." *Adarand*, 515 U.S. at 224. The only reasonable conclusion is that the University's admissions programs cannot survive strict scrutiny.

In short, the University's goal of diversity, however well-intentioned, should be pursued using means other than the dangerous proxy of race. Here, the use of race is not needed to restore to any individuals their constitutional rights. Given that lack of necessity, there is simply no justification for race-conscious programs that abridge individual rights. As with the Hippocratic oath taken by physicians, here the cardinal rule should be, "First, do no harm."

For these and other reasons set forth herein, the University's race-conscious admissions programs should be found unconstitutional.

ARGUMENT

I. USE OF RACE IS "ODIOUS" AND SHOULD BE RESERVED FOR SITUATIONS WHERE IT WILL VINDICATE RATHER THAN TRAMMEL THE RIGHTS OF INDIVIDUALS.

A. A Decision Elevating Diversity To A Compelling State Interest Would Likely Result In Renewed Discrimination Against San Francisco's Chinese American Schoolchildren.

This Court has repeatedly warned that "[c]lassifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (*quoting Hirabayashi v. United States*, 320 U.S. 81, 100). Use of race "threaten[s] to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Id.* at 643. Accordingly, the Fourteenth Amendment provides that "[n]o State [actor] shall . . . deny to

any person within its jurisdiction the equal protection of the laws." *See Croson*, 488 U.S. at 493.

There can be no doubt that the University's race-conscious admissions programs burden individuals of the non-favored races. The University argues that the diversity brought to the halls of its college and law school is well worth the sacrifice of those displaced by its use of race. Whatever the benefits of this skin-deep diversity, however, it comes at a heavy price. It would also be a mistake to assume that the issues at stake here concern only the pedagogical needs and goals of higher education. Any decision upholding diversity as a compelling government interest justifying the use of race would have a chilling effect on individual rights far beyond academia. Even in education alone, the influence of such a decision would be felt all the way down to the elementary-school and kindergarten level.

In particular, in a relevant case which AALF respectfully brings to the Court's attention, such a decision would likely result in San Francisco's schoolchildren of Chinese descent again facing race-based discrimination in the city's public school system. In *Ho v. San Francisco Unified School District*, which began in 1994, San Francisco's Chinese American schoolchildren were forced to turn to the courts for redress of their Fourteenth Amendment rights, in order to halt the school district's policy of classifying and assigning them to the city's K-12 schools on the basis of their race. *See Ho*, 147 F.3d 854; *Ho*, 59 F. Supp. 2d 1021 (on remand); *Ho v. San Francisco Unified Sch. Dist.*, 965 F. Supp. 1316 (1977) (decision giving rise to appeal in 147 F.3d 854).

In *Ho*, the plaintiffs collaterally challenged a consent decree entered in *San Francisco NAACP v. San Francisco Unified School District*, 576 F. Supp. 34 (N.D. Cal. 1983). In that earlier case, a race-based assignment program was enacted with the goal of preventing "racial isolation" in the city's schools. *See Ho*, 965 F. Supp. at 1322; *see also Ho*,

147 F.3d at 859. As explained when the consent order was entered: "The key objective of the student desegregation plan is to eliminate racial/ethnic segregation or identifiability in any school, classroom, or program, and to achieve throughout the system the broadest practicable distribution of students from all the racial/ethnic groups comprising the general student population." *San Francisco NAACP*, 576 F. Supp. at 40. Under the admissions program, nine ethnic groups were arbitrarily defined, including "Chinese"; members of at least four of the groups were required to be present at each school; and no one group could represent more than 45 percent of the student body at any regular school or 40 percent at any alternative school. *See id.; see also Ho*, 147 F.3d at 856.

While the San Francisco admissions program was purportedly remedial in nature, in fact, the promotion of diversity was the only real purpose. In particular, there had never been any findings of a constitutional violation to necessitate a race-based remedy. *See Ho*, 965 F. Supp. at 1320. And significantly, the "remedy" was secured on behalf of a class defined as "*all* children of school age who are, or may in the future become, eligible to attend the public schools of the S.F.U.S.D." *Id.* at 1322 (emphasis added); *San Francisco NAACP*, 576 F. Supp. at 36. As described by the district court, "This plan is designed to provide relief for all San Francisco school children; it does not address the needs of any particular racial or ethnic group." 576 F. Supp. at 49.

Moreover, by the time of the *Ho* challenge, the school district had enlarged the original nine racial categories to thirteen, to take into account the emergence of additional racial groups in the district. *See Ho*, 147 F.3d at 858. Nevertheless, despite the numerous racial categories, no provision was made for the growing number of children of mixed race, or for those who preferred not to declare their race. *See id.* at 862 ("They were not given the option of refusal.").

B. The Experiences Of The Named Plaintiffs And Class In *Ho* Demonstrate That Mandated Diversity Harms Individuals, Even Members Of Groups That Have Historically Suffered Discrimination.

The heaviest burden of the school district's diversity assignment program fell on students identified as "Chinese." With a long history in San Francisco, over the years Chinese Americans had come to constitute the largest identifiable ethnic group in the city. *See* Levine, *supra*, at 55-56. Accordingly, in the student assignment process, a child identified as Chinese was most likely to be "capped out" at many desired schools and forced to attend a non-chosen school, often far from his or her neighborhood. *See id.* At Lowell High School, an academic "alternative" high school that admits students from middle school based on a score derived from a combination of grades and standardized-test results, the mandated diversity was maintained by forcing Chinese applicants to score higher than applicants of all other groups, including White, Japanese, and Korean, in order to gain admission. *See id.*; Siskind, *supra*. Also, even where preferences were not required to maintain the racial caps, the district nevertheless adopted a policy of granting preferences to applicants classified as "Hispanic" and "African American." *See Ho*, 147 F.3d at 858.

The parents of affected children and other concerned Chinese Americans, including officials of the Chinese American Democratic Club, remonstrated with the school district, but the unlawful discrimination continued. *See Levine, supra*, at 56-58. Parents' frustration mounted as their children were turned away from schools for no other reason than that "there were 'too many Chinese.'" *Id.* at 61. Children were stigmatized. "He was depressed and angry that he was rejected because of his race. Can you imagine, as a parent, seeing your son's hopes denied in this way at the age of 14?"

Julian Guthrie, *S.F. School Race-Bias Case Trial Starts Soon*, San Francisco Examiner, Feb. 14, 1999, at C-2 (quoting mother of student "capped out" at Lowell). As Lee Cheng, Secretary of AALF, testified in a written statement for hearings held by the U.S. House of Representatives, Sub-Committee on the Constitution:

> Many Chinese American children have internalized their anger and pain, confused about why they are treated differently from their non-Chinese friends. Often they become ashamed of their ethnic heritage after concluding that their unfair denial is a form of punishment for doing something wrong.

Lee Cheng, *Group Preferences and the Law*, U.S. House of Representatives Sub-Committee on the Constitution Hearings (June 1, 1995), *at* http://www.house.gov/judiciary/274.htm.

Another byproduct of the mandated diversity plan was "rampant dishonesty," as parents of all races attempted to misreport children's racial identity to gain admission to desired schools. *See* Michael Dorgan, *Desegregation or Racial Bias?*, San Jose Mercury, June 5, 1995, at 1A. "[S]ome black families in Bayview-Hunter's Point have gone so far as to take Hispanic surnames to protect their children from busing."- *Id.* at 10A. "People know if they want to go to a particular school that has a lot of Caucasians, they should put down something other than Caucasian, and they do." *Id.* at 10A (quoting School Board President Dan Kelly).[2]

On July 11, 1994, the *Ho* class action was filed by three Chinese American schoolchildren denied admission to city schools because of their race, suing on behalf of themselves and "all children of Chinese descent of school age who were current residents of San Francisco and who were eligible to

[2] On the school enrollment forms, parents were threatened with "perjury" if they misreported the race of their child. *See Ho*, 147 F.3d at 862.

attend public schools of the school district." Levine, *supra*, at 62-63. The named plaintiffs' situations amply illustrate the discrimination meted out to Chinese American schoolchildren by the school district:

> Brian Ho was five years old at the time the suit started. In 1994, he was turned away from his two neighborhood schools when he applied to kindergarten because the schools were capped out for children of Chinese descent. He was assigned to a school in another neighborhood.
>
> Patrick Wong, then fourteen years old, applied for admission to Lowell High School in 1994. He was rejected because his index score was below the minimum required for Chinese American applicants. His score was high enough that he would have been admitted to Lowell had he been a member of any other racial or ethnic group recognized in the consent decree. He was rejected at two other high schools because Chinese Americans were capped out at both. When he tried to apply to a fourth high school, a newly established academic high school, his mother was told that all spaces for Chinese Americans were filled even though spaces for applicants of other racial or ethnic groups were still available.
>
> The family of Hillary Chen, then eight years old, moved from north of Golden Gate Park to a neighborhood south of the park in December 1993. Hilary was not allowed to transfer into any of three elementary schools near her new home because Chinese Americans were capped out at all three schools.

Id. at 61.

C. Settlement Was Reached In *Ho* Only Because The Law Was Clear That The Goal Of Diversity Would Not Justify The School District's Use Of Race.

After some five years of vigorous litigation, the *Ho* case settled on the first day of trial, with defendants agreeing

to cease using race to assign students to the city's schools, and agreeing to end the mandatory requirement of self-identification by race on student enrollment forms. *See Ho*, 59 F. Supp 2d 1021 (approving settlement).

Beyond question, settlement in *Ho* would never have been reached if the district court and the Ninth Circuit (on an interlocutory appeal from the district court's denial of plaintiffs' request for dissolution of the consent decree) had not emphasized to defendants that, under this Court's decisions in cases such as *Croson* and *Adarand*, the goal of diversity provided no justification for use of race, and that at trial the school district would have to prove a past constitutional violation tied to its present use of race—a burden defendants were extremely unlikely to carry. *See Ho*, 147 F.3d at 864-65 ("[T]he temporary expedient of using race is to compensate individual persons themselves injured by the malevolent use of race."); *Ho*, 59 F. Supp. 2d at 1024-25 (noting burdens placed by Ninth Circuit's ruling and district court's prior finding that "defendants had shown little likelihood of prevailing at trial").[3]

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[3] Even after settlement was reached, the school district tried to obtain the district court's approval of a new admissions plan that, like the University's admissions programs at issue here, would have used race as a non-exclusive "diversity" factor. Under the proposed plan, instead of imposing the hard-and-fast quotas and caps ended by the settlement, the school district would have granted preference in student assignment based on a "diversity index" composed of four factors, one of which was race/ethnicity:

(1) Low socio-economic status;

(2) Limited proficiency in English;

(3) Limited math and reading achievement levels; and

(4) Racial/ethnic diversity.

Levine, supra, at 110-11. The district court struck down the proposed assignment plan for failing to meet the constitutional test of strict scrutiny and for violating the terms of the settlement agreement. *See id.* at 113-14. Again, without "diversity" as a compelling state interest, defendants could not meet the constitutional test.

Thus, key to the *Ho* plaintiffs' vindication of their constitutional rights was the recognition by the district court, and ultimately the school district, that the goal of diversity could not be used to justify the district's use of race. Therefore, if this Court, in deciding *Gratz* and *Grutter*, elevates diversity to a compelling government interest, the San Francisco Unified School District will most likely again try to implement a race-based student assignment program, depriving the city's Chinese American schoolchildren of the relief secured in *Ho*. It is also likely that other school districts around the country would similarly subject millions of other schoolchildren to race-conscious assignment policies.

D. The Historical Treatment Of Chinese Americans Amply Illustrates The Wrong Of Treating Individuals As Faceless Members Of Racial Groups.

The experience of Chinese Americans, as exemplified in *Ho* and other cases, illustrates why group identity should never be elevated above individual rights. The struggle by Chinese American schoolchildren in *Ho* against race-based treatment was particularly ironic in that, for much of the preceding century and a half, Americans of Chinese descent had struggled against racial discrimination, often in San Francisco. Throughout their history in this country, individuals of Chinese descent have sought to participate in and contribute to American society but have often faced significant barriers because of their race. *See, e.g.*, McClain, *supra*; Sandmeyer, *supra*; Low, *supra*. Their experiences included some so dire as to give rise to the expression "a Chinaman's Chance," a term meaning "having little or no chance of succeeding." News Watch Diversity Style Guide, *at* http://

newswatch.sfsu.edu/guide. Time and again, Chinese Americans have received equal treatment only after appealing to the federal judiciary for the protections afforded individuals by the United States Constitution.

For example, in *Ho Ah Kow v. Nunan*, 12 F. Cas. 252 (C.C.D. Cal. 1879) (No. 6,546), a district court invalidated San Francisco's infamous "Queue Ordinance" on equal-protection grounds. In *In re Ah Chong*, 2 F. 733 (C.C.D. Cal. 1880), the court found unconstitutional an act forbidding Chinese Americans from fishing in California waters. In *In re Tiburcio Parrott*, 1 F. 481 (C.C.D. Cal. 1880), the court declared unconstitutional a provision of California's 1879 constitution that forbade corporations and municipalities from hiring Chinese. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), this Court ruled that Chinese were "persons" under the Fourteenth Amendment and could not be singled out for unequal burden under a San Francisco laundry licensing ordinance. In *In re Lee Sing*, 43 F. 359 (C.C.D. Cal. 1890), the court found unconstitutional the "Bingham Ordinance," which mandated residential segregation of Chinese Americans. In *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), this Court ruled that a Chinese American boy, born in San Francisco, could not be prevented by San Francisco officials from returning to the city after a trip abroad.

Chinese American schoolchildren were long denied access to the public schools. In *Tape v. Hurley*, 66 Cal. 473, 6 P. 12 (1885), the court had to order San Francisco public schools to admit a Chinese American girl who was denied entry because, as stated by the State Superintendent of Public Instruction, public schools were not open to "Mongolian children." *See* McClain, *supra*, at 137. In response, the California legislature authorized separate "Chinese" schools, to which Chinese American schoolchildren were restricted by law until well into the twentieth century. *See Ho*, 147 F.3d at

864; *see also* Kuo, *supra*, at 207-08 (noting that "Chinese" were segregated even when "Japanese" were not).

Even though it is not widely recognized, the experiences of Chinese American schoolchildren had much to do with the shaping of "separate but equal" jurisprudence as it related to education. In *Wong Him v. Callahan*, 119 F. 381 (C.C.N.D. Cal. 1902), the district court denied a child of Chinese descent the right to attend his neighborhood school in San Francisco, reasoning that the "Chinese" school in Chinatown was "separate but equal." 119 F. at 382. In *Gong Lum v. Rice*, 275 U.S. 78 (1927), this Court affirmed that the separate-but-equal doctrine articulated in *Plessy v. Ferguson*, 163 U.S. 537 (1896), applied to schools, finding that a nine-year-old Chinese American girl residing in Mississippi could be denied entry to a "white" school because she was a member of the "yellow" race. *Id.* at 87.

Thus, in *Lee v. Johnson*, 404 U.S. 1215 (1971), Justice Douglas wrote that California's "establishment of separate schools for children of Chinese ancestry . . . was the classic case of *de jure* segregation involved [and struck down] in *Brown v. Board of Education*, 347 U.S. 483 [1954]. . . ." *Id.* at 1216. "*Brown v. Board of Education* was not written for blacks alone. It rests on the Equal Protection Clause of the Fourteenth Amendment, one of the first beneficiaries of which were the Chinese people of San Francisco. *See Yick Wo v. Hopkins*, 118 U.S. 356." 404 U.S. at 1216.

In the context of the long history of Chinese Americans in San Francisco, the *Ho* case presents distinct ironies. As described above, the challenged race-based assignment plan had as its stated goal the promotion of diversity and elimination of racial identification, and yet San Francisco was and is one of the most diverse cities in the nation, a fact reflected in the composition of its schools. It boasts a true multi-ethnic population with no single group in the majority, and in many ways exemplifies the diversity toward which the

country strives. In spite of all this, the goal of diversity became a tool of oppression wielded principally against Chinese American schoolchildren—members of a community that had suffered similar discrimination in the past. If nothing else, *Ho* shows that once the state is allowed to use race for non-remedial purposes, the rights of all individuals are in danger.

E. Placing Priority On Group Identity Inevitably Results In The Trammeling Of Individual Rights.

Proponents of diversity as a compelling interest typically focus on the perceived pedagogical value or other benefits that diversity brings. *See Grutter*, 288 F.3d at 736-37. Underlying this argument, however, is the mistaken assumption that it is just to deprive an individual of benefits because the "group" with which the individual is identified already has "more than its fair share." This kind of thinking invariably is used to oppress individuals, diminishing them as persons in proportion to the perceived numbers of their "group." Obviously, in most cases, the burden will fall heaviest on the poorer or weaker members of the disfavored group.

In one noteworthy and cautionary example in higher education, in the 1920s, Harvard College and other prominent universities reacted to the perceived "over-representation" of Jews in their student bodies by setting up informal quotas and "diversity" programs that persisted through the 1950s. *See* Evan P. Schultz, *Group Rights, American Jews, and the Failure of Group Libel Laws*, 66 Brook. L. Rev. 71, 111-12 (Spring 2000); Alan M. Dershowitz and Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext*, 1 Cardozo L. Rev. 379, 385-399 (1979); Nathan Glazer, *Diversity Dilemma*, The New Republic, June 22, 1998, *at* http://www.tnr.com/archive/0698/062298/glazer062298.html. These institutions

argued that their diversity schemes were beneficial to all and would lessen ethnic tension. "Harvard initiated its diversity-discretion program to decrease the number of Jewish students; President Lowell of Harvard called it a 'benign' cap, which would help the University get beyond race." Kang, *supra*, at 36. Yet the undeniable effect was to single out individuals for unequal treatment merely because they were identified with a particular religion or ethnicity. "In the 1930s, it was easier for a Jew to enter medical school in Mussolini's Italy than in Roosevelt's America." Siskind, *supra*.

In *Ho*, a similar sentiment was voiced—that "Chinese" already had "enough," and that Chinese American individuals who were turned away had no right to complain:

> "[T]he Chinese are the largest group at most of the best schools in the city. They can't have it all. If anything, I'd say lower the caps, don't raise them—otherwise we're headed back to segregated schools, only all Chinese instead of all white."

Selana Dong, *"Too Many Asians": Challenge of Fighting Discrimination Against Asian-Americans and Preserving Affirmative Action*, 47 Stan. L. Rev. 1027, 1057 n.36 (May 1995) (citation omitted) (quoting Lulann McGriff, former president of San Francisco NAACP); *see also* Levine, *supra*, at 138 (observing that to some, "the *Ho* case is about how much is 'enough' for one racial or ethnic group").

Today, even outside of the *Ho* litigation, some similarly consider Chinese Americans to be over-represented in the nation's academic institutions. *See* Glazer, *supra*; Dong, *supra*, at 1057, nn.4-5; Leo Rennert, *President Embraces Minority Programs*, Sacramento Bee (Metro Final), Apr. 7, 1995, at A1 (reporting that former President Clinton, in speaking favorably about race-based admissions programs, commented that otherwise, "'there are universities in Cali-

fornia that could fill their entire freshman classes with nothing but Asian Americans'"). "To keep a lid on the number of Jewish students—denounced as 'damned curve raisers' by less talented classmates—the universities imposed quotas, sometimes overt, sometimes covert . . . . Today's 'damned curve raisers' are Asian Americans, who are winning academic prizes and qualifying for prestigious universities in numbers out of proportion to their percentage of the population." Kang, *supra*, at 47 n.189 (quoting Don Nakanishi, *A Quota on Excellence*, in The Asian American Educational Experience: A Sourcebook for Teachers and Students, at 275 (quoting Los Angeles Times reporter Linda Matthews)) (internal quotation marks omitted). And again, mandated "diversity" is seen as the answer. *See* Pat K. Chew, *Asian Americans: The "Reticent" Minority And Their Paradoxes*, 36 Wm. & Mary L. Rev. 1, 61-64 (Oct. 1994) (universities use quotas to limit Asian American enrollment).

The goal of mandated diversity, espoused by the University here, emphasizes the group over the individual. The Constitution says nothing about "ideal" racial mixtures or diversity, however. Nor should it, given that individuals have an undeniable existence with interests that can be trammeled, while race is a malleable concept at best, easily subject to misuse. As history shows, discretion to consider ethnicity in the pursuit of a diverse student body invariably leads to oppression. *See* Dershowitz & Hanft, *supra*, at 399 ("Both then and now . . . such unlimited discretion makes it possible to target a specific religious or racial group—then for decrease, and now for increase . . . .").

It is for such reasons that the Constitution has been wisely construed to protect individuals against classification by race. In *Brown v. Board of Education*, 347 U.S. 483, for example, this Court recognized the inherent inequality in allowing schools to segregate students on the basis of race. That same reasoning should apply here.

F. A Pedagogical Desire For Diversity Cannot Rise Above The Constitution's Guarantee Of Equal Protection To Individuals.

This Court's jurisprudence teaches that the Fourteenth Amendment's stricture on race-based treatment by the state is absolute, except where such action is necessary to further the compelling state interest of vindicating the rights of individuals who were subject to racial discrimination. As this Court warned in *Croson*, 488 U.S. 469, unless racial classifications are "reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to the politics of racial hostility." *Id.* at 493. As explained by the dissent in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), later vindicated by this Court in *Adarand*, 515 U.S. 200, "[m]odern equal protection doctrine has recognized only one such interest: remedying the effects of racial discrimination." *Metro Broadcasting*, 497 U.S. at 612 (O'Connor, J., dissenting).

Thus, as this Court declared in *Adarand*, there are no "benign" racial classifications. "[T]he Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*. It follows from that principle that all governmental action based on race . . . should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." 515 U.S. at 227 (emphasis added). As this Court has repeatedly emphasized, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the *individual*." *Shelley*, 334 U.S. at 22 (emphasis added).

While the Fourteenth Amendment protects individuals from racial classification, there is no countervailing principle that would subordinate individual rights to the University's perceived need for some ethnic mix constituting "diversity." The goal of diversity cannot substitute for a remedial purpose, because diversity is "simply too amorphous, too insubstantial,

and too unrelated to any legitimate basis for employing racial classifications." *Metro Broadcasting*, 497 U.S. at 612 (O'Connor, J., dissenting). More important, in any equal-protection analysis, the rights of the individual are paramount. In both *Ho* and the instant cases, a state actor has essentially argued that diversity programs are benign because they are not motivated by animus and are applied impartially. In *Shelley*, 334 U.S. 1, this Court rejected the notion that equal protection is not violated when individual rights are trammeled as a result of the state's impartial enforcement of a scheme with discriminatory impact on an individual. In that case, the Court considered whether states might enforce covenants in residential deeds restricting occupancy to Caucasians. *See* 334 U.S. at 4-7. Rejecting the argument that, because the state courts were equally willing to uphold restrictive covenants against Caucasians, such action did not violate individuals' rights to equal protection, the Court explained, "The rights established are *personal* rights. . . . Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Id.* at 22 (emphasis added).

Similarly, here, as in *Shelley* and *Ho*, the University may not trammel the rights of individuals of one group merely because it does so dispassionately and is equally willing to trammel the rights of members of other groups. And here, as in *Shelley* and *Ho*, because the Constitution protects individuals, the rights of affected individuals should be placed above all other considerations, including the perceived good of having present some ideal racial mix.

G. The Result In *Bakke* Does Not Support The Non-Remedial Use Of Race.

In upholding the University's race-conscious admissions programs, the courts below reasoned that they were following Justice Powell's articulation in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), that in certain

hypothetical circumstances diversity could rise to a compelling government interest. *See Grutter*, 288 F.3d at 739; *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 820, 825 (E.D. Mich. 2000). That statement, however, was essentially dictum expressed only by Justice Powell. Also, Justice Powell failed to consider that the Harvard Plan, upon which he expressly based his dictum concerning a constitutional diversity-discretion plan, was originally designed to keep Jews out of Harvard College:

> In *Bakke*, for example, Justice Powell lauded Harvard University's "soft" diversity-discretion model of affirmative action as constitutionally preferable to a strict, "hard" quota system as adopted by the University of California. He failed to mention, however, that Harvard's program had anti-Semitic roots. Harvard initiated its diversity-discretion program to decrease the number of Jewish students . . . .

Kang, *supra*, at 36. More to the point, the *Bakke* opinion did not uphold the admissions program in question; it found it unconstitutional. *See* 438 U.S. at 272, 320. Thus, Justice Powell's speculation as to a program that might be found constitutional can say little about the present case. *See New York City Transit Auth. v. Beazer*, 440 U.S. 568, 582 n.22 (1979) (noting this Court's policy of "strict necessity" in deciding constitutional issues, as well as its long-standing refusal to issue advisory opinions).

Similarly, here, the University's admissions programs do not merit lenient treatment because of any purportedly attenuated effect on non-favored applicants, or because race is only one of the factors considered in admissions. As stated by this Court, it is not the ultimate result of the racial classification that constitutes the harm, but the imposition of the classification itself: "The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Northeastern Fla. Ch. of*

Assoc. Gen. Contractors of America v. City of Jacksonville, 508 U.S. 656, 666 (1993).

Furthermore, for the applicants who are affected, the effect is neither attenuated nor slight. That is, even if the University's consideration of race diminished the odds of admission for non-favored applicants, such as Chinese American applicants, by only 1 percent—the University concedes the figure is much higher—it would still constitute a higher barrier than that faced by members of favored races. Most important, it is undeniable that many such applicants are denied entry solely based on race. That is, notwithstanding the University's attempts to hide race among the other factors considered, the rejected applicant would have been granted entry if he or she had been a member of a favored race. For such an applicant, the precise odds of entry and any attenuated effect of race in the process are quite meaningless; this person was rejected because of race.

Therefore, even if the University is right that its use of race creates a diversity that promotes the general good, the "mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight," *Croson*, 488 U.S. at 500, and cannot rise to a compelling government interest. "Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the government may not allocate benefits or burdens among individuals based on the assumption that race or ethnicity determines how they act or think." *Metro Broadcasting*, 497 U.S. at 602 (O'Connor, J., dissenting).

II. AS THERE IS NO OBJECTIVE STANDARD BY WHICH RACIAL DIVERSITY MAY BE MEASURED OR LIMITED IN SCOPE OR TIME, THE UNIVERSITY'S ADMISSIONS PROGRAMS CANNOT BE NARROWLY TAILORED TO ADVANCE A COMPELLING STATE INTEREST.

A. The University's Lack Of An Objective Standard For "Racial Diversity" Renders Its Use Of Race Capricious.

As set forth above, the University's goal of diversity cannot constitute a compelling government interest to justify classification of applicants by race. Even assuming it could, however, the University's use of race is too vague and capricious to withstand strict scrutiny. As this Court has stated, "racial classifications . . . are constitutional only if they are narrowly tailored measures that further compeling government interests." *Adarand*, 515 U.S. at 227. "The means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) (opinion of Powell, J.).

Under the admissions programs at issue, preference is granted to applicants from ethnic groups "which have been historically discriminated against," in particular, African Americans, Hispanics, and Native Americans. *Grutter*, 288 F.3d at 737; *see also Gratz v. Bollinger*, 122 F. Supp. 2d at 827. There has never been any showing, however, that members of the favored groups will contribute more to diversity than members of other ethnic groups that are also under-represented. Here, "[t]he concept of 'diversity' is so vague that it lends itself to a myriad of widely divergent and ever-changing definitions capable of masking the criteria actually at work." Dershowitz & Hanft, *supra*, at 404. For example, while the University's programs target "African

American," that itself is an imprecise term, including groups that genetically and culturally are quite different from each other:

> "Black" subjects, for example, may include slave descendants, whose ancestors were from West Africa, but may also include recent immigrants from South Asia, the horn of Africa, South Africa, certain Pacific Islands, and even Australia. The genetic diversity between some of these groups (as estimated from a number of DNA homology studies) is a great as the disparity between some groups of "blacks" and "whites."

James E. Bowman, *Anthropology: From Bones to the Human Genome*, 568 Annals Am. Acad. Pol. & Soc. Sci., 140, 141 (March 2000). The University's capricious preferences violate the principle that use of race must be justified by particularized findings, to guard against the danger that it "is merely the product of unthinking stereotypes or a form of racial politics." *Croson*, 488 U.S. at 510.

Similarly, in the case of the law school, the director of admissions stated that the goal is to produce a "'critical mass' [of each group] with sufficient numbers to ensure under-represented minority students do not feel isolated . . . ." *Grutter*, 288 F.3d at 737. Other witnesses "testified that 'critical mass' was not a set number or percentage." *Id.* Given that none of the favored applicants is entitled to a remedial preference, and that a non-favored applicant is denied admission for each preferential admission granted, a program narrowly tailored to cause as little harm as possible cannot leave this "critical mass" undefined.

B. Lacking Any Attainable Goals Or Temporal Limits, The University's Admissions Programs Would Classify Students By Race Forever.

As in *Ho*, the University's admissions programs fail strict scrutiny because, lacking particularized and attainable goals, they would continue to classify applicants by race forever.

Use of race is "odious" even where necessary, *Reno*, 509 U.S. at 643, and this Court has wisely cautioned against upholding race-conscious programs that are "ageless in their reach into the past, and timeless in their ability to affect the future." *Croson*, 488 U.S. at 498 (internal quotation marks omitted) (quoting *Wygant*, 476 U.S. at 276); *see also Adarand*, 515 U.S. at 238 (program must be appropriately limited in time).

In *Grutter*, the Sixth Circuit acknowledged that, under the vague guidelines of the University's law school admission program, the University's use of race would continue indefinitely. 288 F.3d at 751-52. The Sixth Circuit erred, however, in finding that a temporal limit was not necessary because "[u]nlike a remedial interest, an interest in academic diversity does not have a self-contained stopping point." *Id.* The Sixth Circuit's ruling ignores this Court's admonishment that there must be "consistency" and the "same standard of justification" in reviewing programs for possible equal protection violations. *See Adarand*, 515 U.S. at 224. It also would produce the illogical result that a race-conscious program designed to remedy actual *de jure* segregation, that is, one that seeks to restore to individuals their constitutional rights, would be held to a stricter standard than a race-conscious program designed merely to further pedagogical ends.

One also cannot assume, as did the Sixth Circuit, that in any case, "the admissions policy is 'sensitive to the possibility that [it] . . . might someday have satisfied its purpose.'" *Grutter*, 288 F.3d at 752 (citation omitted). In *Ho*, where there was a purported remedial purpose, diversity was nonetheless a goal that clearly was going to be pursued forever. *See* Levine, *supra*, at 51, 56. Here, as the Sixth Circuit itself recognized, there is no prior constitutional violation against which to gauge the completeness of the present "remedy." The law school's diversity program favors members of ethnic groups deemed under-represented by granting them

preference in the admissions process. *Grutter*, 288 F.3d at 737. While the focus is on African American, Hispanic, and Native American candidates, the University, freed from the constraints of any remedial purpose, also looks to the ethnicity of applicants who purportedly represent the diversity of the world. *See id.* at 736 (highlighting Vietnamese, Bangladesh, and Argentinian applicants).

In short, the University's race conscious admissions programs are impermissibly tailored to the perpetual use of race.

C. The University Failed To Consider And Use Race-Neutral Means To Achieve Diversity, Preferring The Impermissible Proxy Of Race.

The University's admissions programs are also flawed because it failed to consider and use the true, race-neutral measures of the diversity it seeks, preferring instead the easy but flawed proxy of race. In *Croson*, 488 U.S. 469, one of the reasons this Court struck down a program which granted race-based preferences in construction contracts was that the city had failed to consider race-neutral alternatives. *See id.* at 507; *see also Adarand*, 515 U.S. at 237-38 (upholding same requirement). Here, where the goal is not to restore individual rights but simply to promote diversity for pedagogical purposes, the University's failure to find alternatives that do not trammel individual rights is even more glaring.

The University is mistaken in assuming that color of skin is an adequate proxy for the personal attributes it seeks, particularly in our multi-ethnic society. This Court has explained that such thinking "bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw v. Reno*, 509 U.S. at 647. "We have rejected such perceptions elsewhere as impermissible racial stereotypes." *Id.* Indeed, as various

scholars have found, race-conscious admissions programs do foster unfortunate stereotypes, detrimental even to members of those ethnic groups "favored" by the program:

> When few Jews could get into Ivy League schools, and Jewish students had to be superqualified to gain admission, a Jewish stereotype was created: Jews are smart. Admitting black students by lower standards has precisely the opposite effect: it reinforces the pernicious notion that blacks are not academically talented.

Stephan Thernstorm and Abigail Thernstrom, *Reflections on The Shape of the River*, 46 UCLA L. Rev. 1583, 1608 (June 1999).

True diversity is a goal best pursued without recourse to race. It is simplistic to assume that any given African American candidate has suffered adversity and disadvantage, thereby gaining valuable perspective or experience, while assuming that the opposite is true for any given Chinese American candidate. Even where such a generalization could be made for a group as a whole, common sense tells us it would never be true of all individuals in the group. *See Thernstrom, supra*, at 1624-25 (focus on race ignores true measures of diversity, producing "homogeneously upper-middle-class" student bodies). Returning to the example of the two random African American and Chinese American candidates, a statement that the person has experienced adversity might be true for both, either, or neither of the two. All that can be known a priori is that both individuals deserve to be considered on their own merits, undistorted by the prism of a diversity scheme such as those advocated by the University here.

CONCLUSION

In the 19th century, children of Chinese descent were denied equal access to San Francisco public schools solely because of their race. A hundred years later, in the *Ho* case, Chinese Americans were again singled out for unequal treatment. If nothing else, these experiences demonstrate the danger of allowing the state to use race except in the most limited circumstance, such as where such use is strictly necessary in order to provide a remedy to individuals deprived of constitutional rights. Pedagogical needs and goals, including the desire for a diverse student body, simply cannot provide such a compelling interest. Any program that allows state actors to promote diversity through consideration of race will inevitably result, as in *Ho*, and as in the instant cases, in discrimination against individuals based on race. And, as such use of race will be unbounded by any fixed, remedial goal, it will continue without end, to the detriment of our society.

For all of the reasons set forth herein, the University's race-conscious admissions programs further no compelling government interest, are not narrowly tailored to further any such interest, and should be found to violate Petitioners' right to the equal protection of the laws.

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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35 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals in *Bollinger* and District Court in *Gratz* erred in holding that the state has a compelling interest in discriminating against citizens on the basis of race in order to ensure racial "diversity" in the classroom.

2. Whether Michigan's current admissions programs are narrowly tailored to serve any compelling governmental interest.

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Adarand Constructors, Inc. v. Mineta,
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Adarand Constructors, Inc. v. Pena,
515 U.S. 200, 240 (1995) ..... passim

Adarand Constructors, Inc. v. Pena,
965 F. Supp. 1556 (D. Co. 1997) 21

Adarand Constructors, Inc. v. Slater,
169 F.3d 1292 (1999) 21

Adarand Constructors, Inc. v. Slater,
228 F.3d 1147 (2000) 21

Adarand Constructors, Inc. v. Slater,
528 U.S. 216 (2000) 21

Anderson v. Martin,
375 U.S. 399 (1964). 18

Brown v. Board of Ed.,
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Brown v. Board of Ed.,
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City of Richmond v. J. A. Croson Co.,
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Civil Rights Cases,
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Coalition for Economic Equity v. Wilson,
946 F. Supp. 1480 (N.D. Ca. 1996) 22

Coalition for Economic Equity v. Wilson,
122 F.3d 692 (9th Cir. 1997) 21

Cooper v. Aaron,
358 U.S. 1 (1958) 18

Dale v. Boy Scouts of America,
530 U.S. 640 (2000) 2

Dayton Bd. of Ed. v. Brinkman,
443 U.S. 526 (1979) 18

DeFunis v. Odegaard,
416 U.S. 312 (1974) 14

Ensley Branch, NAACP v. Seibels,
31 F.3d 1548 (11th Cir. 1994) 19

F.W. Spencer & Son, Inc. v. City and County of San Francisco, C 95-4242 THE (N.D. Cal.) 21

Freeman v. Pitts,
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Fullilove v. Klutznick,
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Green v. County Sch. Bd.,
391 U.S. 430 (1968) 18, 20

Griffin v. County Sch. Bd.,
377 U.S. 430 (1968) 18, 20

Grutter v. Bollinger,
288 F.3d 732 (6th Cir. 2002) ..... passim

Hi-Voltage Wire Works, Inc. v. City of San Jose,
24 Cal. 4th 537 (2000) 18

Hopwood v. Texas,
236 F.3d 256 (5th Cir. 2000) 6, 7, 19

Johnson v. Bd. of Regents,
263 F.3d 1234 (11th Cir. 2001) 6, 11, 15

Koski v. Gainer, No. 92-C-3293,
1995 WL 599052 (N.D. Ill. Oct. 5, 1995) 19

Loving v. Virginia,
388 U.S. 1 (1967) 18

Maryland Troopers Ass'n v. Evans,
993 F.2d 1072 (4th Cir. 1993) 19

Metro Broadcasting, Inc. v. FCC,
497 U.S. 547 (1990) 7

Missouri v. Jenkins,
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Muller v. Oregon,
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Pasadena Bd. of Ed. v. Spangler,
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Plessy v. Ferguson,
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Podberesky v. Kirwan,
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Regents of University of California v. Bakke,
438 U.S. 265 (1978) ..... passim

Sweatt v. Painter,
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United States v. Morrison,
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Wygant v. Jackson Bd. of Ed.,
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Zelman v. Simmons-Harris,
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Statutes and Constitutional Provisions

ARCW § 49.60.400 (1) (Washington Initiative 200)..... 23

Cal. Const. art. I, 31, cl. A (1996) (Proposition 209)..... 23

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Mass. Dec. of Rights (1780), *reprinted in* 1 THE FOUNDERS' CONSTITUTION 11 (P. Kurland & R. Lerner, eds., 1987). 13

U.S. Const. Amend. XIV..... passim

Va. Dec. of Rights § 1 (1776), *reprinted in* 1 THE FOUNDERS' CONSTITUTION 6 (P. Kurland & R. Lerner, eds., 1987) 13

Other Authorities

"Brief History of Morehouse College," at http://www.morehouse.edu/n..rehouselegacy/index.html 11

"Historically Black Colleges and Universities," at http://edonline.com/cq/hbcu/..... 10

"Marshall, Thurgood," at http://encarta.msn.com/encnet/refpages/refarticle.aspx?refid =761556389. 10

"The Morehouse Legacy: Prominent Alumni," at http://www.morehouse.edu/morehouselegacy/alumni.html. .. 11

AMERICAN HERITAGE DICTIONARY (4th Ed. 2000)..... 20

Carol Ness, *Prop. 209 Foes Win Effort to be Heard in S.F. Court,* SAN FRANCISCO EXAMINER Nov. 14, 1996 at A5 28

Charles Sumner, *The Barbarism of Slavery* (1860) *reprinted in* AGAINST SLAVERY: AN ABOLITIONIST READER 313 (Mason Lowance, ed. 2000)..... 21

Clint Bolick, *Blacks and Whites on Common Ground,* 10 STAN. L. & POL'Y REV 155 (Spring 1999)..... 23

Clint Bolick, *Jurisprudence in Wonderland: Why Judge Henderson's Decision Was Wrong,* 2 TEX REV. LAW & POL. 60 (Fall, 1997) 23

Doug Bandow, *No Justice for Proposition 209,* WASHINGTON TIMES Jan. 14, 1997 at A15..... 28

Edward J. Erler, *The Future of Civil Rights: Affirmative Action Redivivus,* 11 NOTRE DAME J. L. ETHICS & Pub. POL'Y 15 (1997) 2, 20

Frederick Douglass, *What The Black Man Wants* (Jan. 26, 1865), *reprinted in* 4 FREDERICK DOUGLASS PAPERS 59 (Blassingame & McKivigan, eds. 1991)..... 16

Gail Heriot, *University of California Admissions under Proposition 209: Unheralded Gains Face An Uncertain Future,* 6 NEXUS: J OP. 163 (2001)..... 28

HARRY V. JAFFA, EQUALITY AND LIBERTY: THEORY AND PRACTICE IN AMERICAN POLITICS (The Claremont Institute 1999) (1965) 2

James Otis, *Rights of the British Colonies Asserted and Proved, reprinted in* B. BAILYN, ED., PAMPHLETS OF THE AMERICAN REVOLUTION 439 (1965) 12

Letter from Abraham Lincoln to H.L. Pierce (Apr. 6, 1859), *in* 3 COLLECTED WORKS 374, 376.(1953)..... 12

Letter from to Henri Gregoire (Feb. 25, 1809), *in* Jefferson: Writings 1202 (M. Peterson ed., 1984) 14

Letter to Roger C. Weightman (June 24, 1826), *in* JEFFERSON: WRITINGS 1516, 1517 (M. Peterson, ed., 1984). .. 13

Lino Graglia, *"Affirmative Action," Past, Present, And Future*, 22 OHIO N.U.L. REV. 1207 (1996)..... 29

Lyndon B. Johnson, *Commencement Address at Howard University: To Fulfill These Rights, in* 2 PUBLIC PAPERS OF THE PRESIDENTS 1965, 635 (1966). 14

Martin Luther King, I Have A Dream (1963) *reprinted in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 217 (James Washington ed. 1986) 15, 31

MARTIN LUTHER KING, WHY WE CAN'T WAIT (1964). 30, 32

R. Brad Malone, *Note: Marginalizing* Adarand*: Political Inertia and the SBA 8(A) Program,* 5 TEX. WESLEYAN L. REV. 275 (Spring 1999). 29

Ruth Bader Ginsburg, *Constitutional Adjudication in the United States As A Means of Advancing The Equal Statute of Men And Women Under The Law,* 26 HOFSTRA L. REV. 263 (Winter, 1997) 17

T. SOWELL, THE ECONOMICS AND POLITICS OF RACE (1983) 17

TERRY EASTLAND, ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE (2d ed. 1997) 23

THE FEDERALIST No. 10 (Rossiter ed. 1961) 14

THE FEDERALIST No. 36 (C. Rossiter ed. 1961) 14

THOMAS G. WEST, VINDICATING THE FOUNDERS: RACE, SEX, CLASS AND JUSTICE IN THE ORIGINS OF AMERICA (1997) 2

Walter Dellinger, Office of Legal Counsel Memorandum to General Counsels Re: *Adarand,* 1995 DLR 125 d33 (June 29, 1995) 8

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INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent author-

[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties, previously filed. No counsel for a party authored this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

ity in our national life," including the principle, at issue in this case, that the self-evident truth of equality articulated in the Declaration of Independence and now codified in the Constitution of the United States guarantees to every individual the right to the equal protection of the law, regardless of his or her race.

The Institute pursues its mission through academic research, publications, and scholarly conferences. Of particular relevance here, the Institute and its affiliated scholars have published a number of books and monographs about the Founders' views on equality and on the unconstitutionality of laws that categorize Americans on the basis of their race, including Harry V. Jaffa, Equality and Liberty: Theory and Practice in American Politics (The Claremont Institute 1999) (1965), Thomas G. West, Vindicating The Founders: Race, Sex, Class and Justice in The Origins of America (1997), and Edward J. Erler, *The Future of Civil Rights: Affirmative Action Redivivus,* 11 Notre Dame J. L. Ethics & Pub. Pol'y 15 (1997).

In 1999, the Claremont Institute established an in-house public interest law firm, the Center for Constitutional Jurisprudence, to help further the mission of the Claremont Institute through strategic litigation. The Center has previously participated as *amicus curiae* in this Court in such important cases as *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002); *Adarand Constructors v. Mineta,* 534 U.S. 103 (2001); *Dale v. Boy Scouts of America*, 530 U.S. 640 (2000), *United States v. Morrison*, 529 U.S. 598 (2000), and has previously participated in this case as *amicus curiae* in support of the petition for certiorari in *Grutter v. Bollinger*.

SUMMARY OF ARGUMENT

The decisions by the Sixth Circuit in *Grutter* and the District Court in *Gratz* should be reversed for at least three reasons:

- Both courts erroneously interpreted *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), when they held that Justice Powell's separate opinion in that case was the narrowest and therefore controlling opinion, and that Justice Powell "held" (rather than merely stating in *dictum*) that an admissions policy including racial classifications such as the ones at issue here were Constitutional.

- The procedural posture of *Grutter* in the Court of Appeals, discussed at length in the dissent's procedural appendix and the concurring opinions, as well as the procedures followed in *Adarand Constructors* and other cases, demonstrate that this Court is facing the same recalcitrance among defenders of racial discrimination that this Court faced in the immediate wake of *Brown v. Board of Ed.*, 347 U.S. 483 (1954). A forceful statement by this Court, similar to those issued following *Brown,* is necessary to enforce the constitutional demand that all Americans be treated equally, without regard to the color of their skin.

- Most fundamentally, the government's classification of American citizens by race is fundamentally at odds with the equality principle of the Declaration of Indpendence, the "principle of inherent equality that underlies and infuses our Constitution." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment).

ARGUMENT

I. THE COURTS BELOW MISINTERPRETED AND MISAPPLIED THIS COURT'S PRECEDENT.

A. Justice Powell's Opinion in *Bakke* Did Not Uphold Racial Classifications Such As Those at Issue in These Cases.

The fractured nature of the opinions in *Bakke* make it sometimes difficult to assess precisely what portions of that opinion constitute binding precedent. But it is clear that Justice Powell's opinion squarely rejected the sort of racial favoritism which lies at the heart of Michigan's admission policies at issue in this case. As the dissent in *Grutter* below noted, the mere fact that the Law School's policy is less severe than the one which was struck down in *Bakke* does not mean that the Law School's policy is constitutional. *See Grutter v. Bollinger,* 288 F.3d 732, 777 (6th Cir. 2002) (Boggs, J., dissenting).

In his *Bakke* opinion, Justice Powell correctly denounced racial classifications as contrary to our nation's constitutional principles. Such "distinctions of any sort are inherently suspect," he wrote. 438 U.S., at 291. Thus, "[i]t is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others." *Id.*, at 295. Yet that is just what Michigan seeks to do here, when it asserts that "the only way for the Law School to achieve meaningful racial diversity in its student body (while maintaining academic selectivity) is to take race into account." Brief in Opposition, *Grutter v. Bollinger*, No. 02-241 ("*Grutter* BIO"), at 1.

Justice Powell also wrote in *Bakke* that programs which aim to "remedy" past discrimination in general by creating

new legal discriminations unjustly "forc[e] innocent persons . . . to bear the burdens of redressing grievances not of their making." *Bakke*, 438 U.S., at 298. The race-based components of Michigan's admissions programs do just that. Michigan admits, for example, that "minority applicants [are] admitted at substantially higher rates than *otherwise similar* non-minority applicants." *Grutter* BIO at 8. What that means, *necessarily*, is that a substantial number of better-qualified applicants, white and non-preferred minorities alike—"innocent persons," to use Justice Powell's language—are denied admission simply because of their race or ethnic background in order to make way for less-qualified (indeed, unqualified, as Michigan itself concedes)[2] preferred minorities. For a state-run institution of higher learning to do this is unconstitutional as well as unjust, not just for the Barbara Grutters of the world but for the preferred minority students who are plucked—Michigan paternalistically uses the word "chosen," *Grutter* BIO at 1—by the University of Michigan from academic institutions where they would be competitive and thrust into an environment where they are forced to compete with students of significantly stronger academic credentials. When one considers how pervasive is the use of race in college and law school admissions nationwide, the problem becomes intolerable. As Michigan itself concedes, "[o]ver the past two and a half decades, nearly every selective university and professional school in the United States has ...

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[2] *See* Brief in Conditional Opposition, *Gratz v. Bollinger*, No. 02-516 ("*Gratz* BIO"), at 8-9 (acknowledging that the "pool of *qualified* underrepresented minority applicants" is "insufficient to enroll a student body with meaningful numbers of unrepresented minorities" "[w]ithout considering race and ethnicity in admissions") (emphasis added); *Grutter* BIO at 21 n.17 (noting that other efforts to increase diversity, such as California's ten-percent plan, "may also force the enrollment of students who are *unprepared* for the academic demands of selective institutions") (emphasis added).

craft[ed] admissions and financial aid policies" based on race, ostensibly in reliance on Justice Powell's opinion in *Bakke*. A student like Barbara Grutter is thus likely to find the door of elite higher education closed to her, not just in Michigan but throughout the land, based solely on the color of her skin. It is just this kind of pervasive racial discrimination that the Fourteenth Amendment, and this Court's holding in *Bakke*, were designed to prevent.

Moreover, even if Justice Powell's opinion can be read to support Michigan's blatant use of race in making admissions decisions, no other member of the Court joined the relevant parts of Justice Powell's opinion. To be sure, four Justices—Justices Brennan, White, Marshall, and Blackmun—agreed with Justice Powell's brief statement that "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin," *id.*, at 320 (opinion of Justice Powell); *id.* at 326 n.1 (Brennan, J., concurring in part, dissenting in part), but that statement, phrased in the language of intermediate or even rational basis scrutiny, simply cannot serve to authorize Michigan's use of race, which, as subsequent decisions of this Court have made clear, must be subjected to the strictest scrutiny. Not a mere "substantial" interest but only a compelling interest of the first magnitude is sufficient to permit government to discriminate among its citizens on the basis of race, and then only if the program is narrowly tailored (and not just "properly devised") to achieve that compelling government interest. *Adarand*, 515 U.S. at 227.

Whether "diversity" is such a compelling interest is not addressed, much less adopted, by any majority in *Bakke*. *See Hopwood v. Texas*, 236 F.3d 256, 275 (5th Cir. 2000) (noting that *Bakke* did not "approve student body diversity as a justification for a race-based admission criterion"); *Johnson v. Bd. of Regents*, 263 F.3d 1234 (11th Cir. 2001) (noting that "a majority of the Supreme Court has never

agreed that student body diversity is, or may be, a compelling interest sufficient to justify a university's consideration of race in making admissions decisions"); Walter Dellinger, Office of Legal Counsel Memorandum to General Counsels Re: *Adarand* at 12, 1995 DLR 125 d33 (June 29, 1995). But subsequent to the fractured ruling in *Bakke*, this Court has explicitly rejected "diversity" as a compelling rationale for race discrimination and recognized in its stead only a single governmental interest compelling enough to warrant the use of race by government: actual remediation of past discrimination by government. *Adarand*, 515 U.S. 200 (1995), *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); *see also Hopwood*, 78 F.3d, at 944 ("In *Bakke*, the word 'diversity' is mentioned nowhere except in Justice Powell's single-Justice opinion.... Thus, only one Justice concluded that race could be used solely for the reason of obtaining a heterogenous student body"); *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994) (holding that racial preferences in school admissions are only permissible in remedying actual articulable cases of past discrimination). Even *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), in which this Court approved the federal government's racial quota system for broadcast licenses on a "diversity" rationale, did so only after holding that such "benign" racial classifications were subject merely to intermediate scrutiny, a holding that was expressly overruled by *Adarand*, 515 U.S., at 227.

Michigan, like the courts below, seems to assume that the four dissenters in *Bakke* would have approved treating "diversity" in education as a compelling governmental interest since they were all willing to uphold the University of California's racial quota system under the lower level of scrutiny they thought applicable to so-called "benign" racial discrimination, and that, as a result, *Bakke* should be read as actually "holding" that diversity is a compelling governmental interest. Such hypothetical speculations form

no part of the Court's holding, of course, and it is improper for the lower courts to base decisions on them.

This is particularly true where, as here, there are good reasons for questioning Michigan's assumption about how the four dissenters would have treated "diversity" under strict scrutiny. The dissenters' embrace of Justice Powell's apparent approval of the use of race as a "plus" factor in the Harvard plan came with an important caveat. They "agree[d] with Mr. Justice Powell that a plan like the 'Harvard' plan is constitutional under our approach, *as least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination*." *Bakke*, 438 U.S., at 326 n.1 (Brennan, J., concurring in the judgment in part and dissenting in part). Absent past discrimination—and Michigan has not provided any evidence that the statistical disparity in its applicant pool is the result of past discrimination—the use of race would not serve such a remedial purpose but would rather amount to a raw, perpetual racial balancing of the kind that this Court has repeatedly rejected. *See, e.g.*, *Freeman v. Pitts*, 503 U.S. 467, 491 (1992) (holding that courts should withdraw supervision of formerly segregated school district "where racial imbalance is not traceable, in a proximate way, to constitutional violations"); *Pasadena Bd. of Ed. v. Spangler*, 427 U.S. 424, 434-35 (1976); *see also Croson*, 488 U.S., at 495 (plurality opinion of O'Connor, J.) (rejecting an argument for "diversity" in government contracting, noting that "[t]he dissent's watered down version of equal protection review effectively assures that race will always be relevant in American life, and that the 'ultimate goal' of 'elimat[ing] entirely from government decisionmaking such irrelevant factors as a human being's race' . . . will never be achieved") (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 320 (1986) (Stevens, J., dissenting)).

Moreover, treating "diversity" as a compelling interest might allow, perhaps even require, states to ban historically black colleges, or the federal government to exclude them from Title VI funding, a proposition that, one might just as easily assume, the four *Bakke* dissenters would have soundly rejected. The lack of racial diversity at the historically black Lewis College of Business in Detroit, Michigan, therefore, would be problematic, not to mention the lack of racial diversity at the more than one hundred other historically black colleges and professional schools throughout the country—major names in higher education such as Grambling State University in Louisiana, Morehouse College in Atlanta, Georgia, and even Lincoln University in Pennsylvania and Howard University in Washington, D.C., one of the *Bakke* dissenter's own alma maters.[3] Indeed, as with all of these great institutions, Morehouse College, which numbers among its alumni Dr. Martin Luther King, Jr., former U.S. Surgeon General David Satcher, former U.S. Secretary of Health and Human Services Louis Sullivan, former U.S. Ambassador to the United Nations James Nabrit, award-winning filmmaker Spike Lee, Olympic Gold Medalist Edwin Moses, as well as numerous congressmen, business and academic leaders,[4] and which rightfully boast that it "enjoys an international reputation for producing leaders who have influenced national and world history,"[5] should be offended—we all should be offended—by Michigan's patronizing statement that "prepar-

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[3] "Historically Black Colleges and Universities," available at http://edonline.com/cq/hbcu/; "Marshall, Thurgood," available at http://encarta.msn.com/encnet/refpages/refarticle.aspx?refid =761556389.

[4] *See* "The Morehouse Legacy: Prominent Alumni," at http://www.morehouse.edu/morehouselegacy/alumni.html.

[5] *See* "Brief History of Morehouse College," at http://www.morehouse.edu/morehouselegacy/index.html; *see also Missouri v. Jenkins*, 515 U.S., at 122 (Thomas, J., concurring) (noting that historically black colleges "provide examples of independent black leadership, success, and achievement").

ing students for work and citizenship in our diverse society is difficult, if not impossible, in racially homogenous classrooms and racially segregated campuses." *Grutter* BIO at 18 (citing *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)); *see also id.* at 4 (asserting that, according to one of its trial witnesses, "all law students receive an immeasurably better legal education, and become immeasurably better lawyers, in law schools and law school classes where the student body is racially heterogeneous"); *cf. Missouri v. Jenkins*, 515 U.S. 70, 114 (1995) (Thomas, J., concurring) ("It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior").

B. Even if Justice Powell's Reference to Racial Diversity Was A Binding Holding of this Court in *Bakke*, It Should Be Repudiated.

The notion of "diversity" that Michigan would attribute to Justice Powell is, in fact, a plain violation of Constitutional principles. The fundamental creed upon which this nation was founded is that "all men are created equal." DECLARATION OF INDEPENDENCE ¶ 2. This principle is, in Abraham Lincoln's words, a "great truth, applicable to all men at all times." *Letter from Abraham Lincoln to H.L. Pierce* (Apr. 6, 1859), *in* 3 Collected Works 374, 376 (1953). "All men" meant all human beings—men as well as women, black as well as white. *See, e.g.*, James Otis, *Rights of the British Colonies Asserted and Proved* ("The colonists are by the law of nature freeborn, as indeed all men are, white or black"), *reprinted in* B. Bailyn, ed., Pamphlets of the American Revolution 439 (1965); *id.* ("Are not women born as free as men? Would it not be infamous to assert that the ladies are all slaves by nature?").

These sentiments were codified in the first State constitutions established after the American colonies declared

their independence. The Virginia Declaration of Rights, for example, provided that "all men are by nature equally free and independent." Va. Dec. of Rights § 1 (1776), *reprinted in* 1 The Founders' Constitution 6 (P. Kurland & R. Lerner, eds., 1987). And the Massachusetts Declaration of Rights stated simply, "All men are born free and equal[.]" Mass. Dec. of Rights (1780), *reprinted in* 1 The Founders' Constitution at 11. Even those founders who owned slaves recognized that slavery was inconsistent with the principle of equality articulated in the Declaration of Independence. "The mass of mankind has not been born with saddles upon their backs," wrote Thomas Jefferson, "nor a favored few, booted and spurred, ready to ride them legitimately, by the grace of God." *Letter to Roger C. Weightman* (June 24, 1826), *in* Jefferson: Writings 1516, 1517 (M. Peterson, ed., 1984). This was true, according to Jefferson, even if people were not of equal capabilities. "Whatever be their degree of talent it is no measure of their rights," wrote Jefferson shortly before the end of his second term as President. "Because Sir Isaac Newton was superior to others in understanding, he was not therefore lord of the person or property of others." *Letter from to Henri Gregoire* (Feb. 25, 1809), in *id.*, at 1202.

The Founders regularly exhibited an understanding of equality that is strikingly similar to what we today refer to as equality of opportunity, not equality of result.[6] Indeed, James Madison described the "protection of different and unequal faculties" as "the first object of government." The Federalist No. 10, at 78 (Rossiter ed. 1961) (1788). Alex-

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[6] The distinction can probably be traced to President Lyndon Johnson's speech at Howard University on June 4, 1965: "It is not enough just to open the gates of opportunity....We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result." Lyndon B. Johnson, *Commencement Address at Howard University: To Fulfill These Rights, in* 2 PUBLIC PAPERS OF THE PRESIDENTS 1965, at 635, 636 (1966).

ander Hamilton agreed, writing that "[t]here are strong minds in every walk of life that will rise superior to the disadvantages of situation, and will command the tribute due to their merit, not only from the classes to which they particularly belong, but from the society in general. *The door ought to be equally open to all.*" The Federalist No. 36, at 217 (emphasis added).

With the eradication of slavery and the passage of the Fourteenth Amendment, the promise of legal equality was opened to all. Unfortunately, in *Plessy v. Ferguson*, 3 U.S. 537 (1896), this Court, in one of its darkest moments, held that legal policies which separated Americans by race were acceptable under the Constitution. Alone in dissent, Justice John Marshall Harlan eloquently penned the judicial equivalent of the Declaration's creed:

> Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

Id. at 559 (Harlan, J., dissenting). Fifty-eight years later, in *Brown v. Board of Education* and its progeny, this Court repudiated *Plessy's* separate but equal doctrine and ultimately renewed America's dedication to what Martin Luther King would later describe as his dream, "that one day this nation will rise up and live out the true meaning of its creed: 'We hold these truths to be self-evident: that all men are created equal.'" King, I Have A Dream (1963) *reprinted in* A Testament of Hope: The Essential Writings And Speeches of Martin Luther King, Jr. 217, 219 (James Washington ed. 1986).

The evils of racial discrimination are not lessened because they are allegedly created to benefit previously excluded groups. After the Civil War, new racist laws, such as Black Codes and Jim Crow laws, were created in order to keep newly freed slaves from voting, earning a living, or owning property. But the paternalism of "benign" whites limited the freedom of blacks in many ways, too. The former slave Frederick Douglass addressed this problem when he wrote that "in regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested toward us. What I ask for the Negro is not benevolence, not pity, not sympathy, but simply justice." Frederick Douglass, *What The Black Man Wants* (Jan. 26, 1865), *reprinted in* 4 Frederick Douglass Papers 59, 68-69 (Blassingame & McKivigan, eds. 1991). Douglass continued:

> Everybody has asked the question..."What shall we do with the Negro?" I have had but one answer from the beginning. Do nothing with us!.... All I ask is, give him a chance to stand on his own legs!.... If you will only untie his hands, and give him a chance, I think he will live.

Douglass understood that paternalistic programs such as this one "constitute badges of slavery and servitude." *Civil Rights Cases*, 109 U.S. 3, 36 (1882) (Harlan, J., dissenting). They are akin to legislation that once blocked women from entering a variety of professions, which was "apparently designed to benefit or protect women [but] could often, perversely, have the opposite effect." Ruth Bader Ginsburg, *Constitutional Adjudication in the United States As A Means of Advancing The Equal Statute of Men And Women Under The Law*, 26 Hofstra L. Rev. 263, 269 (Winter, 1997); *cf. Muller v. Oregon*, 208 U.S. 412 (1908). Such legislation was "ostensibly to shield or favor the sex re-

garded as fairer but weaker, and dependent-prone," Ginsburg, at 269, but was in fact "premised on the notion that women could not cope with the world beyond hearth and home without a father, husband, or big brother to guide them." *Id.*, at 270.

In exactly the same way, racial preferences, whether in hiring or contracting, the provision of government benefits, or, as here, in law school and college admissions, are ostensibly designed to shield minority group members, but in fact are premised on the notion that they are incapable of competing without a big brother—a white big brother—to guide them.[7]

As Justice Douglas wrote, "A [person] who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner." *DeFunis v. Odegaard* 416 U.S. 312, 337 (1974) (Douglas, J., dissenting); *see also Bakke*, 438 U.S., at 298 (opinion of Justice Powell) ("there is a measure of inequity in forcing innocent persons in [Bakke's] position to bear the burdens of redressing grievances not of their making"); *id.*, at 290 ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color").

[7] Unfortunately, the results of such "benign" discrimination have often been just as bad for their alleged beneficiaries as were the ills which gave rise to such programs. *See, e.g.*, T. Sowell, The Economics and Politics of Race 200 (1983) (illustrating "counterproductive trends" caused by "beneficial" discrimination.)

C. The Courts Below Erred In Holding That Michigan's Programs Were Narrowly Tailored to Achieve "Diversity."

Even if the lower courts' interpretation of *Bakke* were correct, they erred by holding—without any actual discussion—that Michigan's admissions policies actually serve the purpose of diversity. Strict Scrutiny requires that the policy be narrowly tailored to advance that purpose. *Bakke,* 438 U.S. at 294-295; *Adarand,* 515 U.S. at 227. "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Wygant,* 476 U.S., at 280 (*quoting Fullilove v. Klutznick,* 448 U.S. 448 (1980) (Stevens, J., dissenting)).

The Sixth Circuit in *Grutter* held that the Law School's admissions policy is narrowly tailored because the Law School does not use a hard "quota" system for admissions, *Grutter*, 288 F.3d at 745-46, and because "the Law School considers more than an applicant's race and ethnicity," *id.*, at 747. The Circuit Court's determination is based on an erroneous reading of this Court's precedent, however. The Circuit Court held that "consideration of race-neutral means is necessary to satisfy the narrowly tailored component of strict scrutiny." *Id.* at 44. While this may be a *necessary* component of narrow tailoring, it is hardly *sufficient. See Johnson*, 263 F.3d at 1253-1254 ("the mere fact that race technically does not insulate a candidate from competition with other applicants does not, by itself, mean that the policy is narrowly tailored"). Narrow tailoring is not satisfied by a policy which is overinclusive or underinclusive—a policy which will punish those not intended to come within the policy's boundaries, or which will unjustly reward those who are not within the government's asserted "compelling interest." In other words, if the Law School's desire to achieve a racially diverse student body is a sufficiently compelling interest—which it is not—that purpose

is not served by creating preferences for blacks and Hispanics at the expense of, *e.g.*, Asian immigrants. As the dissent below noted, Chinese or Jewish immigrants have suffered a great deal of legal discrimination in American history, and their life experiences might be far richer than that of an upper class black or Hispanic student, yet the latter would benefit under the Law School's policy, at the expense of the former.

More importantly, however, the "diversity" rationale is inherently opposed to the principles of equality enunciated in the Declaration of Independence and the Fourteenth Amendment. This was made clear by one of the concurring opinions in the *Grutter* case below, which claimed that "a comparably-situated white applicant is a 'different person' from the black applicant [because] this black applicant may very well bring to the student body life experiences rich in the African-American traditions emulating the struggle the black race has endured in order for the black applicant even to have the opportunities and privileges to learn." *Grutter*, 288 F.3d, at 764 (Clay, J., concurring). That stereotypical assumption is also repeated in Michigan's briefs in this court. *See Grutter* BIO, at 28 ("students from these [preferred minority] groups are particularly likely to have had experiences of special importance to [the Law School's] educational mission"). In other words, an applicant's *race* is the determining factor in that applicant's character and quality as a student. According to this view, a black applicant is inherently different from—is *not equal* to—the white applicant, because the *content of the applicant's mind is thus determined by his race.* This is the very definition of racism. *See* American Heritage Dictionary (4th Ed. 2000) ("Racism: the belief that race accounts for differences in human character or ability and that a particular race is superior to others"). It is fundamentally contrary to the principle of equality to presume that a person's contributions to the classroom will be determined by the person's race.

Such discrimination is morally wrong because it "treats the accidental feature of race as an essential feature of the human persona [and thus] violates the principles of human nature—those principles in The Declaration of Independence that are said to stem from the proposition that 'all men are created equal.'" Edward Erler, *The Future of Civil Rights: Affirmative Action Redivivus,* 11 Notre Dame J. L. Ethics & Pub. Pol'y 15, 49 n. 132 (1997). As Charles Sumner, one of the principal authors of the Fourteenth Amendment's Equal Protection Clause, wrote:

> [The principle of equality] is the national heart, the national soul, the national will, the national voice, which must inspire our interpretation of the Constitution and enter into and diffuse itself through all the national legislation. Such are the commanding authorities which constitute 'Life, Liberty, and the Pursuit of Happiness,' and in more general words, 'the Rights of human Nature,' without distinction of race…as the basis of our national institutions. They need no additional support.

Charles Sumner, *The Barbarism of Slavery* (1860) *reprinted in* Against Slavery: An Abolitionist Reader 313, 320 (Mason Lowance, ed. 2000).

Michigan's admissions policies are also not narrowly tailored in that they punish innocent members of disfavored racial groups in order to "remedy" past discrimination. "Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus on the individual." *Adarand*, 515 U.S., at 239 (Scalia, J., concurring in part and concurring in the judgment). In all, "[t]he vice…[is] not in the resulting injury but in the placing of the power of the State behind a racial classifica-

tion that induces racial prejudice...." *Anderson v. Martin*, 375 U.S. 399 (1964).

II. THE PROCEDURES FOLLOWED BY THE COURT BELOW AND BY OTHER COURTS IN SIMILAR CASES DEMONSTRATE THAT THIS COURT FACE THE SAME OBSTACLES IN ENDING "BENIGN" RACISM THAT IT FACED IN THE *BROWN* ERA.

A. Racial Classifications Are Not Eradicated Easily.

Unfortunately, experience has shown that racism is not overcome easily, whether it be in segregated schools or in legal classifications like the racial set-aside programs at issue here. This Court spent more than two decades fighting such classifications after the *Brown I* case. *See Griffin v. County Sch. Bd.*, 377 U.S. 430 (1968); *Green v. County Sch. Bd.*, 391 U.S. 430 (1968); *Brown v. Board of Ed.*, 349 U.S. 294 (1955) ("*Brown II*"); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Loving v. Virginia*, 388 U.S. 1 (1967); *Dayton Bd. of Ed. v. Brinkman*, 443 U.S. 526 (1979). Since then, America has made remarkable progress. Today, Americans generally believe that race is an illegitimate factor for government classification. Across the country, Americans have rejected the notion of racial classifications, including supposedly "benign" ones. *See* Clint Bolick, *Blacks and Whites on Common Ground*, 10 Stan. L. & Pol'y Rev 155, 158 (Spring 1999); Terry Eastland, Ending Affirmative Action: The Case for Colorblind Justice 164-165 (2d ed. 1997). States have begun to incorporate Justice Harlan's *Plessy* dissent into law. *See* Cal. Const. art. I, 31, cl. A (1996) (Proposition 209); *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537 (2000) (noting that Proposition 209 "adopt[s] the original construction of the Civil Rights Act"); ARCW § 49.60.400 (1) (Washington Initiative 200).

"In a nearly unbroken line of recent decisions, federal courts in recent years consistently have struck down racial preference policies adopted by federal, state, and local governments." Clint Bolick, *Jurisprudence in Wonderland: Why Judge Henderson's Decision Was Wrong*, 2 Tex Rev. Law & Pol. 60 (Fall, 1997); *see, e.g., Hopwood,*, 78 F.3d at 932; *Maryland Troopers Ass'n v. Evans,* 993 F.2d 1072 (4th Cir. 1993); *Koski v. Gainer*, No. 92-C-3293, 1995 WL 599052 (N.D. Ill. Oct. 5, 1995) (mem. op.); *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *but see Smith v. Univ. of Washington Law Sch.*, 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (May 29, 2001). Yet today, defenders of racially discriminatory laws, as emphatic as their predecessors in the 1950s, are exhibiting the same determination to avoid the commands of the Equal Protection Clause. Reliance upon Justice Powell's opinion in *Bakke* to rationalize racial classifications that violate the fundamental commands of Equal Protection is no more permissible that the long and sordid reliance on *Plessy v. Ferguson* to rationalize "separate but equal" segregation and its scheme of racial classifications. *Compare Grutter* BIO at 12 ("*Bakke* has been relied upon by universities and public officials for decades, and has become an important part of our national culture"), *with* Brief for Appellees, *Brown v. Board of Education*, at 18 (asserting that in upholding the Kansas legislature's decision to classify students according to race and assign them to segregated schools, the Kansas Supreme Court "relied specifically on the decision of the Supreme Court of the United States in the case of *Plessy v. Ferguson*"), *reprinted in* P. Kurland and G. Caspar, 49 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 67, 85 (1975).

The time for government to cease treating individuals on the basis of their skin color rather than their merit is long overdue. As this Court held in *Croson Co.*, any dis-

crimination on the basis of race must cease, except (perhaps) as a remedy for government's own prior or continuing discrimination on the basis of race. 488 U.S., at 493-94; *see also Adarand*, 515 U.S., at 239 (Scalia, J., concurring in part and concurring in the judgment) ("Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus on the individual"). "The time for mere 'deliberate speed' [to fully enforce this principle] has run out." *Griffin*, 377 U.S. at 234; *see also Green v. County Sch. Bd.*, 391 U.S. 430 (1968); *cf. Brown II*, 349 U.S. at 301 (ordering that assignment of pupils to schools based on race be ended "with all deliberate speed").

B. Defenders of Racial Discrimination Are Refusing to Implement The Demands of The Equal Protection Clause.

For examples of the defiance demonstrated by today's defenders of racially discriminatory laws, consider some recent cases:

- *Grutter v. Bollinger*: As the procedural appendix in the dissent below notes, this case was the subject of a number of questionable procedures. The appeal was first assigned to a panel consisting of two judges who had heard an earlier interlocutory appeal in the case, and was filled out by the Chief Judge of the Circuit, who appointed himself rather than accepting a random assignment. The panel (or perhaps the Chief Judge alone) then waited to refer a motion for initial hearing en banc until after two Circuit Judges (both appointed by President Reagan) had taken senior status. While this Court should be reluctant to find that the Circuit was engaged

in result-driven improprieties, these extremely unusual procedures at least raise the appearance that the court below may have been stacked with judges sympathetic to the Law School.

- *Adarand Constructors v. Pena*, 515 U.S. 200 (1995): This Court held that federal "set-aside" programs were subject to strict scrutiny, and remanded the case to the Tenth Circuit, which sent the case back to the District Court. Using strict scrutiny, the District Court held the program unconstitutional. *Adarand Constructors, Inc. v. Pena*, 965 F. Supp. 1556 (D. Co. 1997). While that decision was on appeal, the Circuit Court declared that the plaintiff, a white contractor, had been the victim of racial discrimination and was therefore a member of a disadvantaged minority. As a result, the court held, the plaintiff's case was moot. *Adarand Constructors, Inc. v. Slater*, 169 F.3d 1292 (1999). This Court reversed this attempt to deprive the plaintiff of his day in court. *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000). The Circuit Court then, under the pretext of applying strict scrutiny, but in fact applying intermediate scrutiny, nevertheless upheld the racial classification. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (2000). This Court was again required to grant *certiorari*, but later dismissed the case for procedural reasons. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001).

- *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 522 U.S. 963 (1997): *Wilson* involved a challenge to California's Proposition 209, which prohibited the state government from discriminating against or granting preferential treatment to any individual or group on the basis of race. In a clever version of "forum shopping," the plaintiffs persuaded a party to an unrelated case (*F.W. Spencer & Son, Inc. v.*

City and County of San Francisco, C 95-4242 THE (N.D. Cal.) to amend its pleading to include a request for a ruling on the constitutionality of Prop. 209. Once this amendment was accepted by the court, the judge in that court was therefore empowered to take over the *Wilson* case from the judge to whom it had originally been assigned. *See* Gail Heriot, *University of California Admissions under Proposition 209: Unheralded Gains Face An Uncertain Future,* 6 Nexus: J Op. 163, 167, n 26 (2001); Carol Ness, *Prop. 209 Foes Win Effort to be Heard in S.F. Court,* San Francisco Examiner, Nov. 14, 1996 at A5; Doug Bandow, *No Justice for Proposition 209,* Washington Times, Jan. 14, 1997 at A15. This judge then, coincidentally enough, ruled in favor of the plaintiffs. *Coalition for Economic Equity v. Wilson,* 946 F. Supp. 1480 (N.D. Ca. 1996). The Ninth Circuit later reversed. 122 F.3d 692 (9th Cir. 1997).

Experience has shown that racial discrimination is not easily eradicated. Professor Lino Graglia has noted the "intense resistance that can be expected from academics and the educational bureaucracy" in eliminating racial preferences. Despite California's state laws prohibiting such preferences, for instance, "the Governor and the Board of Regents have encountered the recalcitrance, not to say insubordination, of the President of the University System who is seeking to delay implementation of [a racially-neutral admissions policy] as long as possible." Lino Graglia, *"Affirmative Action," Past, Present, And Future,* 22 Ohio N.U.L. Rev. 1207, 1219 (1996). The federal government's response to this Court's decision in *Adarand Constructors* parallels California's experience. As one commentator notes, despite *Adarand*'s holding, awards to racially preference contractors actually increased in the years following the decision. No honest attempt has been made to fix the problems with the program at issue in *Adarand*—instead, those who defend racially discriminatory laws have sought "to marginalize *Adarand*'s holdings by tinkering with the operation of set-aside programs, but by no means calling for their termination." R. Brad Malone, *Note: Marginalizing* Adarand*: Political Inertia and the SBA 8(A) Program,* 5 Tex. Wesleyan L. Rev. 275, 298-299 (Spring 1999).

These facts reveal that the political opposition to the demands of the Equal Protection Clause is every bit as powerful as the opposition this Court faced in the years following *Brown.* What Martin Luther King, Jr. said in 1964 is therefore equally true today: "the announcement of the high court has been met with declarations of defiance. Once recovered from their initial outrage, these defenders of the status quo had seized the offensive to impose their own schedule of change." Martin Luther King, Jr., Why We Can't Wait 5-6 (1964). Indeed, the defiance of today's defenders of racial classifications is, in some ways, even more pernicious, because their reliance on "diversity" as a governmental interest is one that "effectively assures that race will always be relevant in American life, and that the 'ultimate goal' of 'elimat[ing] entirely from government decisionmaking such irrelevant factors as a human being's race' . . . will never be achieved." *Croson,* 488 U.S., at 495 (plurality opinion of O'Connor, J.) (quoting *Wygant,* 476 U.S., at 320 (Stevens, J., dissenting)). Only by insisting, as the post-*Brown* Court did, that racial discrimination is no longer tolerable, can this Court end racial classifications in the law once and for all.

C. The Time To End Racial Categorizations in The Law Is Now.

Barbara Grutter asks only for a fair chance at a legal education. Now, as this Court faces increasing recalcitrance against eliminating legal classifications in the law, it must

speak with the same language it used in the post-*Brown II* cases. "The vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown II*, 349 U.S. at 300.

It is also time to realize that the principles of the Declaration, codified at long last in the Constitution via the Fourteenth Amendment, will not countenance racial discrimination that purports to remedy past wrongs against individuals of one race by conferring benefits upon others who happen to share the same skin color, at the expense of those who do not. As Dr. King also noted that August day on the steps of the Lincoln Memorial, "In the process of gaining our rightful place [as beneficiaries of the Declaration's promise of equality,] we must not be guilty of wrongful deeds." *I Have A Dream*, *in* Washington, *supra* at 218. In short, "there has been entirely too much deliberation and not enough speed in enforcing the constitutional rights" of the Petitioners in these cases. *Green*, 391 U.S. at 229. It is now for this Court to say, as it said in *Green*, this recalcitrance is unacceptable and that legal categorization by race must end "*now*." *Id.* at 439.

CONCLUSION

In the marble above the grand entrance to this Court are chiseled the words, "EQUAL JUSTICE UNDER LAW." The Court should reaffirm this principle by holding that legally dividing Americans by race is unconstitutional under any circumstances. It should embrace the doctrine of complete racial equality, and stand "for what is best in the American dream and for the most sacred values in our Judeo-Christian heritage, thereby bringing our nation back to those great wells of democracy which were dug deep by the founding fathers in their formulation of the Constitution and the Declaration of Independence." Martin Luther King, *Letter from Birmingham Jail, reprinted in* WHY WE CAN'T WAIT *supra* at 99.

The decisions of the lower courts to the contrary should be reversed.

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Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, *et al.*,

Respondents.

JENNIFER GRATZ, *et al.*,

Petitioners,

v.

LEE BOLLINGER, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICUS CURIAE THE MICHIGAN ASSOCIATION OF SCHOLARS IN SUPPORT OF PETITIONERS

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Ramin Afshar Mahajer and Evelyn Sung, *The Stigma of Inclusion: Racial Paternalism/Separatism in Higher Education*, New York Civil Rights Coalition (2002).....22

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INTEREST OF AMICUS CURIAE[1]

The Michigan Association of Scholars ("MAS") is the Michigan affiliate of the National Association of Scholars ("NAS"). The educators of the MAS engage in teaching and research in a wide rage of academic disciplines, in social and natural sciences, the arts and the humanities. The common goal of the MAS scholars is the search for *truth* within a scholar's specific discipline.

The MAS scholars share a common concern about the increasing politicization of institutions of higher education. Racial preferences given by the University of Michigan violate the Civil Rights Act of 1964 and the Equal Protection guarantee of the 14th Amendment. More specifically, the MAS argues that the goal racial diversity can never be a compelling state interest to justify the use of racial classifications in admissions policy.

The University's attempts to obscure its violations of the Equal Protection Clause come at an high price. It requires an enormous amount of time, effort, obfuscation and sophistry to camouflage admissions policies that are plainly racist. Indeed, pretending that such policies are not noxious, corrosive, humiliating and illegal – so as to avoid offense and to insure political correctness – is to undermine the University's very first mission: to continue

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

the search for truth and extend Michigan's best traditions of intellectual rigor.

STATEMENT

Petitioners are non-minority students who were denied admission to the University of Michigan ("the University") from 1995 through 1997. Petitioners filed actions against Respondents, claiming that in both the College of Literature, Science and the Arts, and the Law School of the University, race-based admissions policies violated Title VI of the Civil Rights Act, as well as the Equal Protection Clause of the 14th Amendment. The District Courts below split their decisions. In *Grutter* v. *Bollinger*, 137 F. Supp.2d 821 (E.D. Mich. 2001), the District Court found the University's Law School admissions policy violated the Equal Protection clause. Specifically, the Court found that the Law School's asserted need for a diverse student body was not a compelling government interest under the standard of strict scrutiny. In *Gratz* v. *Bollinger*,[2] although the District Court found the race-based system in-effect in the undergraduate college when Petitioners originally applied in 1995 was indeed unconstitutional, a revised admissions policy the University adopted after 1995 was found constitutional on the ground that the ethnic diversity it promoted was a compelling interest and was narrowly tailored to the stated need for intellectual diversity in the University.

[2] *Gratz* v. *Bollinger*, 122 F. Supp.2d 811 (E.D. Mich. 2000).

The Sixth Circuit, acting *en banc*, and in a 5-4 ruling, upheld the admission policy of the Law School, but refrained from acting on the undergraduate system.[3] The Sixth Circuit specifically found that, under *Regents of Univ. of Cal. v. Bakke*,[4] the goal of achieving a diverse student body constituted a compelling state interest sufficient to justify the use of racial and ethnic criteria in making admissions decisions.

The University seeks from this Court sanction for its systematic and large-scale uses of racially discriminatory admissions devices for the sake of ethnic diversity. The MAS, working closely alongside Petitioners, seeks from this Court an unambiguous and forceful declaration that racial preference in admission is a violation of Title VI of the Civil Rights Act, is a violation of the Equal Protection Clause of the 14th Amendment, and that under the standard of strict scrutiny such racial discrimination cannot be justified by a quest for diversity in the student body.

SUMMARY OF ARGUMENT

I. The MAS asserts that achieving racial diversity in the university student body can never be a "compelling state interest" sufficient to justify explicit racial discrimination.

II. The MAS also asserts that the racially discriminatory admissions systems of the University do not, in any event,

[3] *See, Grutter* v. *Bollinger*, 288 F.3d 732 (6th Cir. 2002).

[4] *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

substantially advance intellectual diversity, nor do race-based programs contribute to the central aim of the University – the pursuit of truth.

III. The MAS further asserts that, under the Equal Protection Clause, "academic freedom" does not license or conscience racially discriminatory conduct.

IV. The MAS contends that the racial preferences of the University are immoral and totally unacceptable in a democratic society.

V. The MAS concludes that racial preferences in admissions engender tension and racial hostility on the University campus.

ARGUMENT

I. CREATING A DIVERSE STUDENT BODY CAN NEVER BE A COMPELLING STATE INTEREST.

The central contention of the Michigan Association of Scholars, as a friend of this Court, is that the creation of a racially diverse student body *can never be a compelling state interest* in the light of the Equal Protection Clause of the U.S. Constitution.

A. State Interest Is "Compelling" When the Furtherance of that Interest Protects Those Principles Which Lie at the Heart of Ensuring Our Nation Stays Free, Open and Democratic Governed Under the Rule of Law.

Surprisingly, there is no case law defining conceptually or providing factors which define a state interest as

"compelling." Rather, a "compelling state interest" appears to be used by the courts as a "term of art."[5] Nonetheless, Supreme Court precedents suggest a conceptual framework for determining when a state's interest is compelling.

Under the Court's constitutional analysis, the State need only bear the heavy burden of advancing a "compelling state interest" when the state is restricting a citizen's exercise of *fundamental* rights guaranteed to the citizen under the Constitution. When viewed in light of our nation's history, traditions and law, the only interests a state may advance as compelling to justify prohibiting a citizen's exercise of a right guaranteed to the citizen under the Constitution are those interests which protect either governmental or societal structures or principles *absolutely* needed to ensure the state remains able to govern as a free, open and democratic government and that its citizens are likewise able to fully exercise their fundamental rights under the U.S. Constitution. Only when the citizen's exercise of his or her fundamental rights in fact jeopardizes governmental or societal structures or principles *absolutely* needed to ensure the state remains able to govern as a free, open and democratic government must the citizen's fundamental rights yield to the state.

This analysis harmonizes our constitutional history because a citizen's ability to exercise his or her fundamental rights is meaningless unless a government is able and willing to guarantee the exercise of such rights *by force*. Thus, the only interest which should be sufficiently

[5] *See, Quilter v. Voinovich*, 912 F.Supp. 1006, 1019 (N.D. Ohio 1995) (dicta) (reversed on other grounds).

compelling to allow a state to override a citizen's fundamental rights is an interest that is logically and necessarily connected to the state's ability to guarantee other rights.

For instance, American citizens have a fundamental right to speak freely during an election campaign. However, because voter intimidation and election fraud nullify other rights that are guaranteed to citizens, the state has a sufficiently compelling interest to restrict certain kinds of speech (election campaigning) within 100 yards of a polling place.[6] Similarly, while a citizen has a right to equal protection of the law, states may override this right in order to remedy a specific instance of past discrimination.[7]

Moreover, the MAS argues that any compelling interest recognized by this Court must be anchored to *our nation's* history, traditions and laws. One certainly can make the intellectual argument that prior government restraint which forbids the publication of official secrets would be a "compelling state interest." In fact, our philosophical cousin, Great Britain, claims just such an interest. Great Britain has an Official Secrets Act that prohibits publication of such national security secrets. Yet, this is not our history. The struggle for a free press animated our break with Great Britain, as it gives life today to the First Amendment. Our history, traditions and laws make clear that prior restraint of the press is not a "compelling state interest," in the United States, even if it

[6] *See, Burson v. Freeman*, 504 U.S. 191 (1992).

[7] *See, City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

might be considered "logical" or "compelling" in other places on the globe.[8]

As detailed below, any interest the State of Michigan may have in diverse student body is not an interest that is rooted in our nation's history, traditions or laws.

To the contrary, the State of Michigan sacrifices (and proposes to continue sacrificing), for the sake of diversity, those things that are deeply rooted in our tradition and law. While our founding documents declare that "all men are created equal," and the states loyal to the Union waged a bloody Civil War in order to end slavery, the University turns away from the struggle for racial equality, in order to extend, in modern times, racial and ethnic bias.

[8] *See, New York Times Co. v. U.S.*, 403 U.S. 713 (1971). MAS emphasizes that it is important for the law to anchor any analysis identifying a "compelling state interest" under the Equal Protection Clause in our nation's history and not simply leave it untethered and subject to passing ideologies and fads which catch the attention of the judge hearing the case. As Judge Richard Posner has stated:

> the proper constitutional principle [under the equal protection clause] is not, no "invidious" racial or ethnic discrimination, but no use of racial or ethnic criteria to determine the distribution of government benefits and burdens. . . . To ask whether racial exclusion may not have overriding benefits for both races in particular circumstances is to place the antidiscrimination principle at the mercy of the vagaries of empirical conjecture and thereby free the judge to enact his personal values into constitutional doctrine.

Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP.CT.REV. 12 (1974) at 25-26.

B. Government Mandated Racial Diversity Can Never Be a Compelling State Interest Under the Equal Protection Clause.

The People of the United States added the 14th Amendment to the U.S. Constitution, in the wake of the Civil War, so as to ensure that black citizens would not be denied equal protection of the laws. The central purpose of the Equal Protection Clause of the 14th Amendment "is to prevent the States from purposefully discriminating between individuals on the basis of race."[9] The Equal Protection Clause ultimately seeks to render the issue of race irrelevant in governmental decision-making.[10]

> "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality" before the law; therefore "racial discriminations are in most circumstances irrelevant and therefore prohibited. . . . "[11] "[P]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."[12]

Most importantly to this matter, this Court recently has made unequivocally clear that while the Equal Protection Clause was adopted in the wake of the Civil War to

[9] *See, Shaw v. Reno,* 113 S.Ct. 2816, 2824 (1993) (citing *Washington v. Davis,* 426 U.S. 229, 239, 96 S.Ct. 2040, 2047 (1976)).

[10] *See, Palmore v. Sidoti,* 466 U.S. 429, 432 (1984).

[11] *See, Hirabayashi v. United States,* 320 U.S. 81, 100 (1943).

[12] *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733 (1978) (opinion of Powell, J.); *see also Loving v. Virginia,* 388 U.S. 1, 11 (1967); *Brown v. Board of Educ.*, 347 U.S. 483, 493-94 (1954).

ensure that blacks were treated equally under the law, the Clause applies to each and every American citizen regardless of their race or ethnic origin.[13] Thus, this Court has also made unequivocally clear in evaluating any governmental action that expressly distinguishes between persons on the basis of race, the Court will use the most exacting scrutiny even if the proponents of the distinction characterize the classification as "benign" or "remedial."[14]

Finally, in bearing its burden of demonstrating a "compelling state interest," the State may not rely on "assertion and conjecture" – rather, the State must provide objective evidence demonstrating that the interest is compelling.[15] "Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the government may not allocate benefits or burdens among individuals based on the assumption that race or ethnicity determines how they act or think."[16] To hold otherwise would, as Judge Posner stated, subject fundamental rights guaranteed to citizens

[13] *See, Adarand Constructors v. Pena,* 515 U.S. 200 (1995). This thrust of the constitution is important. The Equal Protection Clause was not adopted to "help," "pull up," "improve" or "equalize the quality of the lives of" black citizens. Rather, it was adopted to ensure that black citizens would be treated no differently than any other citizen in the eyes of the law. It follows from this high purpose that no citizen – of whatever race or ethnicity – may be treated differently in admissions, for example, by an arm of the state, because of race or ethnicity.

[14] *See, e.g., Loving,* 388 U.S. at 11.

[15] *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 841 (1978).

[16] *See, Metro Broadcasting, Inc. v. F.C.C.,* 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting).

under the Constitution to the "mercy of empirical conjecture" and thus constant abuse.

The scholars of the MAS, including senior members of the faculty of the University of Michigan itself, find the claims that racial diversity is central, essential, and indispensable to be false. These scholars know from long and varied experience that, even where diversity in their classrooms is a genuine merit, it is simply not the case that their work, their teaching, their research, cannot go forward successfully in its absence. The MAS notes that many great institutions of higher learning in Great Britain, in Germany, and most notably in Japan, pursuing their intellectual missions with dedication and vigor, have met with intellectual success and high achievement with student bodies that would not be considered "diverse" by the standards used by the University of Michigan. American society is different from these societies, no doubt – but the nature of intellectual work in the sciences and in the humanities is not so different to say that diversity is somehow a prerequisite for educational excellence.

The MAS denies, categorically, that racial diversity is central to their work as scholars. The MAS denies, categorically, that racial diversity is essential for research or for effectiveness in teaching. The MAS denies, categorically, that racial diversity is indispensable to the search for truth, which is the truly central task of our institutions of higher learning – truth that does not fluctuate with race or color or national origin. The Michigan Association of Scholars asks that this Court recognize that the University, in claiming that racial diversity is a compelling need of the state, is exhibiting that same distortion of the truth.

II. EVEN IF THE CLAIMS OF THE UNIVERSITY FOR THE VALUE OF RACIAL DIVERSITY HAD SOME MERIT, SUCH DIVERSITY DOES NOT CONSTITUTE A COMPELLING DEMAND UPON THE STATE.

The MAS has said that racial diversity does not have the huge role in the educative process claimed for it by the University. However, MAS's objection to the University argument is yet more penetrating. Being fully aware of the importance of fine scholarship, the MAS also insists that even if it were true that racial diversity had a significant role in university research and teaching, that role could not constitute a compelling need of the state.

A. Student's Race Contributes Nothing to the University's Pursuit of Truth.

The MAS is not blind to the (marginal) advantages of ethnic diversity in our classrooms. With students equally diligent and curious and quick, it is better in many contexts (although not in all contexts) that students be varied in their cultural backgrounds. However, the notion that the marginal benefits such ethnic variety can bring in some few circumstances are to be treated as critical, constitutional and morally compelling needs of the state, overriding the plain intent of the Civil Rights Act of 1964 and the Equal Protection Clause, and overriding the demands of the most fundamental principles of moral fairness is a wholly untenable claim.

First, the race of a student, standing alone, has nothing whatever to do with learning or with truth. The University argued, in *Grutter*, that the Law School's commitment to diversity was not intended as a remedy for

past discrimination, but as a means of including students who may bring a different perspective to law school classes. But neither the University offered, nor did the Sixth Circuit cite, any objective evidence (required under strict scrutiny) to support the conclusion that individuals of different colors actually bring different experiences and perspectives that are essential to the research of or the teaching of the university. There is nothing in the record, and nothing that may be drawn from normal human experience, that would demonstrate that a person's race or ethnicity, taken by itself, would contribute anything significant to the learning process. To suggest that it would do so is, in fact, well-meaning racism.

Second, while the MAS certainly agrees that individuals of certain races or ethnicities may have experiences and perspectives that are different from those of students of other races or ethnicities, the MAS also recognizes that those individuals may not have experiences and perspectives that are different from other students. If, for the sake of better learning, there are certain perspectives and experiences that the University thinks valuable, the University can seek directly to enroll individuals who possess these special experiences and perspectives, rather than relying upon race or ethnicity as a proxy for their possession.

Third, there is no evidence that specifically links a student's race or ethnicity to any factor that is intellectually material to the advancement of learning, or to the University's pursuit of truth. The University's claims in this regard are entirely conjectural and without evidentiary support. The University maintains that its program of racial and ethnic preferences "has made the University of Michigan Law School a better law school than it could

possibly have been otherwise" because it includes students "who may bring to the law school a perspective different from that of members of groups which have not been the victims of such discrimination." However, the University *presumes* that Ms. Grutter, because she is white, has not been the victim of discrimination and *presumes* that those who were favored over her despite their much lower scores were the victims of such discrimination. To pass judgment on persons knowing nothing about them but their race or ethnicity is the plainest form of racial prejudice. In fact, the University readily admits that if Barbara Grutter were black instead of white she surely would have been accepted to the Law School.[17]

B. The Rationale Proffered by the Law School Is Internally Inconsistent.

The University asserts that there are no archetypical minority viewpoints.[18] But while asserting this the University insists upon employing an admissions process that assumes that the viewpoints of applicants largely follow their skin color.[19] Regrettably, the law students at Michigan, and other like schools, are hampered in their

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[17] *See, Grutter*, 288 F. 3rd at 775, 790 (Boggs, dissenting).

[18] That is one of the justifications given for the need for a "critical mass" of minority students. *See Grutter*, 137 F.Supp., at 836. ("Dean Syverud also indicated that when a critical mass of minority students are present, racial stereotypes are dismantled because non-minority students see that there is no "minority viewpoint"; they see, in other words, that there is a diversity of viewpoints among minority students.")

[19] *See, id.*, at 849 ("The connection between race and viewpoint is tenuous, at best").

absorption of the first of these assertions, which is true, by the University's real-life reliance upon the second, which is false. The Law School cannot hope to confront racial prejudice successfully by practicing it.[20]

The long experience of the many members of the Michigan Association of Scholars leads them to the firm conclusion that admitting students because of their race or ethnicity is neither a reliable nor a productive route to the "livelier, more spirited and simply more enlightening" class discussion sought by the University of Michigan.[21] Indeed, MAS members assert that in almost every discipline the racial or ethnic backgrounds of students contribute little or nothing to classroom discussion or learning. In the study of the sciences, for example, while diverse *intuitions, ideas* and *approaches* can lead to the discovery or grasp of natural laws and principles, the ethnic or racial background of the students neither enhances nor diminishes the academic experience. All are welcome to the scientific endeavor without regard to ancestry or skin

[20] As Professor William Van Alstyne has stated:

> [O]ne gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment *never* to tolerate in one's own life – or in the life or practices of one's government – the differential treatment of other human beings by race. Indeed, that is the great lesson for government itself to teach: in all we do in life, whatever we do in life, to treat any person less well than another or to favor any more than another for being black or white or brown or red, is wrong. Let that be our fundamental law and we shall have a Constitution universally worth expounding.

William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U.CHI.L.REV. 775, at 809-10 (1979).

[21] *See, Grutter*, 137 F. Supp. at 849.

color. The same can be said of the study of philosophy, chemistry, classics, and mathematics. The hoped-for diversity lies in the range of *ideas*. When the focus is upon ideas and arguments themselves, and upon the worth of those ideas and the reliability of those arguments when held up to careful scrutiny, the ethnic composition of the student body is largely irrelevant.[22]

C. The University Has Not Sustained Its Evidentiary Burden of Establishing that Its Interest in Racial Diversity is *Compelling*.

The evidence the University has sought to compile regarding the contributions made by diversity is largely conjectural, inconclusive and of doubtful worth. But even if its worth were undoubted, the University's burden would still be sustained. None of its supposed evidence establishes, or can claim to establish, a compelling interest that outweighs the claims of racial justice obliged by the Equal Protection Clause.

[22] Indeed, when it applied multivariate regression analysis to the same database employed by the University of Michigan, the National Association of Scholars has "disconfirmed the claim that campus racial diversity is correlated with educational excellence." *See,* T. Wood and M. Sherman, *Race and Higher Education: Why Justice Powell's Diversity Rationale for Racial Preferences in Higher Education Must Be Rejected*, at 58 (National Association of Scholars, 2001). Further, NAS is not alone in its conclusion. Two other economists, Harry Holzer and David Neumark, whose work had previously exhibited sympathy for racial preferences, emerged with this damning conclusion following their review of the University's evidence: "There is no evidence of the positive (or negative) effects of a diverse student body on educational quality." H. Holzer and D. Neumark, Assessing Affirmative Action, *Journal of Economic Literature*, Vol. 38, No. 3, p. 559 (Sept. 2000).

One example of this failure is illustrative: In an effort to quantify the educational benefits of diversity, the University solicited and then issued a report written by Patricia Gurin, a Professor of Psychology at the University of Michigan. Professor Gurin sought to correlate the racial diversity of classrooms on the one hand with hundreds of educational outcomes on the other. Among her results was the conclusion that students' self-reported intellectual self confidence improved more sharply in classrooms where there was greater racial diversity. But only by wading through pages of regression tables will one find the fact (not much emphasized by the University!) that student self-reported intellectual self confidence in racially mixed classrooms increased for *white* students. For *black* students Prof. Gurin found either no correlation or a negative correlation. Black student self-confidence, according to Prof. Gurin, either did not improve, or it declined in more racially mixed classes.[23]

As the University would have it, the University is justified in abandoning normal admissions criteria so as to boost the number of black students in order that white students (but not black students) may feel more self-confident. Whether this shows a need for diversity at all is

[23] *See,* "Expert Witness Report of Patricia Y. Gurin." 15 December 1998, Appendix D, Table D-1 (white students) and Table D-2 (black students). According to Table D-1, the raw correlation between "classroom diversity" and student self-reported "intellectual self-confidence" for white students was (.031). According to Table D-2, the raw correlation between "classroom diversity" and self-reported black self-confidence was (-.049). Classroom diversity (on this account) partly explained an increase in "intellectual self-confidence" for white students and partly explained a *drop* in intellectual self-confidence for black students.

arguable; that it shows a compelling need for diversity is absurd.

Because the evidence demonstrates that the University of Michigan's use of an applicant's race as a proxy for his or her viewpoints is internally inconsistent, indirectly a form of racism itself and immaterial to the search for truth, the claim that student diversity is an interest so compelling that it justifies racially discriminatory admissions cannot be seriously maintained.

III. "ACADEMIC FREEDOM," CANNOT SERVE AS A SWORD TO ENGAGE IN OUTRIGHT DISCRIMINATION BY RACE IN UNIVERSITY ADMISSIONS.

The original impetus for the use of racial diversity in the student body as a compelling state interest justifying a state's use of race in admission selection criteria was Justice Powell's finding in *Bakke* that "academic freedom" is a "countervailing constitutional interest" to the student's interest in equal protection. Thus, in *Bakke*, when the University of California at Davis baldly asserted without evidence that its educational mission required a racially diverse student body, Justice Powell found that Davis' "academic freedom" to make this decision was a "countervailing constitutional interest" under the First Amendment, an interest that had to be "balanced" against Mr. Bakke's right to have his enrollment application evaluated without regard to race.[24] Using "academic freedom" as a criterion for selection of students is not a

[24] *See, Bakke*, 438 U.S. at 313-14.

"countervailing constitutional interest," and it was not that at the time of *Bakke*.

Straining to find a "countervailing constitutional interest" in academic freedom that might undergird the need for diversity, Justice Powell relied on *Sweezy v. New Hampshire*,[25] and *Keyishian v. Board of Regents*.[26] The argument has little merit, since neither *Sweezy* nor *Keyishian* held that "academic freedom" was any kind of fundamental right to be balanced against other rights. Moreover, the facts and law in each of those cases did not touch on the rights or needs of the universities involved, but rather the right of individual professors to exercise academic freedom grounded in their First Amendment right to free speech. Both cases, in dicta, spoke of the value our society places on academic freedom in the university and the importance of a free and searching inquiry at the academy – but this language could not transform "academic freedom" into a sword for the University, as a state actor, to violate the rights of individuals to equal protection of the laws.

Sweezy involved a McCarthy-era claim against a professor who failed to answer a court order to deliver lecture notes that would reveal the professor's communist sympathies. The Court found that the contempt citation (which it reversed) touched on the *professor's* First Amendment right to free speech and free association. *Keyishian* similarly involved a New York sedition law aimed at university professors who were "disloyal" to the

[25] *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957).

[26] *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

State. Again, the New York law was struck down because it violated the *professor's* First Amendment right to free speech and free association.

Academic freedom is a treasured principle in the life of universities and their members, to be sure. It safeguards the integrity of scholars and the open and robust exchange of ideas in the academic environment. The Michigan Association of Scholars is deeply loyal to this ideal and is as tenacious in its defense. But the MAS scholars do not suppose that their academic freedom gives them, or the State of Michigan, license to act in ways that are blatantly discriminatory, subversive of the deepest constitutional principles, and patently violations of Federal law.

IV. THE UNIVERSITY'S USE OF RACE AND ETHNICITY IN THE ADMISSIONS PROCESS IS IMMORAL.

The officers of the University of Michigan are honorably motivated. And yet they say bluntly that they are entitled to discriminate by race, in ways of their choosing, to improve the intellectual setting of the campus. Their claim that ethnic preferences do indeed improve learning and teaching is an empirical one – and is vigorously disputed by MAS and others – yet, most Michigan residents, and most thoughtful Americans, would agree that even if those educative claims were true, the enrichment of the campus environment cannot justify discrimination by race. Race-based admissions policies are a moral disgrace.

However desirable diversity in the classroom may be, when achieved by the use of a racially discriminatory admissions system it comes at much too high a price. Our

social order is built on a shared understanding that laws and the judicial system will treat each individual the same as every other similarly situated individual and that each individual will be judged on the particular merits of his or her individual circumstances. Race preference proceeds on the corrosive principle that individuals may be judged not entirely by their individual merits, but in good part by their race.

The principle that all persons are equal lies close to the heart of a democratic polity. If that principle is to be realized in practice, there must be no racial discrimination by the state in the exercise of its authority. The Goddess of Justice is rightly blindfolded; the Equal Protection Clause is rightly central in a just society. The race preferences defended by the University undermine the highest of American ideals.

A simple thought experiment will confirm this. Suppose that the trial courts in *Grutter* and *Gratz* had determined that there was strong evidence that segregated classrooms improve learning and teaching at the University of Michigan.[27] Suppose further that the data in support of segregating students by race were very impressive, far more impressive than the materials offered by the University in support of the alleged benefits of diversity. Would we think such evidence, even if reliable, constituted

[27] The argument seems absurd to us now, but in the defense of segregated schools by respondents in *Brown v. Board of Education*, 347 U.S. 483 (1954), a great deal of substantial evidence, unacceptable now but persuasive then, was submitted by the States in supporting their claim that segregation was really very good for us – good for whites and good for blacks too!

a justification for the deliberate segregation of university classes or activities? Of course not. However strong the evidence of its benefits, men and women of principle would insist that segregation by race, imposed by the state, is simply unacceptable. The advantages that may flow from it (MAS would say) could never begin to justify a policy that is intrinsically immoral and unjust.

And so it is with this case at bar. It is unjust to give advantages or impose burdens on the basis of skin color – even if doing so had some benefits, and even if that racial discrimination were honorably motivated. Racial discrimination is wrong; no benefits alleged to flow from diversity on the campus or in the classroom can make it right.

V. THE UNIVERSITY'S USE OF RACE AND ETHNICITY IN THE ADMISSIONS PROCESS ENGENDERS RACIAL TENSION AND HOSTILITY.

The ethnic splintering of campus life is one plain result of educational institutions that continually reemphasize and reinforce racial and ethic distinctions among students and faculty. MAS finds the recent penetrating survey *The Stigma of Inclusion: Racial Paternalism/Separatism in Higher Education,* Ramin Afshar Mahajer and Evelyn Sung, New York Civil Rights Coalition (2002) disturbing and very instructive. In this report, the New York Civil Rights Coalition concludes that "[t]he same schools that use race as a factor to achieve inclusionary admissions will also permit its use as a factor in the selection of roommates, preferences for living quarters in campus housing, for scholarships, and even for the

remediation and counseling of 'at risk' students" until "[r]ace and ethnicity considerations permeate almost every facet of campus life."[28] The report details how, in the 32 undergraduate institutions it surveyed, colleges had increasingly made certain course offerings available only to minority students; had segregated students along color lines through race-based housing; had obliged "diversity training" as a condition of graduation; and had instituted separate graduation ceremonies of those of the several races. The ethnic fences established and authorized in the admissions process engender, and then reinforce a host of race-conscious campus programs. Race-based "diversity" policies fracture the very communities that the proponents of these policies claim will be drawn together and enriched.[29]

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[28] Ramin Afshar Mahajer and Evelyn Sung, *The Stigma of Inclusion: Racial Paternalism/Separatism in Higher Education*, New York Civil Rights Coalition (2002) at p. 3.

[29] *See also, Adarand Constructors v. Pena*, 515 U.S. 200, 241 (Thomas, J., concurring) ("Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race").

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Sixth Circuit should be reversed.

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Nos. 02-241, 02-516

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IN THE

Supreme Court of the United States

BARBARA GRUTTER

v.

LEE BOLLINGER, ET AL.

JENNIFER GRATZ AND PATRICK HAMACHER

v.

LEE BOLLINGER, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF THE CENTER FOR THE ADVANCEMENT OF CAPITALISM AS *AMICUS CURIAE* SUPPORTING THE PETITIONERS

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IN THE

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TO THE UNITED STATES COURT OF APPEALS
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INTEREST OF AMICUS CURIAE[1]

The Center for the Advancement of Capitalism ("CAC") is a District of Columbia corporation organized in 1998, and exempt from income tax under Section 501(c)(4) of the

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[1] CAC files this brief with the consent of all parties. The letters granting blanket consent have been filed concurrently in both cases. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

Internal Revenue Code. CAC's mission is to present to policymakers, the judiciary and the public analyses to assist in the identification and protection of the individual rights of the American people. CAC applies Ayn Rand's philosophy of Objectivism to contemporary public policy issues, and provides empirical studies and theoretical commentaries on the impact of legal and regulatory institutions upon the rights of American citizens.

The University of Michigan's admissions policies, and their disposition by this Court, is a subject of great interest to CAC and its supporters. A fundamental tenet of CAC's mission is the support of individualism as an organizing principle of society. The two cases at bar directly challenge individualism's applicability in the university setting, and as they represent acts of a state government, in the larger context of public action under the Constitution. For this reason, CAC maintains a critical interest in the outcome of both cases.

ARGUMENT[2]

In order to prevail, the University of Michigan must demonstrate that racial "diversity" in admissions is essential to the school's core educational mission. Without this demonstration, there is no compelling interest that justifies the University's violation of the Fourteenth Amendment. Based on the record, the University has not met this burden, and it will never be able to do so, because racial diversity itself is not relevant to education.

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[2] CAC does not wish to burden the court by restating legal arguments that are being argued sufficiently by others. Accordingly, we deliberately limit our argument to what we consider to be the neglected axis of this case, namely, whether "racial diversity" itself is a legitimate end and whether it can constitute a compelling interest that obviates the need to comply with the Equal Protection Clause of the Fourteenth Amendment.

Both cases turn on the definition of "diversity." The lack of precision in defining diversity hampers the University's case. Lee Bollinger, the University president, offered this explanation of diversity in a recent interview:

> "The basic idea is that students learn better when they're in an environment in which not everyone is just like them...The question of the bigness or smallness of the [race] factor is not the way to look at it. The question is: 'How much do you value educational diversity as a tool for your students?'"[3]

President Bollinger asserts diversity *qua* diversity is a value that must be upheld as part of the University's educational mission. Yet nothing in Bollinger's explanation, or any document filed by the University in these cases, offer a precise definition of what diversity is, and how it constitutes a value. In the decision below in *Grutter*[4], Judge Boggs noted in dissent that, in defining diversity, "we must be aware that the definitions of and the precise connotations of words are of crucial importance."[5] Neither the University nor the Sixth Circuit majority heeded Judge Boggs' warning. Consequently, this Court is now faced with resolving the conceptual paradox over diversity's true relationship to education.

The Law School admissions policy establishes two criteria to be considered in assessing diversity: race and experience. The undergraduate policy is far simpler, only dealing with race, and defining race in direct proportion to other factors. Both policies, however, rely on using an

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[3] *60 Minutes: Negative about affirmative action?* (CBS television broadcast, Dec. 15, 2002).

[4] 288 F.3d 732 (6th Cir. 2002).

[5] Id. at 774 (Boggs, J., dissenting).

individual's genetic lineage to assess their character and intellectual capacity. By definition, such a policy is racist.[6]

Yet President Bollinger says we should not "look at the bigness or smallness of race" in assessing race's importance. This is obfuscation, since Bollinger's undergraduate policy defines a very precise relationship: Race counts for 20 points out of the 105 minimum required for admission. By contrast, a perfect SAT score counts for 12 points, and an excellent personal essay counts for two.[7] It is impossible for the University to separate their rhetoric from the reality of their policy.

In the case of the Law School, the University offers a policy that approximates understanding of diversity without being precise:

> "There is a commitment to racial and ethnic diversity with special preference to the inclusion of students from groups that have been historically discriminated against...who without this commitment might not be represented in our student body in meaningful numbers. These students are particularly likely to have experiences and perspectives of special importance to our mission."[8]

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[6] As Ayn Rand observed in 1963, "Racism claims that the content of a man's mind (not his cognitive apparatus, but its content) is inherited; that a man's convictions, values and character are determined before he is born, by physical factors beyond his control. This is the caveman's version of the doctrine of innate ideas—or of inherited knowledge—which has been thoroughly refuted by philosophy and science. Racism is a doctrine of, by and for brutes. It is a barnyard or stock-farm version of collectivism, appropriate to a mentality that differentiates between various breeds of animals, but not between animals and men." AYN RAND, THE VIRTUE OF SELFISHNESS 147 (1964).

[7] *Gratz v. Bollinger*, No. 02-516, Pet. App. at 116a.

[8] 288 F.3d at 737.

The specific justification for using race to attain "diversity" was clarified by University counsel at oral argument before the Sixth Circuit in *Grutter*:

> "Our race matters and it matters across all sorts of economic classes. Race matters in the United States. If we had someone who was a black woman, who otherwise had an application that looked like Barbara Grutter, that would be a different person with different life experiences that would have a different contribution to our class."[9]

Race and experience are presented here as related factors. The defendants' inference is that individuals of the same race share experiences that impact their educational ability in the same way. But this conclusion is faulty and represents the University's fundamental error in its justification of race-based admissions.

Race is not a legitimate proxy for experience for two reasons. First, race is typically determined on the basis of one's biological parentage, yet biological parentage does not determine one's life experiences. One of the simplest examples of this point may be seen in the case of adoptions. Here, biological parents typically contribute less than adoptive parents to their children's life experiences. Thus, in the case of cross-racial adoptions, race becomes a misleading proxy, possibly masking enormous differences in applicants' life history. Second, for purposes of admission, the applicant's race is categorical, meaning that applicants with very different sets of biological parents and grandparents are treated equivalently. Here, too, race is a misleading proxy for experience because wide variations in lineage will not correlate with variations in experience. In a twist on the notorious "one drop rule", the University effectively expects

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[9] *Grutter*, Oral Arg. Trans. at 3 (6th Cir. Dec. 6, 2001).

that an applicant with one African-American grandparent and an applicant with two African-American parents will share the same life experiences, including the experience of racism and other adversities. This assumption is suspect, but its validation would be necessary to support the university's claim that its use of race provides a legitimate stand-in for assessing applicants' experiences.

We argue that race is wholly irrelevant to University admissions, and its use by the University of Michigan serves only to negate the importance of experiences that can be directly identified in *individuals*. Such experiences, however, are misvalued by the University, particularly in the Law School policy. In one passage from their policy, the Law School favorably cites the following experiences as contributing to "diversity": "an Olympic gold medal, a Ph.D. in physics, the attainment of age 50 in a class otherwise lacking anyone over 30, or the experience of having been a Vietnamese boat person." But consider the nature of "diversity" among these four cases. The common factor among them is not group membership, but achievement in some field or in an individual overcoming some specific adversity. Insofar as these present *individual values*, the University may properly consider them, and the University seems to recognize, at least implicitly, that there is no genuine substitute for individual achievement.

Yet race does in fact substitute for individual achievement in both the Law School and undergraduate admission policies. Race is given 1.67 times the weight of a perfect SAT score in undergraduate admissions, and 10 times the weight of an excellent essay. The message here is unmistakable—the University does not consider individual achievement a virtue on par with race.

Racial diversity thus becomes not just a proxy for achievement, but more important than it. The implications of this substitution are enormous. If allowed to stand, the admissions policies will act to undermine the very mission of the University of Michigan—education.

By elevating race over achievement and assigning people to racial groups, the University denies an important truth: students do not learn as social fragments, but as individuals. Ultimately, there is no collective mind; only individual minds can initiate and direct thought. Students certainly benefit from intellectual interaction with others, but such associations ought to take place voluntarily, on the basis of earned achievement and ability, rather than as a product of the state's racial engineering.

In contrast, the University's policy stands for the proposition that every applicant represents a fragment of some collective racial experience. This means that the diversity of experiences, ideas and backgrounds among applicants is effectively ignored as each individual is reduced to a color-coded cipher. The implication is that a black student does not represent himself and his mind alone, but rather some "collective consciousness" of all other blacks not attending the University. Not only is this burden unfair to the individual student, the whole concept runs contrary to the American theory of government. The state has no right to present students as unelected representatives of some racial group. Yet that is precisely the role every black, Latino, and Native American student at the University of Michigan is expected to fulfill.

Although the defendants argue that race-based admissions correct the past and present evils of racism, the only solution to the problem of racism is individualism. This principle is enshrined in the claim of the Declaration of Independence that "all men are created equal." This was not just a political statement, but a *metaphysical* claim: no one inherits any experiences. The implication is that the state—and its universities—cannot infer experience on the basis of biological parentage.

The issue here is whether "racial diversity" constitutes a compelling government interest. The petitioners and other *amicii* expend great energy arguing over the "compelling" aspect. But there is, at the heart of this case, the related

question of whether racial diversity itself is an actual "interest." We argue it is not. Racial diversity is, as Ayn Rand would call it, an "anti-concept," that is, "an unnecessary and rationally unusable term designed to replace and obliterate some legitimate concept."[10] In these cases, "racial diversity" obliterates the concept of equal protection, which requires equal treatment of individuals without regard to race, and seeks to replace the concept with the view that individuals are interchangeable racial fragments. Since "racial diversity" stands in direct opposition to the proper execution of the Equal Protection Clause of the Fourteenth Amendment without any redeeming educational value, it is clear that this "diversity" can not constitute a compelling state interest.

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit in *Grutter v. Bollinger*, and the judgment of the District Court in *Gratz v. Bollinger*, should be reversed.

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[10] AYN RAND, CAPITALISM: THE UNKNOWN IDEAL 183 (1967).

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Nos. 02-241 & 02-516

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and
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE STATE OF FLORIDA AND THE HONORABLE JOHN ELLIS "JEB" BUSH, GOVERNOR, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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U.S. v. Fordice,
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OTHER AUTHORITIES

FIU Press Release, August 16, 2002,
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convocation.htm> 8

Governor's Press Release, November 2, 1999,
<http://sun6.dms.state.fl.us/eog_new/eog/library/releases/1999
/November/leg_committee_a+_11-2-99.html> 9

Governor's Press Release, September 6, 2002,
<http://sun6.dms.state.fl.us/eog_new/eog/library/
releases/2002/September/fcat-9-6-02.html> 10

Governor's Press Release, September 6, 2002,
<http://www.oneflorida.org/myflorida/
government/governorinitiatives/one_
florida/enrollment-9-6-02.html> 8

*The One Florida Accountability Commission:
An Independent Review of Equity in Education and
Equity in Contracts Components of One Florida*, June 2002
<http://www.myflorida.com/myflorida/government/

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Tampa Tribune, *Bush: Data shows Increase in Black Students Taking Advance Placement Tests,* Oct. 23, 2002, <http://www.oneflorida.org/myflorida/government/governorinitiatives/one_florida/articles/test.html> .....-13

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U.S. Census Bureau, 2001 Supplemental Survey Profile, (last modified December 16, 2002) <http://www.census.gov/acs/www/Products/Profiles/Chg/2001/SS01/Tabular/010/01000US1.htm>; *U.S. Census Bureau, 2001 Supplemental Survey Profile,* (last modified December 16, 2002) <www.census.gov/acs/www/Products/Profiles/Single/2001/SS01/Tabular/040/04000US121.htm>. 6

*U.S. Census Bureau, 2001 Supplemental Survey Profile, (*last modified December 16, 2002) <www.census.gov/acs/www/Products/Profiles/Single/2001/SS01/Tabular/040/04000US121.htm>*; U.S. Census Bureau, 1990 General Population and Housing Characteristics*, (last visited January 13, 2003), <http://factfinder.census.gov/servlet/BasicFactsTable?_lang=en&_vt_name=DEC_1990_STF1_DP1&_geo_id=04000US12> ..... 6.

INTEREST OF THE *AMICI*

The State of Florida and Governor Jeb Bush, by and through Attorney General Charlie Crist, respectfully submit this Brief as *amici curiae* pursuant to Sup. Ct. R. 37.4. The State of Florida ("Florida") has a population of approximately 16 million, and enrolls approximately 250,000 students in its State University System, with approximately 800,000 additional students enrolled in its Community College System. Because of its ethnically and racially diverse population, Florida has an interest in promoting diversity in higher education, as well as in all other state programs, including state contracting and employment. Indeed, Florida has adopted numerous policies to promote diversity through empowerment and equal opportunity for all.

The key question before this Court is whether the University of Michigan and the University of Michigan Law School's use of racial preferences in admissions violates the Equal Protection Clause of the Fourteenth Amendment. Florida schools in times past utilized comparable racial preferences, but in November 1999, Governor Bush established the One Florida Initiative. *The One Florida Accountability Commission: An Independent Review of Equity in Education and Equity in Contracts Components of One Florida,* June, 2002 <http://www.myflorida.com/myflorida/government/otherinfo/documents/executive_summary.doc>. One Florida removed racial or ethnic preferences, set-asides, and quotas as acceptable practices for granting admission to the undergraduate programs of the state universities effective for Fall 2000, and to the graduate and professional programs effective for Fall 2001. *Id.* at 11; *see* Rule 6C-6.002(7), Florida Administrative Code (2002). This race-neutral admissions policy in Florida's State University System anticipated, and is in accord with, the Eleventh Circuit's ruling in *Johnson v. Board of Regents of University of Georgia*, 263 F.3d 1234 (11th Cir. 2001),

which invalidated a university's racially preferential admissions policy.

Florida therefore has an interest in this Court's consideration of whether admissions decisions must be made on a race-neutral basis, as this Court requires in state contracting and employment cases in the absence of present evidence of the effects of past discrimination. Florida can share with the Court that through the use of race-neutral means, it has maintained a State University System that reflects the rich diversity of Florida's population.

The best basis for diversity in higher education is not racial preferences and commensurately lower standards. Instead, Florida's approach uses two different methods. First, Florida has taken steps to develop a talented and diverse pool of university applicants by providing opportunities for a rigorous education for all students who so choose. Second, Florida has provided alternative but race-neutral means of admission to those students who are striving for excellence, but who may have been disadvantaged by a lack of educational opportunities.

Florida urges this Court to reverse the lower court decisions and clarify that university admissions decisions, like state decisions in the contracting and employment contexts, must be made on a race-neutral basis absent evidence of present effects of past discrimination. The results of the One Florida Initiative demonstrate that the goal of diversity can be attained without resorting to racially preferential policies.

SUMMARY OF ARGUMENT

Florida is committed to the paramount value of maintaining diverse institutions of higher learning. The issue, of course, is how best to attain that diversity. Our Constitution demands that the government treat each individual with equal dignity and respect, regardless of his or her race or ethnicity. To give effect to this principle, this Court has previously held that government may classify its citizens on the basis of race only when absolutely necessary to remedy the present effects of past discrimination. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274 (1986); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995); *City of Richmond v. J.A. Croson*, 488 U.S. 469, 511 (1989); *U.S. v. Paradise*, 480 U.S. 149, 170-171 (1987). We urge the Court to apply this rigorous standard in the context of higher education and thereby invalidate the race-based admissions policies at issue in this case.

Florida's experience under Governor Jeb Bush's One Florida Initiative demonstrates that diversity can be attained through race-neutral means. Respect for the principle of non-discrimination need not come at the expense of maintaining racially and ethnically diverse institutions of higher learning. In the time since Florida adopted rules prohibiting its universities and graduate schools from considering race in admissions decisions, the overall minority composition of those institutions has remained steady and perhaps even increased. Florida has accomplished this result through policies that develop students' abilities to meet the challenges of higher education and that offer focused assistance to students, regardless of race, who are underprivileged.

Florida's ability to achieve diversity through race-neutral means strongly suggests that the race-conscious admissions policies at issue here are not narrowly-tailored to meet their purported ends. But this Court has long required that government-sanctioned racial classifications be narrowly tailored to achieve a compelling government interest. This failure to

meet the Court's narrow-tailoring requirement should be fatal to the constitutionality of the programs at issue in this case.

In any event, although they are purportedly designed to further the goal of viewpoint diversity, the policies at issue appear to seek racial and ethnic diversity for its own sake. This inference seems inescapable, given that the policies assign preferences based solely on race or ethnicity, regardless of the applicant's particular views or life experiences. This Court has already rejected similar claims that the pursuit of racial and ethnic diversity--in and of itself--constitutes a compelling government interest. Diversity thus defined is no more compelling an interest in the context of higher education.

ARGUMENT

The pertinent question before this Court in both *Grutter v. Bollinger,* 288 F. 3d 732, (6th Cir. 2002), *cert. granted,* 123 S.Ct. 617 (2002) and *Gratz v. Bollinger,* 122 F.Supp.2d 811, (E.D. Mich. 2000), *cert. granted,* 123 S.Ct. 602 (2002), is whether the University of Michigan's use of racial preferences in university and law school admissions violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. As Petitioners' briefs comprehensively address the constitutionality of the specific Michigan programs, this brief will focus on Florida's experience in implementing race-neutral admissions programs while increasing educational opportunities for its diverse population. Florida will argue that racially preferential admissions programs are not required to develop a diverse State University System, and that such programs are no more constitutional than similar decisions in the context of state contracting or employment.

I. FLORIDA'S EXPERIENCE DEMONSTRATES THAT DIVERSITY IN A STATE UNIVERSITY SYSTEM IS ATTAINABLE BY RACE-NEUTRAL MEANS.

The primary goal from Florida's perspective is that all of Florida's students be provided the necessary educational tools and have truly equal educational opportunities available to them. This empowerment and equal opportunity will then result in a diverse State University System. This is a continuing challenge, as Florida is an increasingly diverse and growing state. From 1990 to 2000, the state's population increased from approximately 13 million to 16 million people.[1] In the past ten

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[1] *U.S. Census Bureau, 2001 Supplemental Survey Profile,* (last modified December 16, 2002) <www.census.gov/acs/www/Products/Profiles/Single/2001/SS01/Tabular/040/04000US121.htm>; *U.S. Census Bureau, 1990 General Population and Housing Characteristics*, (last

years, Florida's Hispanic-American population has nearly doubled, from an estimated 1.5 million to 2.8 million. *Id.* Florida is now home to one out of every thirteen Hispanic-Americans in the country.[2] Over the same ten-year period, Florida's African-American population grew steadily from 1.8 million to 2.4 million. [3]

With such rich diversity, Florida's state universities will benefit from the ability to tap a talented and diverse pool of students who have been provided with the educational tools needed to meet the challenges of higher education. The goal is to validate every student's ability to strive for and participate in higher education. This policy will result in a diverse student body that reflects equal student opportunity.

A. Florida's State University System Has Adopted Race-Neutral Admissions Policies And Continues To Be Racially And Ethnically Diverse.

Governor Bush proposed his One Florida Initiative in November, 1999 and requested that the rules governing

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visited January 13, 2003), <http://factfinder.census.gov/servlet/BasicFactsTable?_lang=en&_vt_name=DEC_1990_STF1_DP1&_geo_id=04000US12>

[2] *U.S. Census Bureau, 2001 Supplemental Survey Profile,* (last modified December 16, 2002) <http://www.census.gov/acs/www/Products/Profiles/Chg/2001/SS01/Tabular/010/01000US1.htm>; *U.S. Census Bureau, 2001 Supplemental Survey Profile,* (last modified December 16, 2002) <www.census.gov/acs/www/Products/Profiles/Single/2001/SS01/Tabular/040/04000US121.htm>.

[3] *U.S. Census Bureau, 2001 Supplemental Survey Profile,* (last modified December 16, 2002) <www.census.gov/acs/www/Products/Profiles/Single/2001/SS01/Tabular/040/04000US121.htm>; *U.S. Census Bureau, 1990 General Population and Housing Characteristics*, (last visited January 13, 2003), <http://factfinder.census.gov/servlet/BasicFactsTable?_lang=en&_vt_name=DEC_1990_STF1_DP1&_geo_id=04000US12>.

admissions into the State University System be modified to prohibit preferential admissions on the basis of race or gender. The State Board of Education approved these modifications on February 22, 2000. The undergraduate rule was effective for Fall 2000 admissions, and the graduate and professional rule was effective for Fall 2001 admissions. *See* Rule 6C-6.002(7), Florida Administrative Code (2002). Prior to these rule changes, various universities and programs within the university system had used racial preferences. *See NAACP v. Florida Board of Regents,* Final Order, July 12, 2000, <http://www.doah.state.fl.us/internet/search/detail.cfm?CaseNo=00-000952&URLString=0 >, at ¶ 105, *rev'd*, 822 So. 2d 1 (Fla. 1st DCA 2002), *appeal docketed*, No. 02-1878 (Fla. Sup.Ct. Aug. 22, 2002).

Since the implementation of the One Florida policy of race-neutral admissions in higher education, Florida's State University System has maintained ethnic and racial diversity within its overall student body. *The One Florida Accountability Commission,* at Chart 3, <http://www.myflorida.com/myflorida/government/otherinfo/ppts/enrollment2.ppt> (June 17, 2002). In the last year prior to the effective date of Florida's new policy of race-neutrality (1999-2000), the percentage of minority first-time-in-college students enrolled in Florida's undergraduate institutions was 36.6%. Two years later that percentage is 36.68%. *Id.* Thus, although some individual universities showed increases in minority enrollment while others showed a decrease, the overall representation of minorities within the State University System has remained stable.

Florida State University and the University of Florida are the State University System's flagship universities. Following its implementation of a race-neutral admissions policy, Florida State University's minority enrollment increased. Florida State's African-American student enrollment rose from 11.01% in 1999-2000 to 11.85% in 2001-2002, a gain of almost an entire percentage point. *One Florida Accountability Commission*, at Chart 7, <http://www.myflorida.com/myflorida/government/

otherinfo/documents/enrollment3.xls>. Florida State University's Hispanic-American student enrollment increased from 8.74% to 12.85% during the same period. *Id.* Minority representation did decline slightly at the University of Florida, from 9.95% in 1999-2000 to 7.15% in 2001-2002 for African-American students, and from 11.38% to 11.13% for Hispanic-American students. *Id.* However, even with this decline, the university has maintained a significant minority representation.[4]

Diversity in graduate and professional school enrollment has remained steady as well. In fact, the state's graduate, medical, and business schools are enrolling approximately the same or a greater number of minority students as in the past. *One Florida Accountability Commission*, at Chart 4, <http://www.myflorida.com/myflorida/government/otherinfo/ppts/enrollment3.ppt> (June 17, 2002). In the first year of the implementation of Florida's race-neutral admissions policy, system-wide minority enrollment in graduate programs increased from 21.6 % in 2000-2001 to 24.95% in 2001-2002. *Id.* Only law school admissions experienced a slight decline of .03 % (from 24.63% in 2000-2001 to 24.60% in 2001-2002). *Id.* However, the state has just authorized two new law schools at Florida International University (FIU) and Florida Agricultural and Mechanical University. These schools will increase opportunities for minorities to attend. By way of example, the inaugural class at the FIU law school was 44% Hispanic-American and 8% African-American. *FIU Press Release*, August 16, 2002, <Http://news.fiu.edu/releases/2002/08_16_law_convocation.htm>.

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[4]Preliminary admissions data shows that the African-American enrollment at the University of Florida in 2002-2003 is up 43.26% from the previous year while Hispanic-American enrollment has risen by 13.13%. System-wide minority enrollment will remain steady at approximately 36%. *See Governor's Press Release*, September 6, 2002, <http://www.oneflorida.org/myflorida/government/governorinitiatives/one_florida/enrollment-9-6-02.html>.

B. Florida's Goal Of Providing All Students Equal Opportunity For Educational Achievement Is Accomplished By Better Equipping All Students For Higher Education.

The best way to have a qualified and diverse pool of students available for admission to institutions of higher education is to provide them the opportunity to acquire the necessary tools prior to seeking admission. Concerned that many Florida students were not acquiring the basic educational tools for higher education and life in general, Governor Jeb Bush and the Florida Legislature, in the summer of 1999, implemented the A+ Education Plan. *Governor's Press Release*, November 2, 1999, <http://sun6.dms.state.fl.us/eog_new/eog/library/releases/1999/November/leg_committee_a+_11-2-99.html>. While this plan has a number of components, the operational premise of the program is that every student can learn, and that an accountability system must be implemented that identifies those students who are making progress, as well as identifying those students, classes, and schools that are not making progress. Schools are assigned grades based on student achievement. In this way, teachers, administrators, and districts can be held accountable for student achievement, and resources and efforts can be focused on the most needy students. Then, in addition to targeting more resources to the failing schools, students in schools that are failing for two years have the opportunity of transferring to a better public school or a private school. *See* Section 1002.38, Florida Statutes (2002). The plan focuses on improving achievement of all students, but particularly those students among the bottom 25% in every school in the state. *One Florida Accountability Commission* at 11.

The results of this new program of accountability, responsibility, and remediation will not be fully felt until a generation of students has passed through the system. Nonetheless, in comparing student data from 1998 to 2002, it is

evident that already there has been significant improvement. *Governor's Press Release*, Sept. 6, 2002, <http://sun6.dms.state.fl.us/eog_new/eog/library/releases/2002/September/fcat-9-6-02.html>. This is particularly true among students in the lower grades, and especially true among young minority students. *Id.* There is evidence that the student achievement gap between minority and non-minority students is closing in Florida. Over the last four years learning gains were made by all groups, but African-American and Hispanic-American students made the most progress in student achievement. *Id.* Evidence of this progress is the fact that the number of students scoring in the lowest level on the reading subsection of the Florida Comprehensive Assessment Test (FCAT) is declining. *Id.*

The Florida Comprehensive Assessment Test is scaled from 1-5. The percentage of non-Hispanic whites scoring at the lowest level declined from 18% to 13%, the percentage of Hispanic-Americans declined from 42% to 27%, and the percentage of African-Americans declined dramatically from 58% to 38%. *Id.* The percentage of students scoring at least a level 3 on the FCAT, the level equivalent to reading at grade level, is increasing. The percentage of non-Hispanic whites scoring at level 3 or better increased from 65% to 74%, the percentage of Hispanic-Americans increased from 38% to 56%, and the percentage of African-Americans increased from 23% to 42%. *Id.* While these improvements have been dramatic, Florida recognizes it still has a long way to travel on the road to educational improvement.

In addition to the A+ program, Florida also expanded its College Reach Out Program ("CROP"). *See* Section 1007.34, Florida Statutes (2002). This program identifies disadvantaged students, of whatever race, and strives to prepare them for college through an increased number of tutors, homework clubs, and after-school and in-school academic enhancement strategies. CROP projects emphasize the importance of continuous interaction and offer a wide variety of activities and

opportunities for participants. *One Florida Accountability Commission*, at 15.

CROP presently serves approximately 8,446 students through eleven state universities, twenty-six community colleges, and seven independent colleges and universities. *Id.* Approximately 75% (6,325) of these students are African-American and 9% (745) are Hispanic-American. *Id.* Initial studies have shown that the CROP program is successfully improving the educational preparation and motivation of poor and educationally disadvantaged students. For example, in the 1998-1999 school year, 87% of the high school seniors served by CROP received a standard diploma, compared to 71% of the random sample stratified on the basis of race and income. *Id.* Of the CROP students who graduated, 72% went on to pursue a postsecondary education, compared to only 44% of the random sample. *Id.* at 16.

Some disadvantaged students have never even considered that college might be an option for them. These students may be less likely to take the SAT or ACT as a prerequisite for college admissions. However, students who take examinations such as the Preliminary SAT/National Merit Scholarship Qualifying Test, are more likely to take the SAT or ACT and continue on to college, but the cost of taking these preliminary examinations may have been a bar to some. Florida therefore made the Preliminary SAT/National Merit Scholarship Qualifying Test (PSAT/NMSQT) and the PLAN, which is a tenth grade pre-college test offered by ACT, Inc., available at no cost to all students, and has publicized this opportunity. *Id. at 17.*

Providing this test free of charge obviously removes the previous cost barriers that hindered economically disadvantaged students. Before the One Florida Initiative, the test was administered only to those who were already aspiring to go to college and could afford the test fee. Now it is available to all students. *Id.* These efforts have resulted in a two-year increase of 176% in the number of African-Americans and an increase of

256% in the number of Hispanic-Americans taking the PSAT. *Id.* at 18. It also has resulted in a one-year increase of 221% in the number of African-Americans and an increase of 243% in the number of Hispanic-Americans taking the PLAN test. *Id.*

In 2000, Florida entered into a partnership with the College Board as part of a comprehensive program to expand advanced placement courses and encourage students to enroll in them. *Id.* at 21. The program also was designed to help prepare students for success in college preparatory courses and for college admissions through mentoring, tutoring and test preparation activities. *Id.* The partnership also included the Florida Education Fund's thirteen Centers of Excellence, which are community-based centers whose mission is to identify and motivate historically under-represented and disadvantaged elementary and secondary students to pursue higher education. *Id.* at 22. With the help of these centers, the College Board is able to offer community-based SAT preparation courses for college-bound students across the state. *Id.* These classes are held in various schools and churches in disadvantaged areas, and the state has intensified its efforts to inform the public of these opportunities. *Id.*

In order to accommodate the anticipated increases in achievement and the interest in college preparatory courses, Florida has expanded its International Baccalaureate[5] and Advanced Placement courses for 11th and 12th grade students. *Id.* at 24. These courses provide an excellent opportunity to gain an advantage in college admissions and to enhance retention once there. One Florida has challenged schools to get the message out and encourage more participation in Advanced Placement courses, especially among traditionally under-represented

[5]The International Baccalaureate Program is a demanding two-year international pre-university course of study leading to rigorous examinations, successful completion of which results in the awarding of the International Baccalaureate Diploma. *See* § 1007.27(8), Fla. Stat.

students, such as minorities. *Id.* Teachers in disadvantaged areas are receiving technical assistance and training in an effort to increase the number of teachers available and certified to teach Advanced Placement courses.[6] *Id.* at 25.

As a result of these efforts, participation in these courses has greatly increased, as has the number of students who pass the Advanced Placement tests and exams. *Id.* Minority participation in these courses and the minority passage rate have outpaced the increases of non-minorities over the last two years.[7] *Id.* at 25-27. The quality of examination and test scores continues to improve as well, while more and more minority students are earning scores that qualify for college credit. *Id.*

Additionally, the Florida Virtual School provides an online curriculum of advanced placement courses to students who may not have access to such courses at their schools. *Id.* at 19. Most of these students attend rural or inner-city schools that have yet to expand their advanced placement course opportunities. *Id.* at 20. Minority enrollment in Florida Virtual School classes has climbed from just over 200 in 1999-2000 to over 1200 in 2001-2002 and continues to grow. *Id.*

One Florida has also called on every public and private community college and four-year institution to form

[6]Florida Advanced Placement teachers also receive a fifty dollar per student bonus up to a maximum of $2,000 for each student taught by that teacher who scores at a proficient level on the College Board Advanced Placement Examination. An additional $500 bonus may be earned by teachers at low-performing schools that have at least one student that scores at a proficient level on the test. *See* Section 1011.62, Florida Statutes (2002).

[7]In the past year, the number of African-American students taking Advanced Placement tests in Florida rose by 21%, and the number of Hispanic-Americans taking the tests rose 22%. *See* Tampa Tribune, *Bush: Data shows Increase in Black Students Taking Advance Placement Tests,* Oct. 23, 2002, <http://www.oneflorida.org/myflorida/government/governorinitiatives/one_florida/articles/test.html>

Postsecondary Opportunity Alliances. *Id.* at 27. These partnerships with low performing elementary, middle, and high schools in high poverty areas involve tutoring of students, teacher training, and incentives to push for higher achievement and aspiration. *Id.* The efforts of the students and faculty of the colleges and universities that have participated in these alliances have produced noticeable improvements in the standardized test scores and grades received by the schools being assisted. Additionally, the colleges and universities are able to target and work with potential postsecondary students at an earlier age. *Id.* at 28-29.

One Florida has also placed a greater emphasis on funding for mentoring programs that currently exist throughout the state. *Id.* at 30. In 2001, the state partnered with over 300 organizations to provide regular tutoring and mentoring to K-12 students by 72,579 mentors. *Id.* Another 42,981 mentors provided services through other community-based organizations. *Id.*

All of these programs are premised on the idea that the best way to ensure minority participation in all areas of higher education is to provide the same opportunities and support to all students and to hold minority students to the same standards as all other students. As noted, while Florida is making significant progress in these areas, we have not yet arrived, particularly with regard to students already in the upper grades. In recognition of this fact, Florida determined that certain students who had been educationally disadvantaged, but who were still striving to do their best, should, without regard to their race or ethnic origin, be extended assistance in gaining admission to the State University System. Again, Florida extended this assistance on a race-neutral basis.

C. The Goal Of Providing All Students Equal Opportunity For Educational Achievement Is Accomplished By Recognizing That Some Students, Without Regard to Racial or Ethnic Background, Have Been Disadvantaged In Educational Opportunities.

The achievement gap that developed between the scores of non-Hispanic white and minority students from the decades of the 'soft bigotry of low expectations' demonstrates that there is still a need to extend a helping hand to students, many of whom are minority students, who may not have enjoyed the same opportunities for educational excellence. With that in mind, a significant part of Florida's effort to maintain equal educational opportunity, especially for those students further along in the educational system and currently at a disadvantage, was the Talented Twenty Program. Through this program, Florida became the only state in America to guarantee state university admission to all of its public high school students who graduate in the top 20% of their class. *Id.* at 5. Students must have completed the required 19 credits of course work and have an SAT or ACT score. Rule 6C-6.002(5), Florida Administrative Code (2002). There is no minimum test score required. *Id.*

The Talented Twenty Program was designed to improve postsecondary opportunities for minorities and all students by guaranteeing admission to the top students at every school, whether they graduated from a high school that had the best or the worst academic standards in the state. In this way, top students from the poorest district have the same opportunity of admission as top students from the most elite school. It is unlikely that students graduating in the top 20 percent of their class from the state's best schools need the guaranteed admission of the Talented Twenty Program, as they would be otherwise admitted. The program therefore was intended to benefit students at poorer schools who may have striven to do their best,

but who still needed assistance gaining admission to the state university system. [8]

In conjunction with the Talented Twenty Program, the University of Florida has instituted a "Talented 5%" program, guaranteeing admission into the University of Florida for the top quarter of the Talented Twenty Program. *Id.* at 34. Because the University of Florida has just instituted this program, it is too early to analyze fully its impact.

Florida also has developed a unique "2+2" system which assures that a student who successfully completes an associate degree program at a community college is guaranteed admission into a state university as if he or she had initially attended a state university. *See* Section 1607.23, Florida Statutes; *see also* Rule 6A-10.024 Florida Administrative Code (2002). This is accomplished through a system-wide articulation agreement and a common course numbering system granting the transfer of credit obtained in a community college to a university. The Community College System has an open admission policy for students meeting basic admission criteria. Thus, even students from the most disadvantaged backgrounds may ultimately gain university admissions. The 2+2 system further provides the opportunity for all students to obtain a four-year degree, even if they were not initially admitted into a state university.

II. FLORIDA'S EXPERIENCE DEMONSTRATES THAT A RACIALLY PREFERENTIAL ADMISSIONS PROCESS CANNOT PASS CONSTITUTIONAL MUSTER.

The admissions policies at the University of Michigan's Law School and the College of Literature, Science and the Arts

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[8]Florida additionally increased need-based financial aid for the year 2000-2001 by 43.5% and has continued to increase such aid since that time. *One Florida Accountability Commission* at 36.

have been set forth in greater detail by the parties to this case, and Florida sees no need to further detail such policies. For purposes of this argument, it is enough to say that the admissions policies in both schools, like the admissions policies formerly in place at Florida universities, use race as a factor that can improve certain minority applicants' chances of being granted admission. Some emphasis has been placed by the lower courts upon racial preference being only one of many factors considered in granting admission. The Sixth Circuit suggested that by using race as one of many factors, Respondents' policies were "virtually indistinguishable" from the "Harvard plan" noted in Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and were, therefore, constitutionally permissible. *Grutter*, 288 F.3d at 747.

While there is much before this Court in the way of argument as to the holding and significance of Justice Powell's opinion in *Bakke*, a program's similarity to the "Harvard plan" should not be a guarantee of its constitutionality. An admissions decision is a binary, yes/no decision, and as such, any racial preference could be sufficient to trip the admittance switch.

Respondents' admissions policies gave preferences on the basis of race or ethnicity, and appear to have simply assumed that those categories necessarily corresponded to particular viewpoints. Respondents' assumption that efforts to provide racial diversity equate to viewpoint or academic diversity is problematic. As this Court noted in *Miller v. Johnson*, 515 U.S. 900, 920 (1995), when a state actor makes an assumption that members of a particular race think alike or share the same political views it engages in "racial stereotyping at odds with equal protection mandates." *See also Metro Broadcasting v. F.C.C.*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting).

Understanding, therefore, that the matter before the Court is one of classification based on immutable racial characteristics, the Court's analysis is the same under both the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil

Rights Act of 1964, 42 U.S.C. § 2000d. *Adarand*, 515 U.S. at 234, (*citing Fullilove v. Klutznick*, 448 U.S. 523 and n. 1 (1980)); *U.S. v. Fordice*, 505 U.S. 717, 732 n.7 (1992). The underlying purpose of the Equal Protection Clause of the Fourteenth Amendment "is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)). This Court has clarified that courts must apply the strict scrutiny standard when evaluating all racial classifications, including those that may be considered benign. *Adarand*, 515 U.S. at 226; *City of Richmond v. J.A. Croson*, 488 U.S. 469, 493 (1989).

Under the Court's strict scrutiny analysis there are two questions that must be answered in the affirmative in order for any challenged racial classification to be constitutional: 1) does it serve a compelling state interest? and 2) is it narrowly tailored to the achievement of that interest? *Adarand*, 515 U.S. at 227. The party implementing the classification bears the burden of proving that the racial classification is narrowly tailored to serve a compelling interest. *Croson*, 488 U.S. at 510-511. As Florida's race-neutral policies and diverse results demonstrate, the admissions policies at issue in this case do not withstand the burden of strict scrutiny.

A. A System Of Racially Preferential Admissions Is Not Narrowly Tailored To Accomplish Diversity, And Is Therefore Unconstitutional.

Florida believes in diversity. However, the fact that Florida has developed a race-neutral way to accomplish the goals which the Respondents are pursuing speaks directly to the question of whether the Respondents' policies are narrowly tailored.

Even assuming that the diversity that the University of Michigan is attempting to achieve constitutes a compelling state interest, its race-conscious admissions policies are not narrowly

tailored to accomplish that interest. The Sixth Circuit "found" that "the Law School ha[d] adequately considered race-neutral alternatives." *Grutter*, 228 F.3d at 750. However, the results of Florida's policies call into question this finding and provide evidence that diverse institutions of higher education can be attained through race-neutral means. If a compelling interest may be served without resort to racial classification, a race-based program is by definition not narrowly tailored. *Johnson*, 263 F.3d at 1259. Indeed, this Court has established that the efficacy of alternative remedies, including race-neutral policies, is a factor to be considered in determining whether a state racial classification is narrowly tailored. *Paradise*, 480 U.S. at 171. *See also Johnson*, 263 F.3d at 1252; *Tuttle v. Arlington County School Board*, 195 F.3d 698 (4th Cir. 1999); *In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525 (11th Cir. 1994). The current diversity of the State University System under race-neutral admissions standards demonstrates that the programs outlined by Florida, such as the A+ Education Plan, the Talented Twenty Plan, the University of Florida's 5% Plan, and the 2+2 Plan, are methods that may be used to arrive at a racially diverse higher education system.

Florida's programs, and the principles that they advance, are more than just "another" way of accomplishing true diversity. They provide a better way. Florida's plan is better in that it no longer accepts the lack of quality in the public schools that serve our underprivileged children; better because it recognizes the need to provide mentoring, tutoring, and other extra attention to those underprivileged children and their teachers; better because it encourages all students regardless of race or economic status to aspire to post-secondary education; better because it no longer accepts a separate standard on the basis of race; better because it focuses on providing all races with the opportunity to meet common standards; and finally, better because it looks forward to a day when racial classifications and separate standards are no longer deemed necessary by anyone.

The ultimate goal of the Equal Protection Clause of the Fourteenth Amendment was to put an end to racially motivated state action. *Hopwood v. State of Texas*, 78 F.3d 932, 947-94[illegible] (5th Cir. 1998). Florida's plan effectively accomplishes this goal by ending racial classifications, but in a way that continues to provide diversity in higher education and equal educational opportunities that will close the achievement gap.

B. The Justification For Diversity Based Solely Upon A Public Policy Argument, Without A Showing That It Is Necessary To Correct Past Discrimination, Is Insufficient To Meet The Compelling Interest Requirements.

This Court has held in contexts other than higher education that in order to meet the compelling interest standard, any classification based on race requires some showing of prior discrimination by the governmental unit before limited use of racial classification is allowed as a basis for decision making. *Wygant*, 476 U.S. at 274; *Croson*, 488 U.S. at 500. In the educational context, *Bakke* cannot be said to clearly hold to the contrary, nor should the equal protection clause be satisfied by anything less.

Justice Stevens, in his dissent in *Wygant*, argued that it is not necessary to find the existence of past discrimination to support race-based action with regard to employment decisions affecting teachers. He suggested that the Court should simply consider whether the questioned action advances the "public interest," and whether the manner in which it is pursued justifies any adverse effects on the disadvantaged groups. *Wygant*, 476 U.S. at 313. That argument was rejected by the Court. This Court specifically indicated that such a theory has no logical stopping point, and would allow discriminatory practices long past the point required by any legitimate remedial purpose. *Id.* at 275.

There is no valid reason to justify this Court's use of a different test for determining whether diversity is a compelling interest within the student body of a university as opposed to other areas. Racial diversity is no more compelling a goal in the higher education context than in the context of other institutions or areas of state decision making, including those upon which this Court has already ruled (i.e., government contracting and faculty layoffs). *Adarand*, 515 U.S. 200, 226 (1995); *Croson*, 488 U.S. 469 (1989); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

CONCLUSION

Amici respectfully request that this Court reverse the decisions of the lower courts.

Respectfully submitted,

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In the Supreme Court of the United States

Jennifer Gratz, et al

Petitioners

V

Lee Bollinger, et al

Respondents

On Write of Certiorari to the United States Sixth Circuit Court of Appeals

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TABLE OF AUTHORITIES

Miscellaneous:

Alexander Astin (Alexander W. Astin, *What Matters in College: Four Critical Years Revisited*. San Francisco: Jossey-Bass, 1993)

Joseph B. Berger & Jeffrey F. Milem, "Exploring the impact of historically Black colleges in promoting the development of undergraduates' self-concept," *Journal of College Student Development*, 41 (4) July-Aug. 2000.

Louise Bohr, Ernest T. Pascarella, Amaury Nora & Patrick T. Terenzini, "Do Black students learn more at historically Black or predominantly White colleges?" *Journal of College Student Development* 36 (1) Jan-Feb 1955.

Louise Bohr, Ernest T. Pascarella, Amaury Nora & Patrick T. Terenzini, "Do Black students learn more at historically Black or predominantly White colleges?" *Journal of College Student Development* 36 (1) Jan-Feb 1955.

Hugh Davis Graham, *Collision Course: The Strange Convergence of Affirmative Action and Immigration Policy in America* (New York, Oxford University Press, 2002).

George R. La Noue and John C. Sullivan, "Gross Presumptions: Determining Group Eligibility for Federal Procurement Preferences," *Santa Clara Law Review*, Vol. 41, Number 1, 2000, pp. 103-159.

Peter Skerry, *Counting on the Census? Race, Group Identity, and the Evasion of Politics* (Washington, D.C. Brookings Institution Press, 2000).

Robert Lerner, "The Empire Strikes Back," CEO Policy Brief: Three Views of the River: Three Reviews of the Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions by William G. Bowen and Derek Bok, Washington, D.C. The Center for Equal Opportunity, November 1998.

Robert Lerner & Althea Nagai, "A Critique of the Expert Report of Patricia Gurin in Gratz v Bollinger," The Center for Equal Opportunity, May 7, 2001.

Frederick R. Lynch, *The Diversity Machine* (New York, Simon and Schuster, Inc, 1998).

University of Washington Law School, Documents in the Possession of Dr. Robert Lerner.

Stanley Rothman, Seymour Martin Lipset, and Neil Nevitte, "Does Enrollment Diversity Improve University Education?" *International Journal of Public Opinion Research* Vol. 15 No.1, forthcoming, 2003, pp. 7-25.

INTEREST OF AMICUS CURIAE

Your amici curiae is a professor of history at Montgomery College in Rockville, Maryland and a member of various regional and national scholarly organizations comprised of professors, graduate students, researchers, and administrators throughout the United States. Your amici fully embraces the principle of equal opportunity. Because of this commitment to equal opportunity for all, your amici opposes racial, ethnic, and sex-based preferences in faculty hiring and student admission.

He is deeply concerned with the effects that the advocacy and institutionalization of racial, ethnic, and sex-based preferences have had on the fundamental tenets of our society and particularly in higher education.

Your amici has a particular interest in quantitative social science. Consequently, he has an interest in ensuring the methodological and statistical validity of data used in the evaluation of public policy. In this brief your amici does not represent the views of any organization or person, other than himself.

STATEMENT

Your amici submits this brief to set forth his disagreement with the conclusion reached by the United States District Court below, that there is "solid evidence" that racial and ethnic diversity have educational benefits, and that the specific policies of the University of Michigan (UM) at issue in this case, have such benefits. His position is that one of the principle pieces of evidence used by UM and relied upon by the trial court, a study done by UM's interim Dean, Patricia Gurin (Gurin Report) (see internet URL at http://www.umich.edu/~urel/admissions/legal/expert/gurintoc.html) is scientifically invalid and does not serve to support the points for which it is cited. Dr. Robert Lerner and Dr. Althea Nagai, have released a comprehensive study, published by the Center for Equal Opportunity in Washington, D.C., critiquing the Gurin Report. (See Lerner & Nagai, *A Critique of the Expert Report of Patricia Gurin in Gratz v Bollinger*, May 7, 2001; available at (http://www.ceousa.org/) This report forms the basis for much of this brief. While your amici does not seek to demonstrate here that there may not be a correlation

between racial/ethnic integration and academic performance, he does argue that the Gurin Report fails to make this correlation.

Your amici's interest in the accuracy of data used in the Gurin Report and in the admissions policy of UM in reliance thereon includes the racial classifications. Your amici holds that racial and ethnic classification is so fraught with peril, that this in itself invalidates the report and suggests reasons for disallowing such classifications.

ARGUMENT

I. THE GURIN REPORT IS SO METHODOLOGICALLY FLAWED THAT IT CANNOT BE CONSIDERED TO CARRY ANY WEIGHT AS COMPETENT EVIDENCE.

In the area of social science research a red flag is immediately seen in any work that purports to find a correlation between two variables but can offer no rational basis for that correlation. Hence if a study purports to find a correlation between the presence of black haired students among blond haired students and improvement in the scores of all students in college algebra classes, the wary reader should begin by asking WHY? It is not intuitively evident that the color of one's

hair would affect the overall performance of students sharing that hair color or of a different color. This would be true of any alleged correlation drawn on the basis of say, eye color or skin color. All are biologically determined. Nor is there a correlation between such biological factors and performance within the common and shared experience of teachers and school administrators. Being foreign to both intuitive logic and experience such a purported correlation is to be subject to great scrutiny for it assumes that a biological constant (skin color in the instant case) has an impact upon a social function - education; and furthermore that the impact is a positive, "beneficial" one.

A. THE GURIN REPORT FAILS TO SHOW STATISTICALLY SIGNIFICANT RELATIONSHIPS BETTWEEN THE RACIAL AND ETHNIC COMPOSITION OF A STUDENT BODY AND GURIN'S "EDUCATIONAL BENEFITS."

There are many design, measurement, sampling, and statistical flaws in the Gurin Study. The statistical findings are inconsistent and in many instances trivially weak. Gurin defines her own idiosyncratic diversity variables, which she labels "learning outcomes" and "democracy outcomes," to measure the benefits off diversity. But, Gurin finds no statistical correlation between a racially and ethnically

diverse student body and her "learning outcomes" and "democracy outcomes." Her statistical output shows that taking an ethnic studies course, participating in a diversity workshop, discussing minority issues, and other measures yield exceedingly weak correlations with learning and democracy outcomes, at least some of the time. At other times, she finds nothing, no statistical correlation. Statistically, taking an ethnic studies course, attending a diversity workshop, and having minority race friends are only weakly correlated with the racial and ethnic make-up of the student body. (See Lerner & Nagai "Critique," at p. 36).

B. THE GURIN REPORT FAILS TO EMPLOY STANDARD TESTS OF RELIABILITY AND VALIDITY TO CHECK MEASUREMENTS.

Gurin has not subjected her idiosyncratic "learning" and democracy" measures to standard statistical tests of reliability and validity. (*id*, at pp. 22-27). Common academic survey practice is to employ the wording of questions and possible responses used frequently by large survey research organizations (e.g., Roper, NORC, Gallup) where they have gone through test-retest and validity

checks, or inventories developed in academic research that have been established as statistically valid. Gurin's work lacks these standard controls, making it likely that her statistical findings are in fact spurious and the conclusions inferred from the data are unwarranted. (*id.* at pp. 27-28).

All of Gurin's measurements of whether preferential racial diversity is working as claimed consist of unverified answers to survey questions by students. Yet the answers that Gurin counts as supporting her claim are such things as being involved in a program to clean up the environment (*id.* at p. 26) and other attitudes that are most closely correlated with having a particular political outlook. Exhibiting one or another set of political views is not evidence of having learned academic material, yet Gurin constantly equates the two.

C. THE SURVEYS RELIED UPON IN THE GURIN REPORT DO NOT MEET WIDELY ACCEPTED STANDARDS OF SAMPLING AND RESPONSE RATES.

The bulk of Professor Gurin's analysis is based on the Cooperative Institutional Research Program (CIRP) dataset that compares schools

and students across the country. This dataset is not a random sample of either schools or students. Its respondents consist of a group of volunteers. Findings from such a dataset must not be generalized statistically to the larger population, as this would violate any probability correlation being reached. Nevertheless the Gurin Report does so.

D. THE GURIN REPORT'S SURVEY DOES NOT PROVIDE FOR A CONTROL GROUP TO COMPARE WITH THE EXPERIMENTAL GROUP.

There are two additional surveys of students from which data is used in the Gurin Report. Both are from students at the University of Michigan. But there is no school that serves as a comparison (i.e., control) group. Without a control group being measured along with an experimental group, no distinctions can be validly drawn and any findings based thereon should be ignored. Nevertheless, the Gurin Report in direct violation of this requirement proceeds to draw correlations.

Further, it is logically impossible to answer the basic question Gurin claims to be investigating - whether preferential racial diversity at the University of Michigan improves the quality of education there - by

comparing the University of Michigan to the University of Michigan. In no way can such surveys reveal what the results would be if the University of Michigan did not have its present level of racial preference. The control or comparison group should have consisted of students at some other school without racially-based admission standards, but no such control group was used.

E. THE GURIN REPORT'S STATISTICAL EXCLUSION OF ASIANS IS A FATAL DESIGN FLAW.

Gurin's sample of respondents is very incomplete. Asians are missing. Analysis is performed only on white, black and Hispanic respondents, although Gurin measures a school's diversity as the percentage of students of color: "students of color" being black, Hispanic, American Indian, *and* Asian. Gurin does not explain her lack of interest in students of Asian descent, although such students are approximately as numerous at UM as black and Hispanic students (*id.* at p. 35). To ignore such a sizeable group in a statistical study that purports to include them among the beneficiaries is a glaring omission at the least. Since Gurin brings into play the presence of Asian students as part of her definition of "structural diversity," that

is, the actual racial composition of the school, it was imperative that she analyze them as a separate group as she did with blacks and Hispanics (*id.*)

Moreover the report does not indicate how race was determined among the respondents. There is no standard legal basis for classifying race and the default method of determination is the self-identity of the subject. However, the self-identity of any subject is in turn determined by the number of "Racial/Ethnic Identity" choices which he/she can check off in the boxes provided on a questionnaire. How, for example, would "Tiger" Woods, legendary professional golfer, fit into the narrow ethnic confines offered respondents in the data? Many Native American tribes have qualifications for inclusion that require only a $1/16^{th}$ blood lineage to a known ancestor, which has led to situations in which blond haired, blue eyed people with distinctly Polish sounding family names qualifying for designation as members of a Native American tribe. This problem is so important that it is treated more fully below.

The Gurin Report also ignores CIRP respondents from historically black colleges. She notes this omission, but does not justify or explain

it. Other academic researchers have found that blacks at predominantly white institutions fared less well academically than black students at historically black colleges, controlling for other factors. (see Joseph B. Berger & Jeffrey F. Milem, "Exploring the impact of historically Black colleges in promoting the development of undergraduates' self-concept," *Journal of College Student Development*, 41 (4) July-Aug. 2000: 381-394.)

Another series of studies by Pascarella and others found that on standardized measures of reading comprehension, mathematics, critical thinking, writing skills, and overall achievement, the two groups scored about the same, but blacks at predominantly white institutions fared worse with regards to scientific reasoning skills, and self-reported gains in understanding the arts, the humanities and the sciences. (Louise Bohr, Ernest T. Pascarella, Amaury Nora & Patrick T. Terenzini, "Do Black students learn more at historically Black or predominantly White colleges?" *Journal of College Student Development* 36 (1) Jan-Feb 1955: 75-85 &Ernest T. Pascarella, Marcia Edison, Amaury Nora, Linda Serra Hagedorn & Patricks Terenzini, "Additional Evidence on the *(5)* Cognitive Effects of

College Racial Composition," *Journal of College Student Development.* 37 Sep - Oct 1996: 494-501; Lamont Flowers and Ernest T. Pascarella, "Cognitive Effects of College Racial Composition on African American Students after 3 years of College," *Journal of College Student Development* 40 (6) Nov - Dec 1999: 669 677).

It is clear that the data Gurin worked with - and she presumably selected that data which best supports her case - had not shown others in the field that there are educational benefits from racial diversity. Gurin was certainly aware that prior analyses of the CIRP data had failed to demonstrate any link between racial diversity and educational outcomes. These studies had been published in 1993 by Alexander Astin, (Alexander W.Astin, *What Matters in College: Four Critical Years Revisited.* San Francisco: Jossey-Bass, 1993) the chief architect of the CIRP who has published regular analyses of the data for three decades and who came to very different conclusions (*id.* at pp 36-37).

F. THERE ARE NO QUANTIFIABLE CRITERIA FOR EDUCATIONAL OUTCOMES IN THE GURIN REPORT

Both the reliability and validity of a study are greatly enhanced to the degree in which changes or correlations can be quantified and reduced to numbers. Generally accepted tests of student achievement such as the ACT, LSAT, do precisely that. For that reason such tests are deemed to have great validity and reliability. The Gurin report on the other hand purports to measure rather subjective factors such as attitudes, propensities and desires, rather than in objective outcomes involving performance. While it is perfectly valid in a social science study to measure these subjective factors, it is not valid to draw a conclusion that these indicate any form of performance.

If it was Gurin's intent to demonstrate that the average class grade of students taking say, a calculus class improves significantly when a college campus is ethnically diverse or that overall scores on the Graduate Record Examination increased significantly among students at ethnically diverse colleges and universities than that report would have measured outcomes normally associated with the term "academic achievement." The report however fails to do this.

Only a few of the outcomes measured by the report - those of civic

engagement and racial/ethnic engagement - are related to some of the combinations of the variables used to determine on-campus diversity (taking an ethnic studies class, discussing racial issues, attending a diversity workshop, socializing with those from other racial/ethnic groups, and having close friends not of one's race/ethnicity). Hence, although the relationships are statistically significant any inference to be drawn from them is very weak. The social values measured, such as joining a community action program, etc. do not correlate with even the performance professed - i. e., actually joining a community action program, etc. They merely measure a very intangible "desire."

It is further noted that within the UM surveys, the number of students is so large and so many variables are entered into the equations as to erode any reliable correlation. Any trivially small effect would be picked up as statistically significant, even if it is just a chance phenomenon.

G. THE GURIN REPORT IGNORES ONE OF ITS ACKNOWLEDGED VARIABLES: EQUAL STATUS CONTACT.

The Gurin Report holds that diversity is beneficial *if* there is equal

status contact among groups, but the report does not test for the latter. To omit a variable which a researcher claims is crucial to the conclusions reached is more than a glaring omission. It is another red flag which casts strong doubt on the validity and reliability of the report. Racial and ethnic preferences in admissions indicate that unequal intellectual ability among students and thus unequal status is predicted by race/ethnicity. It would not therefore be difficult for students to conclude that in UM admissions, some races/ethn. groups are "more equal than others."

Nor is it clear what quantity of students in each desired ethnic category must be present on campus in order for the desired outcomes to be achieved. The Report fails to tell us what number or percentage of each ethnic category it must have for the desired outcomes to be achieved. Nor does it even hint at what ethnic "mix" must be present in order for the outcomes to be reached. The term "critical mass" is frequently heard in defining the number of minority students desired. One wonders how this could ever be achieved by, say Native Americans whose overall numbers are small within the general population. In effect the UM proposes drafting a blank academic

check in which after this Court signature appears others will fill in the numbers.

II. DIVERSITY POLICIES REQUIRE GOVERNMENTAL ENTITIES TO DEFINE RACIAL AND ETHNIC CATEGORIES WHICH ARE INHERENTLY ARBITRARY AND STANDARD LESS AND THUS SUBJECT TO MANIPULATION AT THE WHIM OF AUTHORITIES

Accepting diversity policies as constitutionally legitimate introduces complexity not possessed by any race-neutral policies. A working definition of the proper degree of diversity needed in a student body requires decisions to be made about 1) the relevant racial and ethnic categories to be included, 2) which subgroups are assigned to which racial or ethnic category, 3) the assignment of individual applicants to their respective group memberships, 4) the proportion of individuals in each group that is needed to comprise a truly diverse student body and 5) the standard of "under representation" used to determine the correct proportion of individuals in the relevant categories. These determinations require decisions to be made that are based on arbitrary, ill-defined, and standardless criteria.

A. RACIAL AND ETHNIC CLASSIFICATIONS ARE

INHERENTLY AMBIGUOUS

There is no biological ("scientific") basis for defining racial and ethnic groups. Social science regards racial and ethnic groups as social constructs. The American Anthropological Association, and the American Sociological Association, both define race and ethnicity as socially constructed categories, not essentialist determinations.(see their respective Web Pages at http://www.aaanet.stmts/racepp.htm and http://www.asanet.org/footnotes/septoct02/indextwo.html) As the National Academy of Science reports, the dominant perspective in the social sciences is that "race and ethnicity are social constructions" that vary over time (Peter Skerry, *op. cit.* at p. 44).

The arbitrariness of classification can be seen in the changing definitions used by the Federal Government. The Federal Government in 1978 through OMB Directive No. 15 required all government agencies to report numbers for the following racial and ethnic categories: Caucasian, African American, Asian/Pacific Islander (API), Native American, and Hispanic. According to political scientist Peter Skerry (Peter Skerry, *Counting on the Census: Group Identity and the Evasion of Politics*. Washington, D.C. Brookings Institution

Press, 2000, p. 38), OMB civil servants, without prior debate or expert testimony, set up these particular categories. The Hispanic-origin question is there because they were ordered by their political superiors to put it there and not for any scientific reason. As Skerry also reports, the OMB has expressly stated that this classification is not to be taken as in any way scientific (*id.* at p.46).

In preparing for the 2000 Census, interest group pressure obtained the separation of classifying Asians from that of Pacific Islanders and the inclusion of a new Native Hawaiian category, rejecting efforts to combine Native Hawaiian with American Indians and Alaska natives, again for essentially political reasons (*id.* at p. 73). More generally, the 2000 Census had for the first time allowed respondents to choose multiracial categories, including 57 possible combinations of six single-race categories (white, black, American Indian and Alaskan Native, Asian, Native Hawaiian and other Pacific Islander, and "Some Other Race"). As historian Hugh Davis Graham points out, adding Hispanic ethnicity to the racial mix allows for a possible 126 categories (Hugh D Graham, *Collision Course: The Strange Convergance of Affirmative Action and Immigration Policy in*

America: New York, Oxford Univ. Press, p. 195).

In an important series of studies, political scientist George La Noue has shown the chaos that results from governmental policies of racial and ethnic classification as it applies to small business procurement. La Noue and Sullivan report that in 1973, the Small Business Administration (SBA) considered blacks, American Indians, Spanish-Americans, Asian-Americans, and Puerto Ricans as "presumptively disadvantaged (George R. La Noue & John C. Sullivan, "Gross Presumptions: Determining Group Eligibility for Federal Procurement Preferences," *Santa Clara Law Review,* Vol. 41, No. I, 2000, p. 120). In 1978 Congress Amended the act to define the presumptively disadvantaged as blacks, Hispanics, and Native Americans. The exclusion of Asian-Americans was never explained. Later, the SBA decided to add certain groups of Asian Americans as presumptively disadvantaged: these included U.S. citizens from Japan, China, the Philippines, Vietnam Korea, Samoa, Guam, the U.S. Trust Territory of the Pacific, Northern Mariana's, Laos (which was then dropped and subsequently reinstated), Cambodia, and Taiwan (at p. 126). To add to the complexity, in response to various petitions, Iranians were

rejected, but Asian Indians, Tongans, Sri Lankans, Burmans, Thais, Malays, Singaporeans, Pakistanis, and Bangladeshis, were accepted. Also not included on the SBA preferred list are U. S. citizens from Afghanistan, Azerbaijan, Kazakhstan, Kyrgyzstan, Turkmenistan, Uzbekistan, and Tajikistan (pp. 127-129, 153)

The broader categories themselves are staggeringly vague. The SBA admitted it had no working definition of Hispanic or Asian American, or an explanation as to why their categories should stop at the Khyber Pass, which separates Afghanistan from Pakistan. Thus a Pashtun living in Pakistan is classified as an Asian and receives preferential treatment, while a Pashtun living in Afghanistan is classified as white and receives no preference. La Noue and Sullivan also point out that Basques in France are classified as white while those living in Spain are classified as Hispanic (id. at p. 157).

La Noue and Sullivan conclude: "Drawing the lines based on racial or ethnic group membership for the purposes of including or excluding persons as beneficiaries of public programs is one of the most dangerous powers a government can possess. Political polarization and group enmity are almost certain results." (*id.* at p.

137).

B. THE SAME CONFUSIONS AND AMBIGUITIES FOUND IN GOVERNMENT AGENCIES EXIST IN RESEARCH STUDIES OF CAMPUS DIVERSITY.

Although there has been no study of the same process in educational admissions as detailed above, the problem of ascertaining the correct proportions of racial and ethnic groups fully applies to educational admissions. This arbitrariness is expressed in research on the purported effects of student diversity. One way to see this is by considering the research done on student body diversity. Lerner & Nagai point out that how a concept is to be measured is a critical part of the research process. For example, Gurin defines structural diversity in a student body as consisting of the proportion of students "of color" which is the sum of African-American, Asian, Hispanic and Native American" divided by the total student body size (Lerner and Nagai, "Critique..." at p. 35). This assumes that the diversity effect of adding one more Asian student to the mix is the same as the diversity effect of one additional African-American student. The definition itself leads to illogical conclusions because the maximum amount of diversity is 50 percent of the student body. A student body

consisting half-of Asians and half of whites would have the same maximum diversity as one that was 1/6 black, 1/6 Asian, 1/6 Hispanic and half white. Obviously, these are two very different mixtures of students and should lead to very different "diversity" results, assuming that diversity matters at all.

This exclusion is neatly paralleled by the Gurin Report's use of Alexander Astin's CIRP database, which omitted the categories "Cuban-Americans," "Central American," and "South American" Hispanics from the original intake questionnaire of students when asking about their ethnicity (*id.* at pp. 24, & 59).

Other studies of diversity include only blacks and white students in their purview. Thus Bowen and Bok exclude Hispanic and Asian applicants for favored admission and enrollees despite the book's paean to diversity. Although these authors ask their respondents very general questions on diversity, their analysis is limited to the responses of black and white students, omitting Asians and Hispanics entirely (see *Robert Lerner, "The Empire Strikes Back," CEO Policy Brief, The Center for Equal Oppportunity, Nov., 1998* at p. 18).

Another study of diversity, by political scientists Rothman, Lipset,

and Nevitte, reach important conclusions about the impact of diversity on student, faculty, and administrator attitudes but limits its published conclusions to the proportion of blacks, although it reports preliminary results from examining the percentage of Asians among student enrollees. (Stanley Rothman et al, "Does Enrollment Diversity Improve University Education?" *International Journal of Public Opinion Research,* Vol. 15, No. 1 - forthcoming, 2003 at pp 7 - 25). They find that student satisfaction with the quality of their education, the prevalence of serious student work effort, and overall satisfaction with their college experience are all inversely related to the proportion of black students among their student enrollment (ibid. at p. 19).

C. THE CONFUSIONS AND AMBIGUITIES OR RACIAL AND ETHNIC DEFINITIONS ARE INHERENT IN COLLEGES AND PROFESSIONAL SCHOOL ADMISSIONS POLICIES

Different institutions include different student groups in their admissions policies by arbitrary categorizations. An excellent example of the arbitrariness of the ethnic categories as used in admissions is provided by sociologist Fredrick Lynch in his case study of how diversity functions at the university of Michigan. (Frederick R. Lynch, *The Diversity Machine*: New York, Simon &

Schuster, Inc., 1998) UM openly claims on its web site that each school within the university is free to decide for itself how diversity is to be achieved (http://www.umich.edu/~urel/admissions/faqs/q&a/html). This obviously means that each school is free to set up its own set of relevant racial and ethnic categories.

In the search for Hispanics at UM, Cubans were excluded from preferred graduate admissions (but not from undergraduate admissions) as being considered "Hispanic" and thus receiving admissions preference apparently because they were too wealthy (*id.* at p. 278). When Lynch asked about the removal of Cubans from the Hispanic category, he reported that the only response was nervous Laughter. (*id.* at p. 302) In an interview with Lynch, the associate dean of literature, science and the arts admitted, "We equate diversity with skin color . . . We play silly games (*id.* at p. 304)."

The University of Washington Law School is another example. The Center for Equal Opportunity (CEO) requested and obtained data from that institution on its ethnic classification of students. As part of the original dataset provided by the law school, applicant records included both an applicant's racial-ethnic self-identification, and the

law schools re-classification (re-coding, in the statistical parlance), of the ethnic identity into UW's unique set of categories. The law school categories included the following: Asian, African American, White, Hispanic, and *Filipino*. There is no explanation why Filipinos are singled out as a separate category. Native Hawaiians, however, are lumped with Japanese, Chinese, Pakistanis, and other ethnic groups from the Asian and Pacific region under the larger Asian-Pacific Islander category. (University of Washington Law School Documents in the possession of Dr. Robert Lerner)

The American Association of Medical Colleges (AAMC) until 1997 classified Native Hawaiian applicants as Asian/Pacific Islanders (along with such groups as Japanese, Chinese Filipinos, Pakistanis, Guamainans, and Samoans to name a few). After that, Native Hawaiians, but not other Pacific Island groups were places with Native Alaskans and American Indians as part of the Native American group. Moving Native Hawaiians into the latter group made them one of the AAMC's recognized underrepresented Minorities. (AAMC, at p. 15 cited in Lerner and Nagai, "Critique" at p.56). Meanwhile, in its statistical reporting of data, the American

Association of Law Schools subsumes Pacific Islanders under "Asians," and considers the latter to be underrepresented. (see http://www.aals.org/statistics/index.html.)

E. ASSIGNING INDIVIDUALS TO SPECIFIC RACIAL AND ETHNIC CATEGORIES IS COMPLETELY ARBITRARY & THEREBY SUBJECT TO CHANGE FOR POLITICAL REASONS.

At UM, targeted minority identity supercedes other identities, presumably in order to elevate the total count of "targeted minorities." In one case involving a faculty member of mixed ethnicity, the university initially designated her as Hispanic because of Cuban origin, but then withdrew the Hispanic label because she was Jewish, but then subsequently relabeled her Hispanic when she was granted tenure (Lynch, *op cit.* at p.304).

At the University of Washington Law School, the same procedure as at UM seems to apply-targeted minority identity of an individual supercedes all others. Self-identified bi- and multi racial applicants are re-classified by the university, so to increase the numbers of blacks and Hispanics (op cit. documents in the possession of Dr. Robert Lerner).

CONCLUSION

Taken together, these points (and additional ones in the Lerner & Nagai Critique) make it clear that important public policy decisions and/or modifications of important constitutional protections must not be decided on evidence as shaky as the Gurin Report. Common sense says that a court should be wary of evidence produced for the litigation by one of the parties own employees. Professor Gurin is not exactly an unbiased source. While it is entirely possible that such a witness would produce credible evidence the evidence must withstand scrutiny. The Gurin Report does not.

The myriad of problems with racial and ethnic classifications make it clear that governmental policies at any level should not rest on such vague and ill-defined classifications as race and ethnicity. Such policies will lead to a never-ending series of arbitrary determinations and unjust results.

CERTIFICATE OF SERVICE

I certify that three bound copies of the foregoing amicus curiae brief was mailed to all parties at the following addresses, via U.S. Post, first class, postage prepaid, this sixteenth day of January, 2003.

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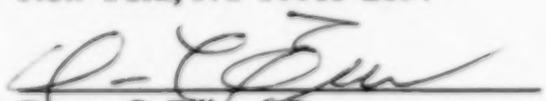

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No. 02-241

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In the Supreme Court of the United States

BARBARA GRUTTER,
Petitioner,
v.
LEE BOLLINGER, *et al.*,
Respondents.

On Writ Of Certiorari to the United States Court Of Appeals for the Sixth Circuit

No. 02-1516

JENNIFER GRATZ AND PATRICK HAMACHER
Petitioners,
v.
LEE BOLLINGER, *et al.*,
Respondents.

On Writ Of Certiorari Before Judgment to the United States Court Of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF REASON FOUNDATION IN SUPPORT OF PETITIONERS

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Daubert v. Merrell-Dow Pharmaceuticals,
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DeFunis v. Odegaard, 416 U.S. 312 (1974) 5, 19

General Electric Co. v. Joiner, 522 U.S. 136 (1997) 8

Kumho Tire v. Carmichael, 526 U.S. 137 (1999) 8

Regents of the University of California v. Bakke,
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Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) 6

STATUTES and RULES

20 U.S.C. sec. 1092(f) 18

MISCELLANEOUS

Alexander W. Astin,
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TABLE OF AUTHORITIES (cont'd)

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William G. Bowen and Derek Bok,
THE SHAPE OF THE RIVER, LONG TERM
CONSEQUENCES OF CONSIDERING RACE
IN COLLEGE AND UNIVERSITY ADMISSIONS (1998) ... *passim*

Stephen L. Carter, REFLECTIONS OF AN
AFFIRMATIVE ACTION BABY (1991) 12

Chronicle of Higher Education,
http://chronicle.com/stats/ncaa/2002/inst_results.php3 13

Beth Dawson, *et al.*, "Performance on the
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Examination by Men and Women of Different
Race and Ethnicity," 272 JAMA 674 (1994) 17

Patricia Gurin, "Reports Submitted on Behalf of
the University of Michigan: The Compelling Need
for Diversity in Higher Education,"
5 MICH. J. RACE & LAW 363 (1999) ..... *passim*

Steven N. Keith, *et al.*, "Assessing the Outcome
of Affirmative Action in Medical Schools: A
Study of the Class of 1975"
(RAND Corp. Series No. R-3481-CWF, 1987) 18

Justin Kruger & David Dunning,
"Unskilled and Unaware of It. How
Difficulties in Recognizing One's Own
Incompetence Lead to Inflated Self Assessments,"
77 J. PERSONALITY & SOC. PSYCHOL. 1121 (1999) 9

TABLE OF AUTHORITIES (cont'd)

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MISCELLANEOUS (cont'd)

Robert Lerner and Althea Nagai, "A Critique of the Expert Report of Patricia Gurin in Gratz v. Bollinger," May 7, 2001 (at http://www.ceousa.org) ..... *passim*

John E. Morris, "Boalt Hall's Affirmative Action Dilemma," AM. LAWYER., Nov. 1997, at 7 15

Nat'l Collegiate Athletic Ass'n, 1998 NCAA Division I Graduation-Rates Report (Marty Benson ed., 1998) 12

Paul R. Sackett, *et al.*, "High-Stakes Testing in Employment, Credentialing and Higher Education: Prospects in a Post-Affirmative Action World," 56 Amer. Psychologist 302, 303 (2001) 17

Peter Schmidt, "Debating the Benefits of Affirmative Action," THE CHRONICLE OF HIGHER EDUCATION, at A25 (May 18, 2001) 10

Thomas Sowell, BLACK EDUCATION: MYTHS AND TRAGEDIES (1972) 12

Shelby Steele, THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA (1990) 12

Shelby Steele, A DREAM DEFERRED: THE SECOND BETRAYAL OF BLACK FREEDOM IN AMERICA (1998) 12

TABLE OF AUTHORITIES (cont'd)

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MISCELLANEOUS (cont'd)

Clyde W. Summers, "Preferential Admissions: An Unreal Solution to a Real Problem," 1970 U. TOL. L. REV. 377 16

Stephan Thernstrom & Abigail Thernstrom, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE (1997) 12

Stephan Thernstrom, "Diversity and Meritocracy in Legal Education: A Critical Evaluation of Linda F. Wightman's 'The Threat to Diversity in Legal Education,'" 15 CONST. COMMENTARY 11 (1998) 16

Stephan Thernstrom and Abigail Thernstrom, "Reflections on the Shape of the River," 46 UCLA L. Rev. 1583 (1999) 12, 15, 19

Linda F. Wightman, "The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions," 72 N.Y.U. L. REV. 1 (1997) 15-16

Thomas Wood & Malcolm Sherman, "Is Campus Racial Diversity Correlated with Educational Benefits?" in RACE AND HIGHER EDUCATION (at http://www.nas.org/rhe.html) 7

QUESTION PRESENTED

Does the University of Michigan's use of racial preferences in undergraduate and law school admissions violate the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), or 42 U.S.C. § 1981?

INTEREST OF *AMICUS CURIAE*

Amicus curiae Reason Foundation is a national research and educational organization that explores and promotes the values of rationality and freedom as a basic underpinning of a good society and it seeks to foster an understanding of and appreciation for the limits of conscious planning in complex social systems. It supports the rule of law, private property, and limited government, and promotes individual responsibility in social and economic interactions, relying on choice and competition to achieve the best outcomes. Reason Foundation advocates policies and attitudes that link individual actions to personal outcomes and strives to correct the public perception that government intervention is the appropriate or efficient solution to most social problems. It is a not-for-profit corporation which has tax-exempt status under Internal Revenue Code section 501(c)(3).[1]

[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that this brief was not prepared or written, in whole or in part, or funded or produced by any person or entity other than *amicus curiae* or its counsel.

SUMMARY OF ARGUMENT

There is no persuasive evidence that racial and ethnic preferences in college and law school admissions to achieve "diversity" improve the educational performance of either the minority student students or non-minority students. The evidence relied on by the courts below was seriously flawed and based on subjective criteria and measures prone to serious error.

Objective measures of academic performance show that a disproportionate number of minority students admitted under preference programs do not do well academically, and may indeed suffer because of their lack of preparation to compete academically at institutions which admit them because of preferences.

Because there is no evidence of educational benefit from preference policies in college and university admissions, the university has failed to meet its burden of showing a compelling interest in imposing race-conscious admissions policies that discriminate against certain groups and individuals on the basis of race or ethnicity.

PRELIMINARY STATEMENT

There are two different admissions programs at issue in the lawsuit that this Court is considering in these cases.

The first is the undergraduate liberal arts school's program. The undergraduate school bases admissions decisions on a 150-point scale. And the scale, for example, awards up to 80 points for the highest grade point average an applicant can earn, 12 points for a perfect SAT score, 10 points for the quality of the

high school the applicant attends, and three points if the applicant submits an outstanding essay. Twenty points are given automatically if the applicant is a member of what is termed an "under represented" racial or ethnic minority, which, for the purpose of the University of Michigan, means African American, Hispanic or Native American. Twenty points generally constitutes about 20 percent of what is needed to be admitted – 100 points are usually sufficient for admission – so the 20 points awarded solely based on race are often the decisive factor.

The result is that a substantial number of minority students with scores and grade point averages substantially lower than many non-minority students are admitted. The only basis for the classification is race or ethnicity. It is a racial classification.

The law school program is different. It has established what it calls a target of a "critical mass" of minority students, and the target is basically between 10 and 12 percent. The LSAT scores and undergraduate grade point average necessary for admission is effectively adjusted in order to meet that numerical target. This means that students are being selected or rejected based primarily on the color of their skin

Both of these programs are *de facto* quota programs. At their core, the University of Michigan's policies amount to a quota system that unfairly rewards or penalizes prospective students based solely on their race. The University of Michigan's admissions policies, which award students a significant number of extra points based solely on their race, and establishes numerical targets for incoming minority students, are unconstitutional.

ARGUMENT

I. THERE IS NO PERSUASIVE EVIDENCE THAT RACIAL PREFERENCES IN ADMISSIONS IMPROVE EDUCATIONAL QUALITY AND THEREFORE SERVE A COMPELLING INTEREST

We assume, for the purposes of argument, that the qualities that make an applicant deserving of admission to a selective university may not be always be measured by "objective" standards such as SAT scores or high school or undergraduate grades. But neither can they be judged simply on the basis of skin color, either as a matter of constitutional law or as a matter of pedagogical theory.

Although tests and grades have had a dominant role in admissions decisions, they have never been considered alone. Selective universities regularly admit, or even recruit, candidates with unimpressive grades or test scores, but with brilliant achievements outside school, such as in music, civic activities or sports. Motivation, curiosity, originality and the capacity to think independently are important components of "merit."

But affirmative action programs in general, and Michigan's in particular, do not focus on those other qualities that are important to educational and life success, and they have been thoughtlessly and mechanically applied. Many institutions with "diversity" goals fail to look carefully at each applicant and are concerned only with making the numbers show that they have not been discriminatory. In the way the Law School and the undergraduate college at Michigan apply their "diversity" program, any African American, Hispanic or Native American

candidate who meets minimum standards substantially lower than those demanded of White or Asian American applicants is "good enough." This reveals a pernicious racism[2] under a liberal veneer. It leads, in fact, to the result about which Justice Powell expressed concern in *Regents of the University of California v. Bakke*, 438 U.S. 265, 298 (1978), that "[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual's worth. (citing *DeFunis v. Odegaard,* 416 U.S. 312, 343 (1974) (Douglas, J., dissenting))."

Are the practitioners and defenders of affirmative action themselves not convinced that merit, if defined without regard to skin color or ethnicity, is equally distributed throughout the population? One could reach this erroneous conclusion only if one believes that a numerical formula, whether it be called a quota or "critical mass," defines merit.

The defense of affirmative action cannot rest on an ideology that celebrates diversity for its own sake. A legitimate and constitutionally appropriate approach would protect applicants against prejudice that creates real disadvantages for certain minority applicants (*i.e.* remedying past or present discrimination), but the university has eschewed that argument,

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[2] The statement of the university's counsel during oral argument before the circuit court that a black woman with the same grades and LSAT scores as Barbara Grutter would be a "different person" (Transcript of Oral Argument at 38, *see* 288 F.3d 732 at 790 (Boggs dissenting)) is either a tautology – since every individual is "different" from any other (including an "identical" twin) or itself a statement based on racial stereotyping, betraying the belief that skin color determines ability or character.

probably because it cannot prove, or does not wish to admit, that it discriminated on the basis of race or ethnicity. The awarding of "points" for group membership, however, corrupts the capacity of institutions to assess each individual's potential.

If colleges and universities were to redefine merit in all its complexity, but with the same standards and expectations applied uniformly to all applicants, the student body at competitive schools could reflect the diversity in the population, without playing a "numbers game."

The burden of proving that the racial classification is narrowly tailored to meet a compelling governmental interest lies with the state actor. The party defending the plan bears the burden of producing evidence that the plan is constitutional. *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989); *Adarand v. Pena,* 515 U.S. 200 (1995). Mere recital of a compelling governmental interest is not enough to satisfy the University's burden under the strict scrutiny standard. Instead, the state must provide a "strong basis in evidence for its conclusion" that its use of race is compelling. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion); *Croson,* 488 U.S. at 500. The rationales and evidence advanced by the university and its *amici,* and relied on by the district court, do not satisfy this heavy burden.

In this case, the university does not claim that its admissions policies, which indisputably favor certain minorities, are "remedial." Rather, its sole rationale is that it seeks to achieve "diversity" in the student body because "diversity" has educational benefits to all students.

The court of appeals in *Grutter* and the district court in *Gratz* relied almost entirely on Patricia Gurin, "Reports Submitted on Behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education," 5 MICH. J. RACE & LAW 363, 364 (1999) (hereafter "Gurin") to find that student racial diversity results in educational benefits. See *Grutter*, 288 F.3d 732, 760 and *Gratz*, 122 F.Supp.2d 811, 822.

The methodology and conclusions of Professor Patricia Gurin do not withstand scrutiny.[3] Among the many methodological flaws in the Gurin study are the following:

(1) Gurin never actually measured racial diversity at the University of Michigan;

(2) Gurin's "learning outcomes" are not true educational outcomes;

(3) The effects purportedly associated with racial diversity were either nonexistent or extremely small;

(4) Gurin did not ascertain how much diversity is necessary to achieve the purported educational benefits, or how educational outcomes would be affected by marginal changes in racial diversity.

Gurin's research, moreover, does not support her claims.[4]

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[3] *See* Thomas Wood & Malcolm Sherman, "Is Campus Racial Diversity Correlated with Educational Benefits?" in RACE AND HIGHER EDUCATION (at http://www.nas.org/rhe.html).

[4] Moreover, the Gurin Report's serious methodological flaws would still preclude reliance on its results. Gurin's statistical study is flawed in most (continued...)

Gurin's "Learning Outcomes" and "Democracy Outcomes" do not objectively measure actual educational benefits. Gurin used what she calls "learning outcomes" and "democracy outcomes" as proxies or surrogates for educational benefits. Her measures of educational benefits include students' self-evaluations of their "social historical thinking," "complex thinking," and "intellectual engagement." (Gurin Rep. App. C, at 19). These measures depend largely on self-evaluations and are inherently subjective, both as to the content of the category and the student's evaluation of his or her capability . These variables measure, at most, whether students believe they engage in complex or "historical"

4(...continued)

major scientific aspects – research design and method, measurement, sampling, statistics, and statistical interpretation. In the statistical social sciences, failure to satisfy minimally the conditions of any one of these dimensions invalidates the conclusions. According to two scholars who critically reviewed Gurin's report,

> There are many design, measurement, sampling, and statistical flaws in this study. The statistical findings are inconsistent and trivially weak. No scientifically valid statistical evidence has been presented to show that racial and ethnic diversity in a school benefits students.

Robert Lerner and Althea Nagai, "A Critique of the Expert Report of Patricia Gurin in Gratz v. Bollinger," May 7, 2001 (at http://www.ceousa.org) (hereafter Lerner & Nagai) at 1. Indeed, the flaws in Gurin's work are so manifest that it probably should not have been admitted as "expert" evidence under the standards articulated by this Court in *Daubert v. Merrell-Dow Pharmaceuticals*, 509 U.S. 579, 593-94 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999). One fatal flaw is that many of Gurin's measures of educational benefit are so subjective and so artificial that they cannot be tested. To the extent that her methods and conclusion have been subjected to peer review, they have been soundly criticized.

thinking, but not whether they are in fact capable of it.[5] These "measurements" are questionable proxies for measurable educational benefits.

Gurin's data includes accepted and measurable indicia of academic achievement, such as grades[6], dropout rates, admission to graduate school, and performance on seven standardized tests, *see* Alexander W. Astin, WHAT MATTERS IN COLLEGE? 188-99, 218-20 (1993), but Gurin uses only one of those measures – self-reported grades -- in her analysis. (Gurin Rep. App. C at 14-15), and, Gurin finds no statistically significant or consistent results for this variable. (Gurin Rep. App. C at 38). Gurin finds no consistent link between her proxies for racial diversity and the only objective measure of academic achievement in her study.[7]

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[5] Self-assessments, such as those Gurin uses to measure educational benefits are of doubtful accuracy. Justin Kruger & David Dunning, "Unskilled and Unaware of It. How Difficulties in Recognizing One's Own Incompetence Lead to Inflated Self Assessments," 77 J. PERSONALITY & SOC. PSYCHOL. 1121, 1123-24 (1999) found that those who were most confident of their abilities are often the least able.

[6] Gurin used self-reported grades, which are, of course, more error prone than grades reported on college transcripts. If privacy was a concern, Gurin could have obtained and used redacted or number-coded transcripts to protect the identity of individual students. Use of self-reported grades very likely increased the rate of error.

[7] Gurin looked for 24 possible correlations between her proxies for student racial diversity and grades. Gurin reported statistically significant results for only six, but for the other 18, Gurin is unable to demonstrate any relationship. The six factors for which there are statistically significant results indicate that her "diversity" measures have little impact on grades -- very large increases in these measures lead to extremely small changes in grades. *See id.* App. D at 2. Moreover, Gurin's results are inconsistent with one another, or with any theory of the beneficial effects of student racial

(continued...)

Gurin fails to show that racial and ethnic-studies courses increase academic achievement. She shows, rather, that such courses sometimes affect students' "feelings" regarding the value of complex thinking; but "feelings" do not measure academic ability.

In WHAT MATTERS IN COLLEGE?, Professor Astin, a supporter of racial preferences, tested the effects of student racial diversity in the student body on grades, dropout rates, and performance on seven standardized tests, using the same database that Gurin used. *Id.* at 188-90 (grades), 191-93 (dropout rates), 199-220 (standardized tests). Astin noted that academic outcomes "are generally not affected" by racial composition of the peer environments and measures of minority enrollment, and that any effects found "are very weak and indirect," *id.* at 362. Astin recently conceded that the claim that more diverse campuses better educate their students "is yet to be convincingly demonstrated,'" and that "The research still needs to be done that would demonstrate that link." *See* Peter Schmidt, "Debating the Benefits of Affirmative Action," THE CHRONICLE OF HIGHER EDUCATION, at A25 (May 18, 2001).

There is evidence more direct than Gurin's constructs that shows that "diversity" as implemented by the defendants in this case on the basis of race, does not lead to improvement in standard measures of academic success. Robert Lerner and

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7(...continued)

diversity adopted by the district court. Gurin acknowledges the "ambiguity" of her finding that increases in "diversity courses" correlate with *lower* grades for blacks but, to a minimal extent, with higher grades for Hispanics and whites. (Gurin Rep. at 38).

Althea Nagai, "A Critique of the Expert Report of Patricia Gurin in Gratz v. Bollinger, May 7, 2001" (available at http://www.ceousa.org), used the numerical results of Gurin's statistical analyses to see whether the presence of the "diversity indicators" used by Professor Gurin predicted higher college grade-point averages for students in various racial and ethnic groups. Lerner & Nagai at 40. Like Astin, they found that "diversity indicators" were not associated with higher grades. To the extent that differences could be detected, "diversity" activities correlated with lower grades for blacks and Hispanics, as Gurin concedes.

Lerner and Nagai also examined whether Gurin's "diversity indicators" predicted that minority students would go on to earn higher degrees: again, the association was negative – it correlated with a reduced likelihood of graduation for black students, *id.* at 40-41. Lerner and Nagai found that academic success, as measured by the objective standards of undergraduate grades, graduation rates, and admission to graduate school, correlated strongly with a student's high school grades and SAT scores, *id.*

II. THERE ARE UNINTENDED CONSEQUENCES WHICH HARM MINORITY STUDENTS ADMITTED UNDER "DIVERSITY" PREFERENCES

A. The "mismatch" between minority applicants and the school to which they are admitted.

Race based admission standards "mismatch" minority students with institutions, placing them in competitive academic settings for which they are ill-prepared. *See* Stephan Thernstrom

and Abigail Thernstrom, "Reflections on the Shape of the River," 46 UCLA L. Rev. 1583 (1999); *see also* Thomas Sowell, BLACK EDUCATION: MYTHS AND TRAGEDIES (1972), particularly Part II, Black Students in White Colleges. More recent accounts documenting the costs of preferential policies, based partly upon the personal experiences of the authors, are found in, *e.g.*, Stephen L. Carter, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991), Shelby Steele, THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA (1990), and Shelby Steele, A DREAM DEFERRED: THE SECOND BETRAYAL OF BLACK FREEDOM IN AMERICA (1998). Statistical data supporting this proposition is provided in Stephan Thernstrom & Abigail Thernstrom, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE 386-422 (1997).

William G. Bowen and Derek Bok, in their widely-hailed (by supporters of race-preference admissions) work THE SHAPE OF THE RIVER, LONG TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998) (hereafter "Bowen & Bok") acknowledge that at the selective schools they studied, 6.3% of the whites failed to get a bachelor's degree (from any school), as compared with 20.8% of the African Americans. *See* Bowen & Bok at 376, table D.3.1. The black dropout rate was 3.3 times that of white students.[8]

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[8] National Collegiate Athletic Association (NCAA) publishes an annual report on graduation rates for large schools with a major commitment to intercollegiate athletics like Michigan. The NCAA's 1998 report indicates that 40% of the black freshmen who enrolled in an NCAA Division I school in 1991-92 had earned a bachelor's degree by 1998, while 58% of whites earned a degree. Thus the white dropout rate was 42%, while the black rate was 60%, or 43% higher. See Nat'l Collegiate Athletic Ass'n, 1998 NCAA Division I Graduation-Rates Report 626 (Marty Benson ed., 1998).

At the University of Michigan at Ann Arbor itself, the graduation rates for students entering in 1995-1996 was: for white male students, 85%, white females, 91%; for Asian males, 84% and for Asian females, 91%; for black males, 52%, for black females, 67%, for Hispanic males, 67% and for Hispanic females, 76%, and for American Indian males and females it was 61%.[9] At Michigan, the dropout risk for black males was 48%, more than three times that of white males; for black females it was 24%, almost three time that for white females.

Recent data from the American Council on Education points in the same direction: 41% of white students at NCAA Division I schools failed to graduate within six years of enrollment, while 62% of African American students and 54% of Hispanic students failed to graduate in six years. American Council on Education, "Minorities in Higher Education 2001-2002: Nineteenth Annual Status Report," Figure 9 (2002). In the period 1990-1999 undergraduate enrollment of whites declined by 5.1%, while enrollment of African Americans increased by 28.2% and of Hispanics increased by 67.3%; professional school enrollment of whites declined 0.8%, enrollment of African Americans increased 41.5% and enrollment of Hispanics increased 89.8% in that same period. *Id.*, Figure 6. Is there a correlation between increased minority enrollment and high minority dropout rates?

The cumulative grade point averages (GPAs) of the black students at the 28 schools in their sample put them at the twenty-

[9] These data are found on the website of the Chronicle of Higher Education, http://chronicle.com/stats/ncaa/2002/inst_results.php3.

third percentile of the class. Bowen & Bok at 72-86. The twenty-third percentile figure includes many African American students who met the regular academic requirements for admission and received no racial preference – about half of the black undergraduates included in the database Bowen and Bok used,[10] the authors estimate. Bowen & Bok at 350 table B.4.

The average rank in class for black students is appreciably lower than the average rank in class for white students within each SAT interval, one indication of a troubling phenomenon sometimes called "underperformance." For example, black students with the same SAT scores as whites tend to earn lower grades. Bowen & Bok at 77.

Diversity policies such as Michigan's undergraduate admissions system have the effect of taking in black and Hispanic students with lower high school grades and SAT scores than white or Asian students who are accepted, and some who are rejected. Lerner and Nagai have shown that preferentially admitted students with poorer high school credentials can be expected to do less well than the students who would have been admitted in their place under a race-blind admissions policy. Michigan's diversity policy takes in students who are at high risk of academic difficulty and who are at considerable risk of dropping out. Lerner & Nagai at 40-41. There no discernible countervailing benefit: diversity does not improve the performance of other students.

[10] The database is called "College and Beyond" or "C&B." The database was assembled by the Mellon Foundation in the years 1995 to 1997, and contains data on approximately 30,000 students who began their studies at one of 28 leading colleges and universities in 1976 and more than 32,000 who started at the 28 schools in 1989.

B. Preferences and professional success.

We know from the facts of this case that some graduate and professional schools also have race- and ethnicity-conscious admissions criteria. This is widespread: in a study of more than 27,000 students who entered 163 American Bar Association (ABA) approved law schools in the fall of 1991, Linda F. Wightman calculated that only 24 African Americans would have been admitted to any of the top 18 law schools if the decisions had been made solely on the basis of college grades and LSAT scores. Because of preferences, 420 black students were admitted to those law schools, 17.5 times as many. *See* Linda F. Wightman, "The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions," 72 N.Y.U. L. REV. 1, 30 table 6 (1997) (hereafter "Wightman").[11,12]

As Stephan Thernstrom and Abigail Thernstrom note in "Reflections on the Shape of the River," 46 UCLA L. Rev. 1583, 1612-13 (1999) (footnotes omitted):

> disproportionate numbers of African-American

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[11] For an analysis of Wightman's data and a critique of her thesis, *see* Stephan Thernstrom and Abigail Thernstrom, "Reflections on the Shape of the River," 46 UCLA L.Rev. 1583 (1999).

[12] More recent statistics show the same trend. In the national applicant pool of approximately 70,000 students who applied to law school for the class entering in the fall of 1997, there were just 16 blacks who scored 164 or better on the LSAT (92.3 percentile) and had a college GPA of at least 3.50. Some 2646 white applicants, 165 times as many, had equal academic credentials. *See* John E. Morris, "Boalt Hall's Affirmative Action Dilemma," AM. LAWYER., Nov. 1997, at 7.

> graduates fail the bar examinations, which are graded on a color-blind basis. For example, 57% of the blacks taking the California bar exam for the first time in 1997 failed, 2.5 times the proportion among whites (23%). The disparity was even wider in New York in 1992--63% of African Americans flunked, more than triple the white figure (18%). . . .
>
> * * * *
>
> . . . . [Wightman] distinguishes black law students who owed their admission to racial preferences from those who did not, and found that more than a fifth of the former failed to graduate. Even worse, 27% of those who got through school were unable to pass a bar exam within three years of graduation, a failure rate nearly triple that for African Americans who were admitted under regular standards and almost seven times the white failure rate. Fully 43% of the black students admitted to law school on the basis of race fell by the wayside, either dropping out without a degree or failing to pass a bar examination. . . .[13]

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[13] For a detailed analysis of Wightman, *see* Stephan Thernstrom, "Diversity and Meritocracy in Legal Education: A Critical Evaluation of Linda F. Wightman's 'The Threat to Diversity in Legal Education,'" 15 CONST. COMMENTARY 11, 32 (1998) *see also* Clyde W. Summers, "Preferential Admissions: An Unreal Solution to a Real Problem," 1970 U. TOL. L. REV. 377, cited by the Thernstroms, notes that many minority students have "social and psychological problems" that are "acute" in the law school environment "even under the best of circumstances. Those problems are multiplied if the student is not prepared to compete academically on even terms with other students because society has cheated him in his educational and cultural opportunities." *Id.* at 385. Summers further spells out the costs to minority students. *See id.* at 395-97. It does not increase the number of

(continued...)

Stephan Thernstrom and Abigail Thernstrom, *id.* at 1613, also demonstrate that the performance of students admitted to medical school under preference programs do poorly. They note that Beth Dawson, *et al.*, in a paper in the JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION, "Performance on the National Board of Medical Examiners Part I Examination by Men and Women of Different Race and Ethnicity," 272 JAMA 674, 675 and table 1 (1994), reported that "in 1988 . . . 51.1% of black medical students failed the required Part I exam given by the National Board of Medical Examiners. The white failure rate was only 12.3%. This glaring disparity . . . was almost entirely attributable to preferential admissions policies. Black students with strong academic credentials were as likely to pass as whites; but a high proportion of African Americans entered medical school without strong credentials, thanks to racial double standards in admissions. *Id.* at 1613 (footnotes omitted).[14]

The Thernstroms, *id.* also observe that:

> Dismayingly large racial disparities also show up in National Board of Medical Examiners tests

---

13(...continued)

black attorneys if selective law schools admit African Americans under distinctly lower standards and those students then flunk out or fail to pass the bar exam.

[14] Other sources show that SAT and LSAT and other standardized tests do predict academic and career performance. "An extensive body of research in both employment and education literatures has demonstrated that these tests generally do not exhibit predictive bias. In other words, standardized tests do not underpredict performace of minority group members." *See* Paul R. Sackett, *et al.*, "High-Stakes Testing in Employment, Credentialing and Higher Education: Prospects in a Post-Affirmative Action World," 56 Amer. Psychologist 302, 303 (2001) (citations omitted).

> measuring the competence of physicians in their field of specialization. . . .This was revealed in a RAND Corporation study of a national sample of the medical school graduating class of 1975, including 715 graduates who were classified as minorities, 80.2% of them African Americans. . . .[but] only 48% of minority physicians were able to qualify as board-certified in their specialty within seven years of graduation, as compared with 80% of whites and Asians. (citing Steven N. Keith, *et al.*, "Assessing the Outcome of Affirmative Action in Medical Schools: A Study of the Class of 1975" at 36, table 27. (RAND Corp. Series No. R-3481-CWF, 1987).
>
> * * * *
>
> . . . .[T]he likelihood that minority physicians would have passed the specialty boards depended largely upon their academic records before they reached medical school. A solid 83% of those in the top category on an "undergraduate performance index" based on college grades and MCAT scores passed Part II; in the second category, 75% became board-certified; in the third, 56%; in the fourth, 47%; and in the lowest group, a mere 32% qualified.
>
> Minority students with weak undergraduate records who had been given a big boost in the admissions process were still conspicuously behind more than a decade after leaving college.

Since 1992, all colleges have been required by federal law to compile annual statistics about crime on their campuses and to provide them to their students and staff members. See 20 U.S.C. sec. 1092(f). Are they not under at least a moral obligation to

disclose the statistics about dropout rates and underperformance to the very minority candidates they purport to benefit by giving them racial preferences in the admissions process?

C. Preferences and stigma.

The combination of significantly higher dropout rates and underperformance may perpetuate stigmatizing myths about black academic talent, fulfilling, ironically, Justice Powell's warning in *Bakke*, 438 U.S. at 298, that "[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth.") (citing *DeFunis v. Odegaard,* 416 U.S. 312, 343, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974) (Douglas, J., dissenting)).

The problem with racial preferences is that its adherents assign people to racial categories and assume that it is legitimate to offer them different opportunities depending upon the category to which they have been assigned. "It does not matter that a . . .white applicant is rejected because the school has 'too many' whites already. . . . the [white applicant] who is turned down should feel the consolation that the white race is very well represented at that school already. In actuality, it is individuals, not groups, who suffer from discriminatory treatment, and it does not matter whether the class being discriminated against is a narrow or a broad one." Stephan Thernstrom and Abigail Thernstrom, in "Reflections on the Shape of the River," 46 UCLA L.Rev. 1583, 1630 (1999).

Indeed, it appears that the "beneficiaries" of preferences also suffer because they are unprepared to compete in the environment into which they have been admitted, or because, even if they are qualified, they are stigmatized because they are seen as being a member of a group that has been given a preference.

CONCLUSION

College and universities that use racial and ethnic criteria for granting preferences in admission do not serve the interests of minority students or non-minority students. These preference policies do not serve a "compelling interest" and therefore violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and 42 U.S.C. § 1981.

The judgment of the United States Court of Appeals for the Sixth Circuit in Grutter, and the order of the United States District Court for the Eastern District of Michigan should be reversed.

January 2003

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Nos. 02-241 & 02-516

In The
Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, ET AL.,

Respondents.

JENNIFER GRATZ AND PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE HAYDEN FAMILY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The Rev. Dr. J. Carleton Hayden, Ph.D. is an ordained Anglican Episcopal priest, and professor of Afro-American History and Anglican Episcopal Church History at Howard University. The *raison d' être* of Father Hayden's ministry is Christian compassion and fundamental fairness within the American society and the world. Thus, Father Hayden supports the respondents University of Michigan admission programs for undergraduate and law school.

SUMMARY OF ARGUMENT

The cases of *Grutter v. Bollinger*, No. 02-241 and *Gratz v. Bollinger*, No. 02-516 demonstrate the appropriate and legal consequences when a State university protects the Fourteenth Amendment rights of individual applicants whilst realizing its inferred First Amendment right of a diverse student body. As these cases demonstrate, the University of Michigan program complies with the precedent of *University of California Regents v. Bakke*, 438 U.S. 265 (1978), where a State may consider the race of any applicant under a properly devised admission program involving the competitive consideration of race and ethnic origin. All citizens of every race and ethnic background are scored and considered for all available seats for admission into the University of Michigan. The University of Michigan

[1] The parties have consented to the filing of this brief. In conformity with Supreme Court Rule 37.6, *amicus* states that counsel for a party did not author this brief in whole or in part and that no persons or entities other than *amicus*, its members, and its counsel made a monetary contribution to the preparation of the brief.

considers the qualifications, quantitative and extracurricular, and every candidate's potential for contribution to educational diversity. The implied First Amendment right of academic freedom of a university includes the right, among other things, to admit. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957). The University of Michigan's admission program was narrowly tailored to serve its compelling interest in achieving a heterogenous student population; therefore, the university's consideration of race and ethnicity in its admissions decisions did not violate the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act. U.S.C.A. Const. Amend. 14; Civil Rights Act of 1964, § 601, *et seq.*, as amended, 42 U.S.C.A. § 2000d, *et seq.*, and 42 U.S.C. § 1981.

ARGUMENT

THE UNIVERSITY OF MICHIGAN'S UNDERGRADUATE AND LAW SCHOOL ADMISSIONS PROGRAM COMPLIES WITH *BAKKE*, THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 (42 U.S.C. § 2000d), AND 42 U.S.C. § 1981.

I. THE UNIVERSITY OF MICHIGAN ADMISSIONS PROGRAM FOLLOWS THE PRECEDENT OF *UNIVERSITY OF CALIFORNIA REGENTS V. BAKKE*, 438 U.S. 265 (1978).

The University of Michigan's undergraduate admission plan rates applicants on a 150-point scale, with as many as 110 points earned for academic standards, and a total maximum of 40 points for other factors. The academic considerations are grade point average, school,

curriculum and ACT/SAT score, which constitute one group of factors. The non-academic factors are geography, alumni relationship, essay, personal achievement, leadership and service, socioeconomic disadvantage, underrepresented racial/ethnic minority, men in nursing, scholarship athlete, and provost's discretion.

The following chart articulates the University of Michigan scoring program on undergraduate admissions. The chart bifurcates the two categories, academic and non-academic, and assigns the scoring points which the University of Michigan employs:

(CHART 1:)
SCORING ADMISSIONS

The University of Michigan's admissions plan rates undergraduate applicants on a 150-point scale, with as many as 110 points earned through academic factors

Academic factors	**Points**
GPA	40 to 80
School	0 to 10
Curriculum	-4 to 8
ACT/SAT score	0 to 12
Sub group 1	**(Total maximum 110 points)**

Other factors	**Points**
Geography	2 to 16
Alumni	1 to 4
Essay	1 to 3
Personal achievement	1 to 5
Miscellaneous (one of the following):	
Socioeconomic disadvantage	20
Underrepresented racial/ ethnic minority	20
Men in nursing	5
Scholarship athlete	20
Provost's discretion	20
Sub group 2	**(Total maximum 40 points)**

Subgroup 1 score + Subgroup 2 score = Selection Index

(Total maximum = 150)

The second chart is a more analytical breakdown of the University of Michigan scoring program on undergraduate admissions. It provides greater insight into how the program complies with Justice Powell's majority opinion in *University of California Regents v. Bakke*, 438 U.S. 265 (1978).

(CHART 2:)
SCORING ADMISSIONS

GPA Score	**Points**
2.0	**40**
2.1	**42**
2.2	**44**
2.3	**46**
2.4	**48**
2.5	**50**
2.6	**52**
2.7	**54**
2.8	**56**
2.9	**58**
3.0	**60**
3.1	**62**
3.2	**64**
3.3	**66**
3.4	**68**
3.5	**70**
3.6	**72**
3.7	**74**
3.8	**76**
3.9	**78**
4.0	**80**

HIGH-SCHOOL QUALITY Score	**Points**
0	**0**
1	**2**
2	**4**
3	**6**
4	**8**
5	**10**

DIFFICULTY OF CURRICULUM Score	**Points**
-2	**-4**
-1	**-2**
0	**0**
1	**2**
2	**4**
3	**6**
4	**8**

TEST SCORES

ACT	SAT1	**Points**
1-19	400-920	**0**
20-21	930-1000	**6**
22-26	1010-1190	**10**
27-30	1200-1350	**11**
31-36	1360-1600	**12**

Points (maximum of 40)
GEOGRAPHY
10 Michigan Resident
6 Underrepresented Michigan county
2 Underrepresented state
ALUMNI
4 Legacy (parents, step-parents)
1 Other (grandparents, siblings)
ESSAY
1 Very good
2 Excellent
3 Outstanding
PERSONAL ACHIEVEMENT
1 State
3 Regional
5 National
LEADERSHIP AND SERVICE
1 State
2 Regional
5 National

MISCELLANEOUS (choose one)
20 Socioeconomic disadvantage
20 Underrepresented racial/ethnic minority identification for education
5 Men in nursing
20 Scholarship athlete
20 Provost's discretion

At the University of Michigan Law School there is no quota system. High grades and standardized test scores increase an applicant's chances for admission into the University of Michigan Law School. *Grutter v. Bollinger, et al.*, 288 F.3d 732, 736 (6th Cir. 2002). The University of Michigan considers, along with the rigor of an applicant's courses, recommendations and essays for admission into their law school.

For the University of Michigan Law School, "it is true that black applicants were admitted at much higher rates than white applicants with similar grades and test scores. But, that fact does not prove that affirmative action imposes a substantial disadvantage on white applicants." *Grutter*, 288 F.3d at 767. The objective statistics "show that rejected white applicants have every reason not to blame their misfortune on affirmative action. In selective admissions, the competition is so intense that even without affirmative action, the overwhelming majority of rejected white applicants still wouldn't get in." *Grutter*, 288 F.3d at 768.

Therefore, the admission formula for the law school is absolutely **not** a quota.

> The Law School drafted its admissions policy to comply with the Supreme Court's opinion in *Bakke*. Adopted by the full faculty in 1992, the policy states that the Law School's "goal is to admit a group of students who individually and collectively are among the most capable students applying to American law schools in a given year." *Grutter*, 288 F.3d at 735-736.

Race and ethnicity can be a reasonable factor in the University of Michigan's legitimate efforts to secure a diverse student body; moreover, in the case at bar it is indeed not the only factor.

> It further provides that the Law School "seek[s] a mix of students with varying backgrounds and experiences who will respect and learn from each other." As part of the Law School's policy of evaluating each applicant individually, its officials read each application and factor all of the

accompanying information into their decision. *Grutter*, 288 F.3d at 736.

The University of Michigan Law School protects the individual Fourteenth Amendment rights of applicants, whilst achieving its inferred First Amendment right of a diverse student body.

The University of Michigan complies with the precedent of *University of California Regents v. Bakke*, 438 U.S. 265 (1978). Pursuant to the doctrine of *stare decisis*, this Honorable Court must take judicial notice of the well-reasoned precedent of *Bakke*. Mr. Justice Powell concluded in *Bakke* that a State may consider the race of any applicant under a properly devised admission program involving the competitive consideration of race and ethnic origin. *Bakke*, 438 U.S. at 320. Mr. Justice Powell writes the following:

> . . . the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed. *Bakke*, 438 U.S. at 320.

The University of Michigan admissions program legitimately serves the State by the proper consideration of race and ethnic origin within the State's substantial interest. Conversely, the University of California admissions program in the 1970s was a quota system; therefore, Mr. Justice Powell wrote the following as to the University of California program:

> In summary, it is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class. *Bakke*, 438 U.S. at 319-320.

The University of Michigan admissions program is the ideal system which Mr. Justice Powell envisioned and whose intellectual legacy created. All citizens of every race and ethnic background are scored and considered for all available seats for admission into the University of Michigan. The University of Michigan's admissions program considers qualifications, quantitative and extracurricular, and every candidate's potential for contribution to educational diversity. Mr. Justice Powell provides clear guidance in this area, and articulates the following analysis:

> . . . race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely

> to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. *Bakke*, 438 U.S. at 317.

The University of Michigan admissions program is within the approval of Mr. Justice Powell's legal analysis of appropriate consideration of race, while protecting individual freedoms from State infringement.[2] Thus, to overturn the University of Michigan admissions program is to set aside a quarter century of law established in *Bakke*, 438 U.S. at 265. Moreover, such a drastic overturn of settled precedent would undermine the intellectual legacy of not only a brilliant jurist, Mr. Justice Powell, but a kind and decent lawyer of high integrity. For this reason, petitioner's arguments, *sub judice*, are extreme.

[2] "Although a university must have wide discretion in making sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded." *Bakke*, 438 U.S. at 314.

II. THE UNIVERSITY OF MICHIGAN ADMISSIONS PROGRAM IS "NARROWLY TAILORED" TO MEET A "COMPELLING GOVERNMENT INTEREST" AS DEFINED IN *UNIVERSITY OF CALIFORNIA REGENTS V. BAKKE*, 438 U.S. 265 (1978).

Supreme Court decisions have suggested consideration of race-neutral means as necessary to satisfy the narrowly tailored component of strict scrutiny. *City of Richmond v. J.A. Croson Company*, 488 U.S. 469, 507 (1989). "In determining whether race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies." *United States v. Paradise*, 480 U.S. 149, 170 (1987). However, there is a difference between government contracts in *Croson* and university admissions in *Bakke* in regard to consideration of race and ethnicity. Education is unique and different from employment, minority business contracts and re-districting.

> This unique context, first identified by Justice Powell, differs from the employment context, differs from the minority business set aside context, and differs from the re-districting context; it comprises only the public education context and implicates the uneasy marriage of the First and Fourteenth Amendments. *Grutter v. Bollinger*, 288 F.3d 732, 749-750 (2002).

The University of Michigan admissions program is "narrowly tailored" to meet a "compelling government interest" as discussed in *Bakke*, 438 U.S. at 314-315. Mr. Justice Powell asserts that diversity which furthers a compelling State interest encompasses many factors and considerations of which race is a single consideration.

> The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. *Bakke*, 438 U.S. at 315.

As aforementioned, Mr. Justice Powell found the University of California program in the 1970s to be a quota[3] and violative of individual protections. Here, *sub judice*, a quarter century later, the University of Michigan protects individual rights whilst furthering a compelling State interest to achieve a heterogenous student population by consideration of a broad array of qualifications and characteristics of which race or ethnic origin is but a single though important element. Mr. Justice Powell articulates the importance of ethnic diversity while protecting individual constitutional rights as follows:

> Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogenous student body. Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded. *Bakke*, 438 U.S. at 314.

Here, *sub judice*, where the University of Michigan attains the goal of a heterogenous student body while protecting individual constitutional rights, the university advances the ideal of academic freedom. The ideal of

[3] "Petitioner's special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity." *Bakke*, 438 U.S. at 315.

academic freedom is implied within the First Amendment.[4] A university has the freedom to make its own judgments on education of its students, and includes selection of its students. Indeed, it is the business of the university to create an appropriate environment conducive to learning.

In *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (concurring in result), Mr. Justice Frankfurter articulated four essential freedoms that constitute academic freedom. Those four essential freedoms are, *inter-alia*: (1) who may teach; (2) what may be taught; (3) how it shall be taught; and (4) who may be admitted to study.[5] It is the freedom of who may be admitted that is the question, *sub judice*; and, so long as an applicant's individual constitutional rights are protected, in turn a State university has a First Amendment right to achieve student diversity. *Bakke*, 438 U.S. at 312.

In the case at bar, where the University of Michigan has protected individual constitutional rights, it must in

[4] "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body." *Bakke*, 438 U.S. at 312.

[5] "Mr. Justice Frankfurter summarized the 'four essential freedoms' that constitute academic freedom:

> 'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.' *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (concurring in result)."

See *Bakke*, 438 U.S. at 312.

turn be accorded the First Amendment right to select those students who will contribute to a diverse student body. *Bakke*, 438 U.S. at 313.

III. THE JUXTAPOSITION OF JUSTICE POWELL'S OPINION IN *BAKKE* TO JUSTICE O'CONNOR'S DISSENT IN *METRO BROADCASTING, INC. V. FCC*, 497 U.S. 547, 623 (1990).

In *Metro Broadcasting, Inc. v. Federal Communications Commission, et al.*, 497 U.S. 547 (1990), the Court was concerned with minority ownership programs of the Federal Communications Commission (FCC), not only as remedies for victims of discrimination, but also to promote programming diversity as mandated by Congress.

Justice O'Connor's dissent in *Metro* does not conflict with the analysis of Justice Powell's majority opinion in *Bakke*. In *Metro*, Justice O'Connor's dissent was reasoned on the FCC's ability to develop programming that reflects underrepresented minority interests via race-neutral means. Justice O'Connor's dissent in *Metro* concludes that the FCC programs of minority interests consideration "cannot survive even intermediate scrutiny because race-neutral and untried means of directly accomplishing the governmental interest are readily available." *Metro*, 497 U.S. at 622. On the other hand, Justice Powell's majority opinion in *Bakke* reasoned that a State university admission program which protected individual rights whilst furthering a compelling State interest to achieve a heterogenous student population by an array of qualifications and characteristics is constitutional. *Bakke*, 438 U.S. at 315. Thus, FCC regulation of the finite electromagnetic spectrum is distinguished factually from a university's legitimate efforts to realize a diverse student body.

The juxtaposition of Justice O'Connor's dissent in *Metro* to Justice Powell's majority opinion in *Bakke* is quite easily reconciled. Indeed, Justice O'Connor's dissent in *Metro* does not disturb Justice Powell's majority opinion in *Bakke*. There is a profound difference between government contracts and/or licenses, *vis a vis* admissions into universities. It is one thing for the government to provide consideration of race for FCC license and diversity, and quite another for mere consideration for admission into a university. There is a difference in government contracts in *Croson* and university admissions in *Bakke* relative to consideration of race.

Justice Powell reasoned that student diversity which furthers a compelling State interest encompasses many factors and considerations of which race is a single consideration. *Bakke*, 438 U.S. at 315. State universities, as aforementioned, have an implied First Amendment right as to whom they admit regarding achievement of a diverse student body. *Sweezy*, 354 U.S. at 263. It is an intellectual freedom of academic choice as to who is admitted into the university which is the question, *sub judice*. Thus, so long as an applicant's individual constitutional rights are protected, in turn the University of Michigan has an implied First Amendment right to achieve student diversity in the legitimate interests of educational advancement. *Bakke*, 438 U.S. at 312, and *Sweezy*, 354 U.S. at 263.

CONCLUSION

For the foregoing reasons this Honorable Court must rule in favor of respondents, University of Michigan, on all issues, and affirm the decisions below.

Respectfully submitted,

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Nos. 02-241 & 02-516

IN THE

Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

—v.—

LEE BOLLINGER, *et al.*,

Respondents.

JENNIFER GRATZ and PATRICK HAMACHER,

Petitioners,

—v.—

LEE BOLLINGER, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICI CURIAE COLUMBIA UNIVERSITY, CORNELL UNIVERSITY, GEORGETOWN UNIVERSITY, RICE UNIVERSITY AND VANDERBILT UNIVERSITY IN SUPPORT OF RESPONDENTS

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Patricia Gurin, *The Compelling Need for Diversity in Higher Education*, available at http://www.umich.edu/~urel/admissions/legal/expert/summ.html 2, 2n

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Periodicals:

Joseph Beckham, *Reasonable Independence for Public Higher Education: Legal Implications of Constitutionally Autonomous Status*, 75 LAW AND ED. 177 (1978) 14n

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INTEREST OF *AMICI*

This brief is submitted on behalf of *amici curiae* Columbia University, Cornell University, Georgetown University, Rice University and Vanderbilt University in support of the respondents in these appeals.[1] Each of the *amici curiae* is a private university subject to Title VI of the Civil Rights Act of 1964.[2] Each is highly selective in its admission policy—Columbia College, for example, accepted less than 12% of over 14,000 applications for the undergraduate class of 2006. Each takes into account a myriad of factors, in addition to class rank and standardized testing results, in determining which applicants, out of thousands of superlatively qualified candidates, should be accepted. As Columbia College currently advises prospective applicants:

> The Columbia College first year class of approximately one thousand students is chosen from a large and diverse group of applicants. In the process of selection, the Committee on Admissions asks questions about each applicant's academic potential, intellectual strength, and ability to think independently. The Committee also considers the general attitudes and character of the applicant, special abilities and interests, and whether he or she is likely to make productive use of the four years in the College. In its final selection, the College seeks a diver-

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[1] This brief *amici curiae* is submitted with the consent of all parties to these actions. No counsel for a party authored this brief in whole or in part; nor did any person or entity, other than *amici* and their counsel, make a monetary contribution to the preparation or submission of this brief.

[2] Cornell University is a private, Ivy League research university and is, at the same time, designated as the land-grant university for the State of New York, committed to the application of basic knowledge for the public good.

> sity of personalities, achievements, and talents, and of economic, social, ethnic, and geographic backgrounds. Each applicant's academic record is examined, together with reports on personal qualities that have been supplied by the principal, the headmaster, or counselor, and by teachers. The students' records of participation in the lives of their schools and communities are also important, as is their performance on standardized tests.

COLUMBIA COLLEGE BULLETIN, available at http://www.college.columbia.edu/bulletin/admission.php.

Each of the *amici curiae* has concluded that a significant level of diversity amongst its students is essential to assure the fulfillment of its academic mission. Those missions are, of course, individualized and reflect each institution's character and history. Georgetown's commitment to diversity, for example, is rooted in its Jesuit tradition, while other *amici* have more secular origins. But each shares, from its own experience, the view of Professor Patricia Gurin, introduced in evidence in these actions, that "students who experienced the most racial and ethnic diversity in classroom settings and informal interactions with peers showed the greatest engagement in active thinking process, growth in intellectual engagement and motivation, and growth in intellectual and academic skills."[3] Each agrees, as well, with the conclusion that

> We need to educate students to participate in a larger human culture, not just confirm their prejudices, whatever those prejudices may be. The essential contributions of pluralism to a good education are made not only through working with a variety of

[3] Patricia Gurin, *The Compelling Need for Diversity in Higher Education*, available at http://www.umich.edu/~urel/admissions/legal/expert/summ.html.

> disciplines, teachers, and methodologies, but also through working with a variety of colleagues and peers. Anyone learns better in an environment that includes other students who bring a different background and perspective to the same experience or material. Our obligation to educate undergraduates includes assembling a diverse and heterogenous student body. This will provide the ferment and creative excitement that is itself part of a good education and will prepare them to participate in a world which promises to be very different from that any of us have experienced.

Nannerl O. Keohane, *The Mission of the Research University*, THE RESEARCH UNIVERSITY IN A TIME OF DISCONTENT 164 (Jonathan R. Cole *et al.* eds., Johns Hopkins University Press 1994).

Accordingly, each of the *amici curiae* has considered a variety of means to achieve that level of diversity in its entering classes that is required to assure the benefits to *all* students of learning in a university that is—in the words of the brief, *amicus curiae*, of the United States—"experientially diverse and broadly representative of the public."[4] All the *amici curiae* thus recruit on a continuing basis in schools with a high percentage of minority students; all have taken steps to avoid any overt or covert acts of discrimination of any sort on campus; all offer programs designed fully to integrate minority students into the university community at the same time they offer courses and extra-curricular activities that may be of particular (but not exclusive) interest to these students.

Each of the *amici curiae*, like virtually every university in the nation, has reached the conclusion that completely race-blind admissions practices frustrate or

[4] Brief, *Amicus Curiae*, of the United States in *Grutter* v. *Bollinger*, at 17.

otherwise impede its effort to achieve a sufficient level of diversity in its student body to effectuate its academic mission. As a result, each of the *amici curiae* has concluded as well that one factor amongst the multitude it considers in its admissions process should be the race and ethnic background of otherwise underrepresented minorities.[5]

Each of the *amici curiae* here agrees with and supports the arguments made by the respondents and other *amici curiae* that diversity is a compelling interest under the Fourteenth Amendment and Title VI, warranting use of ethnicity or race as one of many "plus" factors to achieve educational diversity. This brief seeks to avoid repetition of the arguments primarily addressed in the briefs of the parties and other *amici*. Accordingly, we focus on one issue only: the need for this Court to give a high level of deference to the good faith admissions decisions of public and private universities around the nation and the unconstitutional impact on academic freedom of any ruling failing to do so.

SUMMARY OF ARGUMENT

In the course of the wrenching legal and public policy debate about university admission policies that take account of race to some degree or other, little has been

[5] The admissions policies and practices of *amici* Columbia University, Cornell University, Georgetown University and Vanderbilt University are consistent with the principles of Justice Powell's concurring opinion in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978). Rice University, however, currently is precluded from considering race or ethnicity as a "plus" factor in admission in order to comply with the interpretation of Title VI rendered by the United States Court of Appeals for the Fifth Circuit in *Hopwood* v. *Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

said about the First Amendment rights of the universities themselves. Academic freedom has frequently been said by this Court to be a "special concern of the First Amendment" and the right of a university to determine whom to admit has been said to constitute a central element of academic freedom. But the core question in cases such as this has commonly been phrased in an entirely one-dimensional way, just as petitioners have phrased it here, by simply asking whether a university's "use of racial preferences in student admissions violates the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 . . . or 42 U.S.C. § 1981." Petition for Writ of Certiorari in *Grutter* v. *Bollinger*, at i; Petition for Writ of Certiorari Before Judgment in *Gratz* v. *Bollinger*, at i.

What this debate has failed to recognize is that there is another constitutional provision at issue, that it is the First Amendment, and that it should be understood to *limit* the power of the government to require all universities—public and private—to adopt completely race-neutral admissions policies. The same is true of the concept that what is involved here is, in Judge Wiener's felicitous phrase, an "uneasy marriage of the First and Fourteenth Amendments"[6] which requires due consideration to the claims of both.

This brief is submitted to set forth the First Amendment side of the equation. We urge that First Amendment interests can be accommodated and Fourteenth Amendment and Title VI interests still vindicated by providing, as this Court often has, a high degree of deference to a university's good-faith determination as to how to further its academic mission. We urge specifically that when a university (especially a private uni-

[6] *Hopwood v. Texas*, 78 F.3d 932, 965, n.21 (5th Cir.) (Wiener, J., concurring), *cert. denied*, 518 U.S. 1033 (1996).

versity) determines that a constitutionally permissible goal—such as diversity within its student body—is essential to providing the highest quality educational experience for its students, any assessment of "narrow tailoring" as part of strict scrutiny analysis should reflect that deference. Consistent with the First Amendment, a university's judgment about *how* best to implement its academic mission should not be easily ignored.

ARGUMENT

As far back as this Court's landmark decision in *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819), this Court has been solicitous of the independence of private colleges from governmental control. Prior to that ruling, "[i]n state after state—in Virginia, Massachusetts, New York, Connecticut, Pennsylvania, North Carolina, and, of course, New Hampshire—legislative threats to or attacks on colleges had produced at least stagnation in and often serious injury to the institutions . . . ." Bruce A. Campbell, *Dartmouth College as a Civil Liberties Case: The Formation of Constitutional Policy*, 70 KY. L.J. 643, 693-94 (1982).

The *Dartmouth College* case itself arose out of heated debates between the president of the college and college trustees "over the appointment of the professor of divinity, the students' attendance at chapel and local churches, and the divinity professor's services to neighboring congregations." Jurgen Herbst, FROM CRISIS TO CRISIS: AMERICAN COLLEGE GOVERNMENT 1636-1819, at 235 (1982). When the trustees, in the service of protecting the religious character of the college, dismissed the president, the New Hampshire legislature responded by altering the charter of the college to add new members to the board, to add a new entity with the power to veto determinations of the trustees, and to make the president and

trustees accountable to the governor and the state council. *Id.* at 236.

In his opinion for the New Hampshire Supreme Court upholding the law, Chief Justice Richardson observed that he could not "bring himself to believe, that it would be consistent with sound public policy, or ultimately with the true interests of literature itself, to place the great public institutions, in which all the young men, destined for the liberal professions, are to be educated, within the absolute control of a few individuals, and out of the control of the sovereign power." *Trustees of Dartmouth College* v. *Woodward*, 1 N.H. 111, 135 (1817). Truly "independent" trustees, he wrote, would "ultimately forget that their office [was] a public trust." *Id.*

This Court reversed, holding that the charter of a private college could not be so overcome and that a private college could not be required to serve the state's end of advancing "perfect freedom of religion." 17 U.S. (4 Wheat.) at 543.[7] As phrased by Chief Justice John Marshall:

> That education is an object of national concern, and a proper subject of legislation, all admit. That there may be an institution, founded by government and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer, and do donations for the purpose of education necessarily

[7] In his oral argument on behalf of Dartmouth College, Daniel Webster urged that if "every college" were "subject to the rise and fall of popular parties, and the fluctuation of political opinions" colleges would "become a theatre for the contention of politics." 17 U.S. (4 Wheat.) at 598-99.

> become public property, so far that the will of the legislature, not the will of the donor, becomes the law of the donation?

Id. at 634.

Answering those questions in the negative and holding that a college charter was a contract protected by Art. I, Section 10 of the Constitution, the Court's opinion "encouraged the development of 'private' colleges by protecting them from state interference." Mark D. McGarvie, *Creating Roles for Religion and Philanthropy in a Secular Nation: The Dartmouth College Case and the Design of Civil Society in the Early Republic*, 25 J.C. & U.L. 527, 560, 566 (1999). In doing so, the *Dartmouth College* case, one eminent scholar concluded, became "the *magna carta* of the American system of higher education . . . ." Jurgen Herbst, *Forum: How to Think About the Dartmouth College Case,* 26 HIST. ED. 342, 346 (1986).

For over a century after the *Dartmouth College* case, there was little direct conflict between government and private universities. Those universities "received virtually no state or federal support and were subjected to few governmentally-imposed legal duties." J. Peter Byrne, *Academic Freedom: A Special Concern of the First Amendment,* 99 YALE L.J. 251, 322 (1989). At the same time, the general "physical isolation of the college or university, set in a rural college town and behind the traditional college gate, reflected the more general removal of scholarly and student life from the interest or control of society at large." *Id.*; *see* Walter P. Metzger, *Academic Freedom in Delocalized Academic Institutions,* DIMENSIONS OF ACADEMIC FREEDOM 1 (Walter P. Metzger, ed. 1969).

There was no reference in so many words to academic freedom in the *Dartmouth College* case, and, indeed, no

reference to it at all in any opinion of this Court until Justice Douglas, dissenting in *Adler* v. *Board of Education*, 342 U.S. 485, 510-11 (1952), did so.[8] *Adler* itself upheld the constitutionality of the Feinberg Law, a New York statute that barred from employment in the public schools any member of an organization declared by the state's Board of Regents to advocate the overthrow of the government by force or violence. Justice Douglas's dissent argued that the New York law, with its "system of spying and surveillance . . . cannot go hand in hand with academic freedom" and that "[t]here can be no real academic freedom in that environment." *Adler,* 342 U.S. at 510-11 (Douglas, J., dissenting).

Five years later, in *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957), a plurality of the Court identified academic freedom as a core constitutional interest and a concurring opinion of two members of the Court—Justice Frankfurter and Justice Harlan—memorably identified the central role of academic freedom in a free society. *Sweezy* itself arose out of an investigation conducted by the State Attorney General of New Hampshire about lectures conducted at the University of New Hampshire by Professor Sweezy. After he declined to respond to certain questions, the Attorney General sought to compel the testimony. In Justice Brennan's plurality opinion, he focused on the "essentiality of freedom in the community of American Universities" and

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[8] The term "academic freedom" has not been without a level of ambiguity. Often used to articulate the rights of individual faculty members, it has more recently been used to embody the "First Amendment right of the university itself . . . largely to be free from government interference in the performance of core educational functions." Byrne, *supra*, 99 YALE L.J. at 311; *see also*, Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America,* 66 TEX. L. Rev. 1265 (1988). This brief uses the term in the latter sense.

the violation of that freedom occasioned by compelled disclosure about the substance of Sweezy's lectures.

Justice Frankfurter's concurring opinion, *id.* at 263, has been quoted, analyzed and relied upon for nearly half a century. The opinion warned of the "grave harm resulting from governmental intrusion into the intellectual life of a university" and the need for the First Amendment protection to assure "the exclusion of [such] governmental intervention." *Sweezy*, 354 U.S. at 261-62 (Frankfurter, J., concurring).[9] In its most celebrated portion, the opinion quoted with approval from a statement written on behalf of two "open" universities in South Africa—the University of Cape Town and the University of Witwatersrand—that accepted non-white as well as white students. Drafted at a time when the South African government was adopting apartheid laws enforcing segregation in the nation's universities, the statement urged that "legislative enactment of academic segregation on racial grounds is an unwarranted interference with university autonomy and academic freedom." THE OPEN UNIVERSITIES IN SOUTH AFRICA (Albert van de Sandt Centlivres *et al.* eds. 1957) 5. In the portion of the document quoted and adopted by Justice Frankfurter, it stated:

> "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."

Sweezy, 354 U.S. at 263.

Twenty-one years later, Justice Powell, in his critical concurring opinion in *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 311 (1978), relied upon the last of those freedoms—*i.e.*, "who may be admitted to study"—in offering his analysis of the very issue now before this Court. The attainment of a diverse student body, Justice Powell wrote, is "clearly . . . a constitutionally permissible goal for an institution of higher education." *Id.* at 311-12.[10]

Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.[11] The

[9] The granting of a high level of institutional autonomy to universities is not an American creation. "European universities of the middle ages enjoyed extensive autonomy from both church and state, and the authority to base their corporate lives on academic values resulted in free teaching and scholarship." Byrne, *supra*, 99 YALE L.J. at 321. In the latter half of the 19th century, German concepts of academic freedom, which had considerable impact on American thinking, encompassed the principle of *Lehrfreiheit*—literally "teaching freedom"—which allowed professors "to decide on the content of their lectures and to publish the findings of their research without seeking prior ministerial or ecclesiastical approval or fearing state or church reproof. . . ." Metzger, *supra*, 66 TEX. L. REV. at 1269.

[10] It is, in that respect, completely different from what was at issue in *Bob Jones University* v. *United States*, 461 U.S. 574 (1983)—*i.e.*, a racially discriminatory goal undermining the attainment of diversity or consideration of each person on an individual basis which "violates a most fundamental national public policy, as well as rights of individuals." *Id.* at 593. Consideration of race or ethnicity as only one of a myriad number of factors in the individualized consideration of applicants for admission in order to achieve educational diversity is a far cry from a naked goal of stereotypical racial discrimination applied without consideration of individual merit and potential.

[11] In *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967), in the course of holding the Feinberg Law to be unconstitutional, this Court had observed, *inter alia*, that

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a

> freedom of a university to make its own judgments as to education includes the selection of its student body.

Id. at 312.

Then, after quoting from Justice Frankfurter's language set forth above, Justice Powell summarized with approval the university's argument as follows:

> Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.

Id. at 313.

Justice Powell then proceeded to his twin conclusions that (a) the special admissions program at issue in *Bakke* involving an explicit racial quota could not pass Fourteenth Amendment review but that (b) race could constitutionally be considered as one factor in university admissions practices as a part of a broader review of a variety of factors determined by the university to serve its pedagogical ends.

In the years that have followed, this Court has repeatedly emphasized the need to protect the institutional autonomy of universities by deferring to their good faith judgments as to how to implement their academic missions. In *Widmar* v. *Vincent*, 454 U.S. 263 (1981), the Court, in the course of concluding that a public univer-

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> special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

Id. at 603.

sity could not exclude speech on the basis of content once the university had established a forum generally open for the use of student groups, noted that "[a] university's mission is education, and decisions of this court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities." *Id.* at 267, n.5. *See also id.* at 279 (Stevens, J., concurring, quoting from Justice Frankfurter's concurring opinion in *Sweezy*).

In *Regents of the University of Michigan* v. *Ewing*, 474 U.S. 214 (1985), the Court rejected a due process claim of a student who had been expelled from an undergraduate medical school program, even though it assumed that the student had a property interest in continuing his studies. The Court held:

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

Id. at 225.

Still more recently, in *Board of Regents of the University of Wisconsin System* v. *Southworth*, 529 U.S. 217 (2000), the Court concluded that a public university could constitutionally impose a mandatory student activity fee which would be used to fund a program for extra curricular student speech provided that the fund was allocated in a viewpoint neutral way. Deferring to the university's own determination as to how best to implement its pedagogical ends, the Court concluded that:

> The University may determine that its mission is well served if students have the means to engage in

> dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall. If the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends.

Id. at 233.

Yet despite authorities such as these deferring to one after another academically-rooted decisions of universities, little heed has been paid by petitioners, their *amici* allies or even the dissenting jurists in *Grutter* to the notion of academic freedom, let alone to the idea that the view of the University of Michigan itself to determine "who may be admitted to study" was entitled to any deference at all.[12] Not only is such an approach contrary to First Amendment norms but to those embodied in principles of federalism as well. Michigan, like many other states,[13] has included in its state constitution protection for the institutional autonomy of its state university. Mich. Const. art. VIII, § 5. Michigan courts have

[12] The same is true of the jurists that joined the majority opinion in *Hopwood* with respect to the University of Texas.

[13] *See* Harold W. Horowitz, *The Autonomy of the University of California Under the State Constitution*, 25 U.C.L.A. L. REV. 23 (1977); Byrne, *supra*, 99 YALE L.J. at 327 n.303 (listing state constitutions); Joseph Beckham, *Reasonable Independence for Public Higher Education: Legal Implications of Constitutionally Autonomous Status*, 75 LAW and ED. 177, 179 (1978) (citing states with constitutionally autonomous status). In other states, the autonomy of universities is guaranteed by statute. *See* Kelly Knivila, Note, *Public Universities and The Eleventh Amendment*, 78 GEO. L. J. 1723, 1731 (1990) (citing examples). *See also*, *Maas* v. *Cornell University*, 94 N.Y.2d 87, 92 (1999) (colleges and universities are "peculiarly capable of making the decisions which are appropriate and necessary to their continued existence" and courts have " 'restricted role' in dealing with and reviewing controversies involving colleges and universities").

accordingly "consistently construed the provision as a prohibition against all attempts by the legislature to interfere with the academic management of the university." Byrne, *supra*, 99 YALE L.J. at 327.

The briefs, *amicus curiae*, of the United States offer useful examples of the consequences of failing to grant the University of Michigan or any public or private college or university anything like the autonomy required by academic freedom principles. The government concedes, with respect to the university admission process, that "[m]easures that ensure diversity, accessibility and opportunity are important components of government's responsibility to its citizens." Brief, *Amicus Curiae*, of the United States in *Grutter* v. *Bollinger* at 10. No claim is made that the University of Michigan's admissions policy fails to provide "diversity, accessibility and opportunity." Indeed, the Solicitor General's brief acknowledges that public universities need not "tolerate artificial obstacles to educational opportunity," that they have "substantial latitude to . . . ensure that universities and other public institutions are open to all and that student bodies are experientially diverse and broadly representative of the public." *Id.* at 17. But when the rubber hits the road with respect to *how* the university's "substantial latitude" may be exercised, the government's view permits little or no latitude.

Consider the Solicitor General's first example:

> [I]n Texas, which has operated without race-based admissions policies since they were invalidated by the Fifth Circuit in 1996, the undergraduate admissions program focuses on attracting the top graduating students from throughout the State, including students from underrepresented areas. See Tex. Educ. Code Ann. § 51.803 (West 2001). By attacking the problems of openness and educational opportunity

directly, the Texas program has enhanced opportunity and promoted educational diversity by any measure . . .

> Under this race-neutral admission policy, "pre-*Hopwood* diversity levels were restored by 1998 or 1999 in the admitted and enrolled populations and have held steady. . . ." Thus in 1996, the last year race was used in University of Texas admissions decisions, 4% of enrolled freshmen were African Americans, 14% were Hispanic, and less than 1% were Native Americans. In 2002, 3% of enrolled freshmen were African American (this figure has fluctuated between 4% and 3% since 1997), 14% were Hispanic, and less than 1% were Native American.

Id. at 17-18 (citations omitted).

This discussion of Texas's efforts to deal with the effects of the *Hopwood* opinion is not necessarily wrong as a description of how Texas has sought to cope with the new legal reality in that state after *Hopwood*.[14] It is, however, problematic because the approach to diversity forced upon Texas in a post-*Hopwood* era is by no means necessarily right from the academic perspective *of the University of Texas itself* where the principles of academic freedom are applicable. For example, the Texas scheme is wholly dependent for its success upon the perpetuation of *de facto* segregated schools. As former university presidents Bowen and Rudenstine have concluded, "in states like Texas where the secondary school

[14] It does omit, however, that in Texas the percentage of minority students attending colleges and universities has declined significantly at a time when the percentage of minority students at the secondary school level has risen. *See* William G. Bowen & Neil L. Rudenstine, *Race Sensitive Admissions: Back to Basics*, THE CHRONICLE OF HIGHER EDUCATION (Feb. 7, 2003) at 13, n.15, available at http://www.mellon.org.

system is highly segregated, this approach can yield a significant number of minority admissions at the undergraduate level." Bowen & Rudenstine, *supra*, at 13. However, "[t]he top-x-percent plan is . . . entirely ineffective at the professional and graduate school level, because (like selective undergraduate colleges) these schools have national and international applicant pools with no conceivable 'reference group' of colleges to which they could possibly give such an admissions guarantee." *Id.* at 14.

The *amici curiae* can add to that judgment their own knowledge that at universities far smaller in size than the Universities of Texas or Michigan, the 10% across-the-board approach or anything like it is of absolutely no use at all. Such universities—many of which are private, none of which determines admissions on a purely numerical basis, and all of which have sought to further diversity on campus by taking race or ethnicity into account as one of many potential factors to be considered in the admissions process—focus *as to each applying student* on a myriad of factors which makes the Texas 10% approach—or a similar 4% figure used in California—irrelevant.[15] As Justice Powell observed of similar admissions policies, "this kind of program treats each applicant as an individual in the admissions process." *Bakke*, 438 U.S. at 318 (Powell, J., concurring).

These universities are able in their admissions processes to be sufficiently selective that they routinely turn down large numbers of applicants with scores at or near the top of their high school classes. Any approach that

[15] The degree to which smaller colleges and universities take into account a wide range of factors as they make their admissions decisions is well-described in a new book describing in detail the admissions process at Wesleyan College. *See generally* Jacques Steinberg, THE GATEKEEPERS (2002).

requires the admission of *all* high school applicants who fall within the top 10% of their high school classes would require a complete abandonment of the selective admissions policies currently in effect—a result that the *amici curiae* believe would be utterly contrary to their educational missions and the institutions' academic freedom to determine who should be admitted to study.

Beyond that, the Texas approach results in a student mix that may disserve the academic ends even of a large state university by favoring a minority student in the top 10% of a less demanding school academically over a different minority student in, say, the 12th percentile of a more demanding school. This approach would not only be contrary to the interests of the university but properly be viewed as unfair; "the process is highly mechanical," students "are given automatic admission without any prior scrutiny, and without any consideration of the fact that some high schools are much stronger academically than others." Bowen & Rudenstine, *supra*, at 13-14. The impact of such a rigid regime on out-of-state applicants is equally problematic. By definition the Texas scheme would make it highly unlikely for a university to achieve a diverse mix of students from states other than Texas. Moreover, as noted above, any schemes created for state universities that enroll tens of thousands of students from within the state are wholly inapplicable to and unsuitable for small private universities that recruit students from a national pool. For example, the entering undergraduate class of 2005 at Rice University, also in Texas and also bound by *Hopwood*, is comprised of 660 students. About half of Rice's undergraduates are from Texas; the other half are from all 49 other states and various nations around the world. Given its size, Rice could not begin to accept anything like the top 1% of the high school graduates in Texas or even the valedictorian of each of the high schools around the nation from which

applications are submitted. To assemble a diverse entering class of the highest academic quality from around the nation, Rice must make a multitude of difficult choices. *Hopwood* interferes with (and indeed frustrates) that process: the 10% approach adopted by the University of Texas is simply not relevant to it.

The point, we repeat, is not that the post-*Hopwood* approach of the Texas legislature is necessarily poorly conceived. It is that in the course of the state of Texas responding to *Hopwood*, the University of Texas has been forced to take action inconsistent with its own view of its educational mission and its own judgment about how best to recruit the most academically competitive student body. Such a state-imposed "one size fits all" requirement is facially inconsistent with the core of the last of the "four essential freedoms" that a university should be free to decide for itself "on academic grounds . . . who may be admitted to study." *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring).

The imposition of such a model on universities is not only at odds with the core notion of institutional autonomy of universities as articulated by Justice Frankfurter, but with the later cases cited above. The *Ewing* case is illustrative. Inconsistently with the ruling in that case, the United States offers no hint of "great respect" —or indeed any respect at all—"for the faculty's professional judgment" and no showing at all that the University of Michigan "did not actually exercise professional judgment" in reaching its decision about how best to structure its admissions process.

That sort of deference—indeed, *any* sort of deference—might not be owed if this case simply involved a typical application of strict scrutiny in the context of an alleged violation of the Fourteenth Amendment. But this case, in this unique context, as Judge Weiner observed,

"differs from the employment context, differs from the minority business set aside context, and differs from the redistricting context," *Hopwood*, 78 F.3d at 965 n.21, and potentially goes far beyond the actions of state institutions through the reach of Title VI to nearly all private universities in the United States.

The difference is that this case arises in a context which this Court has repeatedly stated implicates "a special concern of the First Amendment," one in which the very decision of universities as to "who may be admitted to study" is a long-recognized "essential" freedom. *Bakke*, 438 U.S. at 312 (Powell, J., concurring); *Sweezy*, 354 U.S. at 263 (Frankfurter, J. concurring). Given the decision of universities through the nation (including the *amici curiae*) that the goal of having a diverse campus which reflects the highest academic standards can best be achieved by taking *some* account of the racial and ethnic background of their applicants, any direction then not to do so necessarily implicates—and threatens—a core principle of academic freedom.

The First Amendment interests that encompass the concept of academic freedom are not, to be sure, the only ones present in the case. These interests must be accommodated with the Fourteenth Amendment and Title VI. But they cannot be simply ignored. Admissions policies of universities that are animated by racial exclusion or animus, *cf. Bob Jones University v. United States*, *supra*, may be entitled to no deference at all; policies that seek to serve the "constitutionally permissible goal for an institution of higher learning" of diversity through consideration of race or ethnicity as one of a myriad of "plus" factors in crafting a class, *Bakke*, 438 U.S. at 311-12 (Powell, J., concurring), should receive deference.

The implementation of a legal standard that acknowledges weighty First Amendment interests of public and private universities without unduly compromising core Fourteenth Amendment and Title VI interests is required. We suggest that it is in the application of the "narrow tailoring" element of strict scrutiny analysis that an accommodation of the competing constitutional interests should occur. It would not be unprecedented to do so. Justice Powell consciously applied a more relaxed standard in assessing narrow tailoring in his *Bakke* opinion, recognizing the significant educational interests of universities themselves.

In this case, the University of Michigan has determined that to achieve a level of diversity consistent with the university's educational mission, it was necessary to consider race as one of many factors in the admissions process. That is the same decision that public and private colleges and universities throughout the country have made for themselves, tailored by each for the accomplishment of its educational mission, since 1978. It is a decision, we submit, that must be treated with great deference, lest the judiciary be placed in the position of "substituting its judgment in this regard for those of the educators who are the custodians and guardians of the [university's] mission and academic standards." *Grutter* v. *Bollinger*, 288 F.3d 732, 771 (6th Cir. 2002).

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Sixth Circuit in *Grutter* v. *Bollinger* (No. 02-241) and the order of the United States District Court for the Eastern District of Michigan in *Gratz* v. *Bollinger* (No. 02-516) should be affirmed.

February 13, 2003

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Nos. 02-241 & 02-516

In The
Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, *et al.*,

Respondents.

JENNIFER GRATZ AND PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, *et al.*,

Respondents.

On Writs of Certiorari To The United States Court of Appeals For the Sixth Circuit

BRIEF OF REPRESENTATIVE RICHARD A. GEPHARDT, ET AL., AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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CASES

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) ..... *passim*

Brown v. Board of Education, 347 U.S. 483 (1954) 7, 19

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 10, 13, 21

Easley v. Cromartie, 532 U.S. 234 (2001) 9

Fullilove v. Klutznick, 448 U.S. 448 (1980) 23

Green v. County School Board, 391 U.S. 430 (1968) 18

Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002) 12

Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001) 13

Keyes v. School District No. 1, 413 U.S. 189 (1973) 19

Plessy v. Ferguson, 163 U.S. 537 (1896) 7

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) ..... *passim*

Shaw v. Reno, 509 U.S. 630 (1993) 8

Sweezy v. New Hampshire, 354 U.S. 234 (1957) 5

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 9, 19, 20

United States v. Paradise, 480 U.S. 149 (1987) 23

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) 5, 7

FEDERAL CONSTITUTIONAL PROVISION

U.S. CONST. amend. XIV § 1 3

STATUTES AND LEGISLATIVE MATERIALS

CONG. GLOBE, 39th Cong., 1st Sess. 10 (1865), *available at* http://memory.loc.gov/ammen/amlaw/lwcg.html 7

FLA. ADMIN. CODE ANN. R. § 6C-6.002(5) (2002) 16

H.AMDT 548 to H.R. 6, commonly known as TEA-21, 105th Cong. (1998), *available at* http://thomas.loc.gov. 5

H.AMDT 612 to H.R. 6, 105th Cong. (1998), *available at* http://thomas.loc.gov. 5

TEXAS EDUC. CODE ANN. § 51.803 (West 2001) 16

42 U.S.C. § 2000d-1 1

42 U.S.C. § 2000e-5(f) 1

42 U.S.C. § 2000h-2 1

EXECUTIVE MATERIALS

Exec. Order No. 10,925, 3 C.F.R. 448 (1961) 29

OTHER AUTHORITIES

Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. Rev. 1195 (2002) 15

Vickie Chachere, *Bush's One Florida Praised*, THE TALLAHASEE DEMOCRAT, June 18, 2002, *available at* http://www.tallahassee.com/mld/democrat/news/local/3490611.htm 25

Defend Affirmative Action Party, Affirmative Action Facts, at http://www.umich.edu/~daap/facts.htm. 1

Erika Frankenberg, Chungmei Lee, and Gary Orfield, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, The Civil Rights Project, Harvard University, January 2003 18

Rolando Garcia, *Officials Say A&M Needs Racial Preferencing*, THE BATTALION ONLINE – TEXAS A&M'S NEWS SOURCE, Jan. 28, 2003 *at* http://www.thebatt.com/vnews/display..... 28

Governor Jeb Bush's "Equity In Education Plan", *at* http://www.myflorida.com/myflorida/government/governorinitiatives/one_florida/documents/educationplan.doc. 18

Patricia Gurin, *Expert Report of Patricia Gurin, Gratz v. Bollinger, Grutter v. Bollinger*, 5 MICH. J. RACE & L. 363 (1999) 16

John Hasnas, *Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 FORDHAM L. REV. 423 (2002)..... 8

Danielle Holley and Delia Spencer, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245 (1999) 18

Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences*, The Civil Rights Project, Harvard University, (February 2003)..... 16, 18, 27

A Joint Report Between the Bureau of Labor Statistics and the Bureau of the Census, The Annual Demographic Survey, March Supplement, *at* http://ferret.bls.census.gov/macro/032002/pov/new01_001.htm 14

Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1336 (1986) 7

ANDREW KULL, THE COLOR-BLIND CONSTITUTION, (1992) 7

Edgar K. Lee & Patricia Marin, *Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida*, The Civil Rights Project, Harvard University, February 2003 25

Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939 (1997) 15

Minority Enrollment for Entering First Year Classes at the Univ. of Texas School of Law, 1983-2002, *available at* http://www.law.utexas.edu/hopwood/minority.html.. 28

National Association for College Admission Counseling, Issue Paper: *Affirmative Action in College Admission*, Summer 2001. 26

Lloyd Peake & John Sealander, *Societal Impact Reports: The Paradox of Legalized Inequality and a Revised Context for Race Based Affirmative Action*, 29 W. ST. U.L. REV. 57 (2001) 9

Press Release, U.S.CENSUS BUREAU, *Majority of African Americans Live in 10 States*, Aug. 13, 2001, *at* http://www.census.gov/Press-Release/www/2001/cb01cn176.html. 23

Report of New FTIC Student Enrollment, Division of Colleges and Universities, prepared by Office of Planning, Budgeting and Policy Analysis, *found at* www.oneflorida.org/myflorida/government/governorinitiatives/one_florida/documents/minority_enrollment.xls. 25

Jeffrey Selingo, *What States Aren't Saying About the 'X-Percent Solution,'* CHRON. OF HIGHER EDUC., June 2, 2000 19

Statement of Clay Johnson, President George W. Bush's Presidential Personnel Director, *quoted in* Al Kamen & Ellen Nakashima, *Bush Picks as Diverse as Clinton's*,WASH. POST, Mar. 30, 2001 4

Statement of Richard Kahlenberg, Senior Fellow at the Century Foundation, *quoted in* Michael A. Fletcher, *Race-Neutral Plans Have Limits In Aiding Diversity, Experts Say*, WASH. POST, Jan. 17, 2003 29

Statement of Marvin Krislov, Vice President and General Counsel of the University of Michigan, on ABC News, *Schools Differ On Affirmative Action*, Jan. 16, 2003, http://abcnews.go.com/sections/wnt/DailyNews/affirmativeaction_options030116.html..... 22

Statement of Colin Powell, Secretary of State under President Bush, *on* CNN-Late Edition, January 19, 2003, *at* http://www.cnn.com/2003/ALLPOLITICS/01/19/powell.race 11

Statement of Condoleezza Rice, National Security Advisor to President Bush and Former Provost at Stanford University, *quoted in* Mike Allen, *Rice: Race Can Be Factor in College Admissions*, WASH. POST, Jan. 18, 2003 11

Marta Tienda, et al., *Closing The Gap?: Admissions & Enrollment at the Texas Public Flagships Before and After Affirmative Action,* Abstract (January 21, 2003) *available at* http://www.texastop10.princeton.edu/publications/tienda.012103.pdf 24

U.S. CENSUS BUREAU, Census 2000, *Population 18 Years and Over by Race and Ethnicity, at* http://www.eeoc.gov/stats/census/majorgroups/us/ us_state_rank.pdf. 23

U.S. Commission for Civil Rights, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education*, Chapter 2, November 2002, *at* http://www.usccr.gov/pubs/percent2/summ.htm 24, 26

DeWayne Wickham, *Bush's Timing Symbolizes Misunderstanding of King's Message*, GANNETT NEWS SERV., Jan. 16, 2003 20

INTEREST OF THE AMICI CURIAE

This brief is submitted on behalf of certain individual members of the U.S. House (the "Congressional Amici") as amici curiae.[1] The Congressional Amici have the responsibility of enacting various statutes prohibiting discrimination on account of race and ethnicity.[2] The Congressional Amici also have a substantial interest in ensuring that the Equal Protection Clause of the Fourteenth Amendment continues to promote equal opportunity for all Americans in the context of public education including admission to public colleges and universities.[3]

SUMMARY OF ARGUMENT

This Court's jurisprudence has recognized that diversity is a compelling governmental interest in the context of a university's admissions program. Since that time, the practical effects of diversity both in the classroom and beyond have been extensively discussed and documented. It is time for this Court to reaffirm that diversity in higher education is a compelling governmental interest.

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[1] A list of the individual members of Congress is included in the appendix to this brief. Counsel for the Congressional Amici were the sole authors of this brief. No person or entity other than the Congressional Amici made a financial contribution to this brief. Pursuant to Supreme Court Rule 37.2(3)(a), all parties have consented to the filing of this brief. These consents were filed with this Court in December 2002.

[2] *See, e.g.*, §§ 42 U.S.C. 2000d-1, 2000e-5(f), 2000h-2.

[3] Congressman Gephardt graduated from the University of Michigan Law School in 1965, a year in which the only minority graduate was the Honorable Harry T. Edwards of the United States Court of Appeals for the District of Columbia Circuit. *See Defend Affirmative Action Party, Affirmative Action Facts, at* http://www.umich.edu/~daap/facts.htm.

Even those who contend diversity is not sufficiently compelling do not dispute its importance. Rather, they seek to uproot the purpose behind the Equal Protection Clause by arguing that the use of race by the University of Michigan's College of Literature, Science, and the Arts (the "undergraduate college") in *Gratz v. Bollinger*, No. 02-516 and Law School (hereinafter together the "University") in *Grutter v. Bollinger*, No. 02-241, is impermissible stereotyping. The Equal Protection Clause, however, does not prohibit the use of race, but rather guarantees that race is not used to arbitrarily burden a group of individuals. Here, the University's use of race is narrowly tailored to meet this interest because it is not a quota and is utilized in a manner consistent with the Fourteenth Amendment and this Court's decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

Finally, the alleged race-neutral alternatives put forth by the Bush Administration are not really "race-neutral" at all. These percentage plans, standing alone, are not effective in maintaining current levels of diversity nationwide. They also rely, to a great extent, on racially segregated high schools to produce racial diversity in colleges. Therefore, these alleged race-neutral alternatives are constitutionally suspect.

This Court should uphold the constitutionality of the University's admissions program, and may do so in a manner completely consistent with *Bakke* and this Court's prior cases.

ARGUMENT

I. PROMOTING DIVERSITY IN HIGHER EDUCATION THROUGH INCREASED MINORITY REPRESENTATION IS A COMPELLING GOVERNMENTAL INTEREST.

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Equal Protection Clause was born of our belief in human equality and guarantees equal treatment and equal opportunity for all Americans regardless of race. At its heart, the Equal Protection Clause recognizes that the diversity of our Nation is one of its greatest strengths.

The Constitution also breathes life into this principle of equality and the importance of diversity in its framework for a democratic system of government. Our country was founded on the principles of democracy and representational government. The founding fathers recognized that every person should be allowed to participate fully in national affairs by voting and having a representative in Congress to protect and advance their interests. This framework still exists today in both Houses of Congress. While certainly there are heated debates and members do not always agree, the legislative process resulting from real debate and dialogue can result in a better, more-reasoned legislative product. It is important for persons with varying viewpoints, experiences and perspectives to weigh in at the national legislative level so that the citizens of this land are fully represented.

Similar principles are found in our two sister branches of government. The Executive Branch, including

the current Administration, recognizes that it is extremely beneficial and important to appoint persons with diverse backgrounds and experiences. *See* Statement of Clay Johnson, President George W. Bush's Presidential Personnel Director, *quoted in* Al Kamen & Ellen Nakashima, *Bush Picks as Diverse as Clinton's*, WASH. POST, Mar. 30, 2001, at A27 ("[I]f everybody comes from the same background, same part of the country, looks the same, acts the same, it's not going to be as strong . . . as if you have diversity of background, however you define that, of geography, ethnicity, gender."). This Court also has benefited and become stronger because of its diversity of race, gender and ethnicity while continuing its tradition of carefully calibrating the various and diverse opinions of individual Justices into a majority opinion, which becomes the law of the land.

Equally as important is diversity of race, gender and ethnicity in this country's higher educational institutions. As set forth more fully in other amici briefs filed with this Court, diversity in the classroom produces tangible benefits both during the educational process and throughout a student's life. Colleges and universities are the gateways to future opportunities. An undergraduate degree removes the barriers to a wealth of career options for the rest of a student's life. We have seen the tremendous impact of providing *meaningful* equal opportunity for minority students at this country's higher education institutions by their increased numbers as lawyers, physicians, professors, and judges.

In addition to the practical benefit of providing increased educational and professional opportunities for minorities, diversity in the context of higher education also creates a more dynamic, improved learning environment.

See Bakke, 438 U.S. at 312 ("The atmosphere of 'speculation, experiment and creation' – so essential to the quality of higher education – is widely believed to be promoted by a diverse student body.") (opinion of Powell, J.) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)). Indeed, in 1998, in bold recognition of the value of diversity in education, the 105th Congress overwhelmingly rejected a proposal which would have banned public colleges and universities that accept Federal funding under the Higher Education Act from using racial or gender preferences in admissions. *See* H.AMDT 612 to H.R. 6, 105th Cong. (1998) (failed by recorded vote of 171-249), *available at* http://thomas.loc.gov.[4]

In *Bakke*, this Court upheld the use of race in higher education admissions. *Bakke*, 438 U.S. at 320. Justice Powell's opinion recognized that "the interest of diversity is compelling in the context of a university's admissions program." *Id.* at 314-315. Justice Powell explained that "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.* at 315 Similarly, Justice O'Connor explained in *Wygant v. Jackson Board of Education*, "a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." 476 U.S. 267, 286 (1986) (O'Connor, concurring in part and concurring in the

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[4] There also have been other votes against legislation that would have eliminated traditional affirmative action programs. *See, e.g.*, H.AMDT 548 to H.R. 6, commonly known as TEA-21, 105th Cong. (1998) (sought to eliminate the Disadvantaged Business Enterprise Program) (failed by recorded vote of 194-225), *available at* http://thomas.loc.gov.

judgment). It is now time for a majority of this Court to reaffirm that diversity is a compelling governmental interest in the context of higher education.

The Bush Administration recognizes the importance of ensuring diversity through increased minority representation in institutions of higher learning. Indeed, the Administration, in its *amicus curiae* brief, even characterizes the goal of educational diversity variously as "important," "laudable" and even "paramount." Brief for the United States as *Amicus Curiae* Supporting Petitioner in *Grutter v. Bollinger* (the "Administration's *Grutter* Br.") at 9, 10, 16. Not only does the Bush Administration recognize the importance of achieving educational diversity, but it also concedes that it is "government's responsibility" to ensure that such diversity is achieved, and that minorities are provided "meaningful access to institutions of higher learning." Administration's *Grutter* Br. at 10.

Despite its explicit recognition that the goal of ensuring diversity in the context of higher education is "laudable," "important" and "paramount" – and further that it is the government's responsibility to see that such diversity is realized – the Bush Administration attempts to skirt the ultimate issue of whether diversity is a compelling governmental interest. However, this attempt is undercut by the Administration's own language.

The position of the Bush Administration and Petitioners that Equal Protection Clause generally prohibits – and, by implication, is violated by – the use of race in admissions decisions is not well founded. *See* Administration's *Grutter* Br. at 13 ("central purpose [of the Equal Protection Clause] is to guarantee 'racial neutrality in governmental decisionmaking'") (citation omitted); Pet.'s Br.

in *Grutter* at 18; Pets.' Br. in *Gratz* at 15.[5] By making arguments such as these, Petitioners seek to turn the Clause against those whom it was intended to help. This type of tactic has been used previously – most notably, by those seeking to uphold a "separate but equal" status for blacks in *Plessy v. Ferguson*, 163 U.S. 537 (1896). It is clearly inconsistent with the history of the Equal Protection Clause and this Court's Equal Protection jurisprudence.

The Equal Protection Clause was never intended to be completely color-blind, but rather to "do away with all governmentally imposed discrimination based on race." *Wygant*, 476 U.S. at 277 (citation omitted). This is an important distinction. In the wake of the Civil War and in the era of Reconstruction, the 39th Congress was presented with an alternative, "color-blind" draft of the Fourteenth Amendment, which provided that "[a]ll national and State laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color." CONG. GLOBE, 39th Cong., 1st Sess. 10 (1865), *available at* http://memory.loc.gov/ammen/amlaw/lwcg.html; ANDREW KULL, THE COLOR-BLIND CONSTITUTION, at 67 (1992).

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[5] The Petitioner in *Grutter* quotes the opening argument of Robert L. Carter, the attorney for petitioners in *Brown v. Board of Education*, 347 U.S. 483 (1954), in support of her argument, echoed by the Bush Administration, that the Fourteenth Amendment requires color-blind governance. Pet.'s Br. in *Grutter* at 18. In so doing, Petitioner demonstrates the danger of ignoring the historical context in which that argument was made. Put simply, "*Brown* and its progeny do not stand for the abstract principle that governmental distinctions based on race are unconstitutional. Rather, those great cases, forged by the gritty particularities of the struggle against white racism, stand for the proposition that the Constitution prohibits any arrangements imposing racial subjugation." Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1336 (1986).

Congress, thus, considered and explicitly rejected the idea that the Equal Protection Clause embodies a requirement that government act in a color-blind fashion. *See* John Hasnas, *Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 FORDHAM L. REV. 423, 444-45 (2002).

Based on the foundational underpinnings of the Equal Protection Clause, this Court's jurisprudence, and the significant short- and long-term benefits of a diverse student body, it is clear that diversity in the context of higher education is a compelling governmental interest.

II. THE UNIVERSITY OF MICHIGAN'S ADMISSIONS POLICIES ARE NARROWLY TAILORED TO MEET THIS INTEREST.

The Congressional Amici believe that Michigan's use of race is constitutional, entirely consistent with this Court's decision in *Bakke*, and narrowly tailored to meet a compelling government interest.

A. It is Undisputed That Race is a Constitutionally-Permitted Factor to Consider in Achieving a Diverse Student Body.

This Court has repeatedly emphasized that it "never has held that race-conscious state decisionmaking is impermissible in all circumstances." *Shaw v. Reno*, 509 U.S. 630, 642 (1993); s*ee also Bakke*, 438 U.S. at 355 ("[T]he position that such factors [as race] must be 'constitutionally an irrelevance,' summed up by the shorthand phrase '[o]ur Constitution is color-blind,' has never been adopted by this Court as the proper meaning of the Equal Protection

Clause.") (Brennan, J., concurring) (citations omitted). In fact, this Court has upheld the use of race in many different contexts. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (government contracting); *Easley v. Cromartie*, 532 U.S. 234 (2001) (legislative redistricting); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) (school desegregation).

In the context of considering the merits of diversity in higher education through increased minority representation, Justice Blackmun explicitly recognized the propriety of considering race when he wrote in *Bakke:* "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot – we dare not – let the Equal Protection Clause perpetuate racial supremacy." *Bakke*, 438 U.S. at 407 (Blackmun, J., concurring opinion). Indeed, it would be paradoxical to claim that "taking race into account by preferential treatment or any other means - may result in unequal treatment, while failing to take race in account may result in maintaining a status quo that offers substantial evidence of unequal treatment and opportunity based on race." Lloyd Peake & John Sealander, *Societal Impact Reports: The Paradox of Legalized Inequality and a Revised Context for Race Based Affirmative Action*, 29 W. ST. U. L. REV. 57, 66 (2001).

In recent cases, this Court reaffirmed that the reason why considerations of race are held up to strict scrutiny is not because race cannot be used as a basis for decisionmaking *per se*, but rather it is to "distinguish legitimate from illegitimate[6] uses of race in governmental

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[6] Illegitimate uses of race have been noted by this Court to include invidious purposes and conceptions such as "racial prejudice or stereotype," "illegitimate notions of racial inferiority," and "simple racial

decisionmaking." *Adarand*, 515 U.S. at 228. In unequivocally rejecting the notion that strict scrutiny is "strict in theory, but fatal in fact," *id.* at 237, this Court confirmed that under certain circumstances, race is a permissible factor to consider. Indeed, this Court recognized that not all race-based decisions are "equally objectionable." *Id.* at 228. As this Court acknowledged in *Adarand*, "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and the government is not disqualified from acting in response to it." *Id.* at 237.

Here, it is undisputed that the University's admissions policies are employed for the legitimate purpose of promoting a diverse student body – not as a means to discriminate against individuals on the basis of racial prejudice or due to notions of racial inferiority. As such, it is precisely the kind of circumstance under which the use of race has been approved by this Court. *See id.* at 228; *Bakke*, 423 U.S. at 314. Thus, the University's use of race in this instance is constitutionally permissible to meet the compelling governmental interest of attaining a diverse student body.

B. The University of Michigan's Use of Race is Constitutional.

The way in which the University uses race in its admissions considerations, both in the Law School and the undergraduate college, is narrowly tailored to further the compelling interest of a diverse student body. Far from using race bluntly, the University's policies are carefully

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politics." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

crafted to allow the active participation of underrepresented minority students, without precluding others solely on the basis of their race. Most significantly, neither of the admissions policies uses race standing alone, or as the single decisive component, in making admissions decisions. Rather, race is simply one factor which is considered along with test scores, grades, and numerous other attributes in an individual applicant's background (*e.g.*, geography, alumni connection, and socioeconomic status). This approach is entirely consistent with this Court's decision in *Bakke* where considering race as a "plus" factor was deemed permissible.[7] *See Bakke*, 438 U.S. at 317 ("race or ethnic background may be deemed a 'plus' in a particular applicant's file"). Thus, in keeping with the instruction of this Court in *Bakke*, the University's policies clearly consider a variety of "pertinent elements of diversity" – which *Bakke* said includes race – relating to each applicant. *Id.*

Moreover, contrary to the Bush Administration's assertions, the University's policies are not "automatic, inflexible, and overwhelming[ly] relian[t] on race." Brief for the United States as *Amicus Curiae* Supporting Petitioner in *Gratz v. Bollinger* (the "Administration's *Gratz* Br.") at 26.

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[7] It is also worth noting that the University's use of race is entirely consistent with the views of several prominent members of the Bush Administration. *See* Statement of Condoleezza Rice, National Security Advisor to President Bush and Former Provost at Stanford University, *quoted in* Mike Allen, *Rice: Race Can Be Factor in College Admissions*, WASH. POST, Jan. 18, 2003, at A1 ("[I]t is appropriate to use race as one factor among others in achieving a diverse student body."); *see also* Statement of Colin Powell, Secretary of State under President Bush, *on* CNN-Late Edition, Jan. 19, 2003, *at* http://www.cnn.com/2003/ALLPOLITICS/01/19/powell.race ("I believe race should be a factor among many other factors in determining the makeup of a student body of a university.").

In fact – and it cannot be emphasized enough – under both of the University's admissions policies, *every application* is reviewed individually and is weighed fairly and competitively against every other application submitted. There is no "dual" track or evaluation system based upon the applicant's race. *See Bakke*, 438 U.S. at 315 (holding invalid an admissions program using a two-track system based solely on race). Under the University's admissions policies, because race is used as only one factor among many, white applicants are in no way foreclosed from consideration or competition based on their race. Thus, comporting with Justice Powell's prescription in *Bakke*, the University's use of race does not "insulate the individual from comparison with all other candidates for the available seats." *Id.* at 317.

C. The University of Michigan's Admissions Policy is Not a Quota.

Despite the efforts of opponents of the University's admissions policies, *see, e.g.* Administration's *Grutter* Br. at 11-12, 28-30, merely repeating that the policies amount to a "quota" does not make it so. Rather, the record is clear that the University of Michigan Law School seeks to achieve a "critical mass" of students from underrepresented minority groups. As University officials testified before the district court, a "critical mass" is a sufficient number of underrepresented minority students to ensure that they can "contribute to classroom dialogue and do not feel isolated." *Grutter v. Bollinger*, 288 F.3d 732, 747 (6th Cir. 2002). Preventing racial tokenism is necessary to allow for the classroom interactions that make diversity an educational benefit to the entire student body. *See Bakke*, 438 U.S. at 316-17. The use of such an educational concept is completely consistent with *Bakke's* recognition that the

benefits of diversity "cannot be provided without some attention to the numbers." *Id.* at 323.

Also, unlike a quota, the concept of "critical mass" is flexible, having no set numbers, or even target percentages of how many underrepresented minority students to admit. Indeed, it is so flexible that it was deemed "amorphous" by the district court in *Grutter*. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 850-51 (E.D. Mich. 2001). Ironically, the University's witnesses' failure to "clearly define critical mass in terms of numbers or percentages" was criticized by the district court and cited as a reason that the University's policy was *not* narrowly tailored. *Id.* at 851.

But the principal reason that the University's admissions policy is not a quota is because, as discussed above, the University "treats each applicant as an individual in the admissions process." *Bakke*, at 318; *see also Croson*, 488 U.S. at 508 (considerations on "a case-by-case basis. . . are less problematic from an equal protection standpoint because they treat all candidates individually. . . ."). Upon even a cursory review of either of the admissions policies, it is clear that race is but one factor among many that are combined to reveal the entire applicant. Moreover, this individualized attention is far closer to the ideals stated in *Bakke* than a rigid bright-line rule that relies upon nothing but one aspect of an individual, such as their class rank. *See Bakke* at 318.

D. Programs Based on Socioeconomic Status Or Other Factors Cannot Replace Race-Conscious Admissions Policies to Achieve a Diverse Student Body.

Both Petitioners and the Bush Administration criticize the University's admissions policies as not narrowly tailored because, according to them, race-neutral policies can effectively achieve a diverse student body. The Bush Administration suggests several "race-neutral factors" to consider as replacements for race in college admissions. *See* Administration's *Grutter* Br. at 24-25. However, programs based solely on these other factors, such as a purely socioeconomic affirmative action policy, would be insufficient to achieve a diverse student body.

For instance, relying solely on socioeconomic status or similar factors will not result in underrepresented minorities being represented in significant numbers at colleges and universities. Although minorities are disproportionately poor, the greatest *number* of people in poverty are white. For example, in 2001, 22.7% of African Americans were below the poverty level, while only 9.9% of whites were below the poverty level. However, the number of African Americans living below the poverty level was only 8.1 million as compared to 22.7 million whites.[8] Accordingly, based on numbers alone, a purely socioeconomic system would predominantly assist white students and would likely yield an insufficiently small number of minorities to achieve a racially-diverse student body.

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[8] *See* A Joint Report Between the Bureau of Labor Statistics and the Bureau of the Census, The Annual Demographic Survey, March Supplement, *at* http://ferret.bls.census.gov/macro/032002/pov/new01_001.htm.

Moreover, use of factors other than race – which the University already considers as well – cannot completely replace race as a factor. These other considerations standing alone do not take into account the realities of race in America. As one scholar explained, "[i]n a country saturated with race-conscious beliefs, feelings, and practices, people will have different experiences on account of the ways they are differently racially classified, and these experiences will influence their other beliefs and attitudes." Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. Rev. 1195, 1233 (2002). Contrary to the Petitioners' argument that any assertion that an individual's race influences his or her experiences is a stereotype or within-race homogeneity (*i.e.*, that all people of one race have the same views), this view fully recognizes "both between-race and within-race heterogeneity" (*i.e.*, that both people of different races, and people of the same race, can have different worldviews due to the impact of their own racial classification on their life). *Id.*

In fact, racial diversity is an important component of a diverse student body. *See Bakke*, 438 U.S. at 315 ("The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single important element.") (opinion of Powell, J.) Race not only influences an individual's view of the world and factors into his own unique experiences and viewpoints, *see, e.g.*, Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 950 (1997) (noting that "one can be economically indistinguishable from a white person and still be culturally and experientially distinct as an African American"), but also influences the entire student body by fostering an ability to understand the

perspectives of others. *See* Patricia Gurin, *Expert Report of Patricia Gurin, Gratz v. Bollinger, Grutter v. Bollinger*, 5 MICH. J. RACE & L. 363, 399-401 (1999). Accordingly, race and considerations of these other "race-neutral" factors cannot be viewed as interchangeable.

Precluding the use of race completely in admissions would prevent the University from addressing the unique reality that racial diversity is an essential component of a diverse student body. Therefore, the Congressional Amici believe that the University's use of race is constitutional and entirely consistent with this Court's decision in *Bakke*.

III. THE ALLEGEDLY RACE-NEUTRAL ALTERNATIVES PROPOSED BY THE BUSH ADMINISTRATION ARE CONSTITUTIONALLY SUSPECT.

Both the Bush Administration and the State of Florida tout percentage-based programs like those recently implemented in California, Florida, and Texas as a viable, race-neutral alternative to achieve racial diversity. These percentage programs, adopted first by Texas (under then-Governor George W. Bush), and later by Florida (under Governor Jeb Bush) and California, guarantee the top 4% (California), 10% (Texas) and 20% (Florida) of each graduating class throughout the state's high school system admission into the state's colleges and universities. *See, e.g.*, TEXAS EDUC. CODE ANN. § 51.803 (West 2001); FLA. ADMIN. CODE ANN. R. 6C-6.002(5) (2002).[9]

[9] For a detailed discussion of each state's percentage plans and highlights of the differences between them, *see generally*, Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences*, The Civil Rights

The Bush Administration and the State of Florida contend that these percentage programs have been successful in maintaining, even surpassing, the levels of minority enrollment at California, Florida, and Texas state schools achieved by traditional affirmative action programs like the University's without the explicit use of racial classifications. However, as set forth below, these plans – which operate much like quotas – are not racial neutral at all, and, in fact, achieve racial diversity at the college level by impermissibly relying upon racial segregation at the high school level. This racially discriminatory scheme renders these programs constitutionally questionable under the Equal Protection Clause of the Fourteenth Amendment.

Furthermore, even if these percentage programs were constitutional, the uncontroverted evidence shows that they have not delivered results as promised in the states where they have been implemented, and, standing alone, will never work to achieve racial diversity in the majority of states. Therefore, contrary to the assertions of the Bush Administration and the State of Florida, these percentage programs are not viable alternatives to the University's admissions policies.

A. Percentage Programs Impermissibly Rely on Segregated High Schools to Produce Racial Diversity In Colleges.

The percentage programs at work in California, Florida, and Texas all share the common purpose of achieving racial diversity at the university level without

Project, Harvard University, February 2003 [hereinafter *Percent Plans in College Admissions*].

explicitly considering race in the admissions process. For example, Governor Jeb Bush expressly announced: "Through the Talented 20 program, we will enhance the diversity of our state university system by pulling in high-performing minority students who might not otherwise be eligible for admissions." *See* Governor Jeb Bush's "Equity In Education Plan", *at* http://www.myflorida.com/myflorida/government/governorinitiatives/one_florida/documents/educationplan.doc. Similarly, the legislative history behind Texas' program shows that "[t]he sponsoring legislators hoped that because it targeted high schools highly segregated by race and class, the Ten Percent Plan would broaden the student applicant pool." *See* Danielle Holley & Delia Spencer, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245, 253 (1999).

To the extent that these stated goals of racial diversity have purportedly been achieved at California, Florida, and Texas universities, such achievement is due to the *de facto* segregation of California, Florida, and Texas high schools.[10] It is a sad fact in this country's history that this Court's mandate to state actors in *Green v. County School Board* to "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch" was to be so short-lived. 391 U.S. 430, 437-38 (1968). Not even two generations after this mandate, the majority of this Nation's high schools remain heavily racially segregated.[11] It is this *de facto* segregation

[10] *See Percent Plans in College Admissions* at viii ("These policies are not race-conscious at the level of the individual student, but are built on the high levels of racial segregation in the k-12 system. . . .").

[11] *See* Erika Frankenberg, Chungmei Lee, and Gary Orfield, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, The Civil Rights Project, Harvard University, January 2003, at

that allows percentage programs to promise racial diversity at the college level simply by skimming a certain percentage of students from the top of every high school in the state. In fact, in at least one of those states, officials literally consulted mathematicians to develop the numbers to achieve that goal. *See* Jeffrey Selingo, *What States Aren't Saying About the 'X-Percent Solution,'* CHRON. OF HIGHER EDUC., June 2, 2000, at A31 [hereinafter "Jeffrey Selingo"] ("Aides to Gov. Jeb Bush of Florida admit they settled on a 20-percent standard after computer models of 10-percent and 15-percent policies failed to produce enough black and Hispanic students.").

This interdependency between continued racial segregation and educational opportunities turns this Court's ruling less than fifty years ago in *Brown v. Board of Education*, 347 U.S. 483 (1954), on its head by encouraging the practice that *Brown* declared unconstitutional. As this Court has observed, "[t]he constant theme and thrust of every holding from *Brown I* to date is that state-enforced separation of the races in public schools is discrimination that violates the Equal Protection Clause." *Swann*, 402 U.S. at 22. Even when state actors found creative ways to achieve school segregation by facially-neutral means, this Court recognized that discrimination – although indirect – for what it was. *See Keyes v. School District No. 1*, 413 U.S. 189, 201 (1973).

The percentage plans in California, Florida, and Texas perpetuate segregation in much the same way as the school transfer policies encountered by this Court post-*Brown*. Rather than "eliminat[ing] . . . all vestiges of state-

4 ("The desegregation of black students. . . has now receded to levels not seen in three decades.").

imposed segregation," *Swann*, 402 U.S. at 15, the percentage plans encourage minority students to remain in inadequate majority-black and/or Hispanic schools, and punish those who transfer to integrated and majority-white schools in search of a better education. As observed by DeWayne Wickham in *Bush's Timing Symbolizes Misunderstanding of King's Message*, the vast majority of all-black or Hispanic schools are severely "under funded, understaffed and underperforming" yet, "[t]o increase their chances of getting into college, black students in Texas, Florida and California must attend a mostly-black school, where they have a better chance at guaranteed college admission – but where they are less likely to get the education they need to succeed in college." GANNETT NEWS SERV., Jan. 16, 2003. One talented minority high school student at a magnet school eloquently expressed his frustrations with the irony of the percentage plans, saying: "I'm punished no matter what I do. I come here, I may not make the 20 percent, but I get the medical classes and internships that I need for college. Or I go back to my home school, make the 20 percent, but I don't get the science classes. It doesn't make sense." Jeffrey Selingo, *supra*, at A31. Under the University's policy, school administrators would have been able to exercise their discretion to admit this student based on his specific circumstances. Under the percentage programs in California, Florida, or Texas, the talented minority student from a segregated school district often is forced to choose between segregation and better educational opportunities.

Because the percentage plans touted by the Bush Administration and the State of Florida are dependent upon, and, indeed, perpetuate the *de facto* segregation of this Nation's public schools, these plans are constitutionally suspect under the Equal Protection Clause of the Fourteenth Amendment. As such, these plans do not – as the Bush

Administration and the State of Florida contend – offer a viable alternative to the affirmative action policies used by the University.

B. Cookie-Cutter Percentage Plans Improperly Regard Students as Numbers, Rather Than Unique Individuals.

An unwavering theme among this Court's most recent decisions pertaining to issues of race-based policies is that under the Equal Protection Clause, "personal rights" are paramount. *See, e.g., Croson*, 488 U.S. at 493; *Adarand*, 515 U.S. at 230. In *Croson*, this Court, recognized that "rigid rules" erecting a "sole criterion" for evaluation is a disrespect to an individual's personal rights. *Id.*

In light of this recognition, it is counterintuitive that the Bush Administration rejects the University's admissions policy – which examines potential students on an individual basis – in favor of replacing traditional affirmative actions policies with percentage plans that, in fact, reduce a school admissions decision to one "sole criterion," *i.e.*, class rank, thereby stripping a student of their "personal right" to be treated as an individual. *See, e.g., Bakke*, 438 U.S. at 314 ("Although a university must have wide discretion in making sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded.") (Powell, J.).

In direct contradiction to the teachings of this Court, the percentage plans deprive school administrators of "the opportunity to look at [the] whole person and the person's talents, abilities, experience, interests," and reduces the admissions process to "simply a mechanical exercise where a

spot is guaranteed based on the high school rank."[12] Sadly, what percentage plans do is make the admissions process inflexible and automatic. *Id.*

In stark contrast to the cookie-cutter approach of the percentage plans, the University's policies, as discussed previously, allow its administration to assess the students as unique people and not simply as numbers.

C. Percentage Plans Are Not Effective on a Nationwide Scale.

1. Percentage Plans Are An Unworkable Approach to Increasing Minority Representation in Most States.

Aside from relying upon a segregated secondary school system in order for minorities to be "represented in significant numbers," Administration's *Grutter* Br. at 25, the percentage plans also necessarily assume the presence of a large number of minorities within the state. However, such percentage plans will not function on a nationwide scale because of the lack of a significant minority population in the majority of the states.

This failure to take account of the varying minority populations among the different states, and even within different communities in the same state, fails to accomplish

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[12] Statement of Marvin Krislov, Vice President and General Counsel of the University of Michigan, on ABC News, *Schools Differ On Affirmative Action*, Jan. 16, 2003, http://abcnews.go.com/sections/wnt/DailyNews/affirmativeaction_options030116.html.

the goal of ensuring equal opportunities for minority applicants at higher education institutions. As such, these plans are not racially neutral and will unfairly discriminate against minority applicants in many states. This Court has consistently evaluated affirmative action programs with an eye toward their flexibility and taking into account variances in the applicant pool. *See, e.g., United States v. Paradise*, 480 U.S. 149, 171 (1987); *Fullilove v. Klutznick*, 448 U.S. 448, 487 (1980) (recognizing that the scope of the problem of discrimination in the construction industry could vary from market area to market area).

Census data confirm the unfortunate conclusion that percentage plans will not increase minority participation in the majority of states. Over 80% of African Americans live in only approximately one-third of the states.[13] And over *half* of the 50 states have populations that are at least 80% white and non-Hispanic.[14] As a result of this demographic reality, a broad stroke application of percentage plans would likely result in a scant number of minorities being admitted in the majority of the Nation's state university systems. Therefore, to the extent that its proponents claim that percentage plans can achieve racial diversity in schools at the same level enjoyed under the University's plan, the pro-

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[13] Seventeen states (Alabama, California, Florida, Georgia, Illinois, Louisiana, Maryland, Michigan, Mississippi, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Texas and Virginia) account for more than 80% of the nation's African Americans. *See* Press Release, U.S. CENSUS BUREAU, *Majority of African Americans Live in 10 States*, Aug. 13, 2001, *at* http://www.census.gov/Press-Release/www/2001/cb01cn176.html.

[14] *See* U.S. CENSUS BUREAU, Census 2000, *Population 18 Years and Over by Race and Ethnicity, at* http://www.eeoc.gov/stats/census/majorgroups/us/ us_state_rank.pdf.

ponents fail to account for the true national population picture.

Strikingly, even in states where there is a high proportion of minorities, such as in Florida, Texas, and California where these plans have been implemented, the percentage plans have not delivered results as promised. In fact, in a recent study regarding the impact of a percentage plan on minority university student populations, researchers found that at least in Texas' flagship universities,[15] "[t]he ban on affirmative action did have a chilling effect on enrollment of minority students admitted to the public flagships." *See* Marta Tienda, et al., *Closing The Gap?: Admissions & Enrollment at the Texas Public Flagships Before and After Affirmative Action,* Abstract (January 21, 2003), *available at* http://www.texastop10.princeton.edu/publications/tienda.012103.pdf. The study forcefully concluded that "*by itself, the top ten percent policy is NOT an alternative to race sensitive admissions.*" *Id.* (emphasis in original).

Likewise, in California, in 1995, prior to the ban on the use of race in admissions in the University of California ("UC") system, the student population was 16% Hispanic, 4% African American, and 1% Native American, with the remainder of the population equally divided between whites and Asian Americans. However, by 2001-02, only five years later, the UC system's population was 12-14% Hispanic, 3% African American and less than 1% Native American.[16] At

[15] Texas' plan differs in one important respect from the Florida or California plans in that it guarantees admission to the university of the student's choice, including its flagship schools, The University of Texas-Austin and Texas A&M.

[16] *See,* U.S. Commission for Civil Rights, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education*, Chapter 2, November 2002, *at* http://www.usccr.gov/pubs/percent2/summ.htm

California's most selective universities, UC-Berkeley and UCLA, minority students, once representing as much as 30% of the population, have dwindled to only 16-17%. *Id.*

In Florida, after its first year, the percentage plan had maintained minority enrollment across the state university system as a whole. However, at the state's flagship school, the University of Florida, there was a 40% drop in African American enrollment and a 7.5% drop in Hispanic enrollment.[17] Indeed, almost 73% of the Talented 20 program students applying to the University of Florida were white. Edgar K. Lee & Patricia Marin, *Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida*, The Civil Rights Project, Harvard University, February 2003, at 29.

As the studies clearly indicate, in just the few years that percentage plans have been in effect in California, Texas, and Florida, enrollment numbers have sent a clear sign: these plans simply are not getting the job done in

[hereinafter USCCR, *Beyond Percentage Plans*]; *see also Percent Plans in College Admissions* at 48 (reporting that between 1995 and 2001, the percentages of Hispanic and African-American students actually enrolling at UC-Berkeley dropped from 16.9% and 6.7%, to 10.8% and 3.9%, respectively.)

[17] *See* Report of New FTIC Student Enrollment, Division of Colleges and Universities, prepared by Office of Planning, Budgeting and Policy Analysis, *at* www.oneflorida.org/myflorida/government/governorinitiatives/one_florida/documents/minority_enrollment.xls. The "[e]nrollment of black freshmen dropped from a high of 829 students in 2000 to 461 students in 2001." *See* Vickie Chachere, *Bush's One Florida Praised*, THE TALLAHASEE DEMOCRAT, June 18, 2002, *available at* http://www.tallahassee.com/mld/democrat/news/local/3490611.htm.

assuring minority representation on the states' college campuses.

2. Percentage Plans Ignore Realities and Rely on the Very Same Problematic Criteria that Traditionally Have Stifled Minority Students.

There are also several particular facets of the percentage plans – standing alone – which render them inaccessible for many minority students who would benefit under the University's admissions policies. First, the percentage plans are based solely on high school class rank. This systematically excludes older minority students who tend to apply later, such as following several years of employment or service in the armed forces.[18]

Second, there is no national, state-wide, or even school district-wide method for calculating class rank. Each school varies in the courses used and the credits given for those courses. *See* National Association for College Admission Counseling, Issue Paper: *Affirmative Action in College Admission*, Summer 2001. Therefore, relying on class rank alone may present problems, particularly for minority students in underfunded and substandard schools that do not offer the more-challenging college-prepatory classes.

Moreover, by relying solely on class rank, the percentage plans fail to take into account the disparity among

[18] *See, e.g.*, USCCR, *Beyond Percentage Plans*, "Executive Summary," *at* http://www.usccr.gov/pubs/percent2/summ.htm ("Minority students are less likely to enroll in college right after high school. . . .").

high schools. "Top" students from less qualified schools, which are more often in minority areas, may not be as well-prepared for a college curriculum as some of their peers at higher quality high schools. A plan that relies on class rank alone, effectively sets up these students for failure at the university level. Conversely, minority students who attend above average high schools may not rank in the designated percentage of their class. A percentage plan that offers admission and scholarships based on rank alone may thereby preclude these students from thriving on a university campus. In sum, the percentage plans neither make adjustments nor account for any variation among high schools, an oversight which overwhelmingly burdens minority students.[19]

Third, the percentage plans do not offer a solution to graduate and professional school admissions. *See Percent Plans in College Admissions*, at 10. As currently implemented in Texas, California, and Florida, graduate and professional schools are excluded from the percentage plans. However, at the same time, as a result of case law or legislation, these same jurisdictions have prohibited or limited traditional affirmative action plans. As a consequence, the number of minority students has substantially declined at most of the professional schools in those states. For example, in Texas, the percentage of African American students at the University of Texas Law School dropped from 7.4% in 1995 to approximately 2% in 1998 and 1999, rising only recently to 4% in 2002. *See*

[19] The Congressional Amici firmly believe that equal access to higher education must first begin with correcting the inequities that exist in K-12 education. Until there is true parity on the primary and secondary level, access to post-secondary education cannot be premised on the illusion of such.

Minority Enrollment for Entering First Year Classes at the Univ. of Texas School of Law, 1983-2002, *available at* http://www.law.utexas.edu/hopwood/minority.html. Accordingly, states with percentage plans alone offer only a first step to minority students toward the goal of equal access to education.

Despite their appeal to critics of race-based affirmative action policies, the percentage plans touted by the Bush Administration fail to fully address the complex issues facing educational professionals in assembling student bodies, and do not provide a viable alternative to policies, such as those employed by the University. [20]

* * *

It has been a little over forty years since President Kennedy issued Executive Order No. 10,925 and the term "affirmative action" entered our national consciousness. *See* Exec. Order No. 10,925, 3 C.F.R. 448 (1961). We have learned much over the last four decades, but we still have farther to go. At this juncture in our learning process toward the goal of achieving diversity in higher education, race is still the best method of ensuring that there is a racially-diverse student body. *See, e.g.*, Statement of Richard Kahlenberg, Senior Fellow at the Century Foundation, *quoted in* Michael A. Fletcher, *Race-Neutral Plans Have Limits In Aiding Diversity, Experts Say*, WASH. POST, Jan. 17, 2003, at A12 ("There is no better way to guarantee a certain percentage of the student body is minority than by taking race into account.").

We should not shy away from using race as one of the factors to be considered in an admissions decision. As Justice O'Connor acknowledged: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand*, 515 U.S. at 237. *See also Bakke*, 438 U.S. at 327 ("claims that law must be 'color-blind' or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as a description of reality") (Brennan, J., concurring in judgment in part and dissenting in part).

We must, however, guarantee that this use of race does not violate the Constitution. Unfortunately, we do not live in a color-blind society. While efforts to set forth alleged "race-neutral" policies are laudatory in the abstract, as demonstrated above, they are hardly "race-neutral" when applied. Utilizing race as the University does is entirely consistent with the Fourteenth Amendment, particularly given the rigors of this Court's strict scrutiny analysis. *See Adarand*, 515 U.S. at 237 ("When race-based action is

---

[20] Indeed, the ramifications of a ruling declaring the admissions policies used by the University unconstitutional would be far-reaching in its potential affect on the admissions policies at private universities, which are also exempt from the percentage plans. It would also effect financial aid decisions because many universities utilize the principles enunciated in *Bakke* as a basis for extending financial aid. There have already been ramifications in Texas because of the prohibition on using race in financial aid decisions as well as in admissions. At Texas A&M, "[t]he lure of better financial packages from other schools is one of the primary reasons why only 53 percent of Hispanic applicants and 47 percent of black applicants who were admitted to A&M chose to enroll. By comparison, 64 percent of white applicants who were admitted decided to come to the University." Rolando Garcia, *Officials Say A&M Needs Racial Preferencing*, THE BATTALION ONLINE – TEXAS A&M'S NEWS SOURCE, Jan. 28, 2003 *at* http://www.thebatt.com/vnews/display.

necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases.").

One of the hallmarks of upholding affirmative action plans is continuing to permit higher-education administrators to have the flexibility they need in order to further this Nation's compelling interest in ensuring diversity. It cannot be disputed that educators must be allowed discretion in making admissions decisions. The task for this Court is to ensure that this discretion is exercised in a constitutional manner as the University has done here.

CONCLUSION

For all of the reasons set forth herein, the University's admissions programs should be found to further a compelling government interest, to be narrowly tailored to meet that interest, and to be constitutional under the Equal Protection Clause of the Fourteenth Amendment.

Respectfully submitted,

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APPENDIX

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Nos. 02-241 & 02-516

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BARBARA GRUTTER,
Petitioner,

v.

LEE BOLLINGER, *et al.*,
Respondents.

JENNIFER GRATZ, *et al.*,
Petitioners,

v.

LEE BOLLINGER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the SixthCircuit

BRIEF OF *AMICUS CURIAE* STATE OF NEW JERSEY IN SUPPORT OF RESPONDENTS

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TABLE OF AUTHORITIES

CASES CITED

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995) 10, 11, 19

Alden v. Maine, 527 U.S. 706 (1999) 24

Alexander v. Sandoval, 532 U.S. 275 (2001) 14

Bd. of Curators, Univ. of Mo. v. Horowitz,
435 U.S. 78 (1978) 18

Bd. of Educ. of the Borough of Englewood Cliffs v.
Bd. of Educ. of the City of Englewood,
788 A.2d 729 (N.J. 2002) 22

Booker v. Bd. of Ed.,
212 A.2d 1 (N.J. 1965) 1

Brown v. Board of Education, 347 U.S. 483 (1954) 6

Bush v. Vera, 517 U.S. 952 (1996) 23

City of Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) 10

Davis v. Halpern, 768 F.Supp. 968 (E.D.N.Y. 1991) 12

Dickerson v. United States, 530 U.S. 428 (2000) 6

Englewood Cliffs Bd. of Educ. v.
Englewood Bd. of Educ., 788 A.2d 729 (N.J. 2002) . 22

Gratz v. Bollinger, 122 F.Supp. 2d 811
(E.D.Mich. 2000), cert. granted,
123 S.Ct. 617 (2002) 3, 16, 19, 25

Griswold v. Connecticut, 381 U.S. 479 (1965) 17

Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002),
cert. granted, 123 S.Ct. 617 (2002) 3, 7, 19, 25

Hampton v. Jefferson County Board of Education,
102 F.Supp.2d 358 (W.D. Ky. 2000) 12

Hopwood v. State of Texas, 78 F.3d 932
(5th Cir. 1996), cert. den. 518
U.S. 1033 (1996) 12

Jenkins v. Twp. of Morris School District,
279 A.2d 619 (N.J. 1971) 22, 23

Johnson v. Board of Regents
263 F.3d 1234 (11th Cir. 2001) 12

Keyishian v. Bd. of Regents, 385 U.S. 589 (1967) 17

Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) 24

Marks v. United States, 430 U.S. 188 (1977) 7

McDonald v. Hogness, 598 P.2d 707 (Wash.
1979) cert. den. 445 1979) U.S. 962 (1980) 12

Planned Parenthood v. Casey,
505 U.S. 833 (1992) 5, 8

Regents of the Univ. of Michigan v. Ewing,
474 U.S. 214 (1985) 18

San Antonio Dist. v. Rodriguez,
411 U.S. 1 (1973) 24

Seminole Tribe of Florida v. Florida,
517 U.S. 44 (1996) 24

Smith v. University of Washington, Law School,
233 F.3d 1188 (9th Cir. 2000),
cert. den. 532 U.S. 1050 (2001) 8

Swann v. Charlotte-Mecklenburg Bd. of Ed.,
402 U.S. 1(1971) 18

Sweatt v. Painter, 339 U.S. 629 (1950) 16

Sweezy v. New Hampshire, 354 U.S. 234 (1957) 17

Tuttle v. Arlington County School Board,
195 F. 3d 698 (4th Cir. 1999),
cert. dism. 529 U.S. 1050 (2000) 12

U.S. v. Lopez,
514 U.S. 549 (1995) 24

University of California v. Bakke,
438 U.S. 265 (1978) ..... passim

Wygant v.Jackson Bd. of Educ.,
476 U.S. 267 (1986) 10

CONSTITUTIONAL PROVISIONS CITED

U.S. Const., Amendment I 17, 18

U.S. Const., Amendment XIV ..... passim

STATUTES CITED

Title VI of the Civil Rights Act of 1964,
42 U.S.C. §2000d et seq. 14

EXECUTIVE ORDER CITED

New Jersey Admin. Code,
Executive Order No. 14 (1994) 1

OTHER AUTHORITIES

Michelle Adams, Isn't It Ironic?
The Central Paradox at the Heart of 'Percentage Plans', 62 Ohio State Law Journal 1729 (2001) 22

Dr. Alexander W. Astin, University and Multiculturalism on the Campus: How are Students Affected, 25 Change 44, 45 (Mar/Apr. 1993) 15

Association of American Universities,
Diversity Statement: On the Importance of Diversity in University Admissions (Sept. 14, 1997) at http://www.aau.edu/issues/diversity 15

William Bowen, Admissions and the Relevance of Race, Princeton Alumni Weekly (September 26, 1977) 14

Eugene Garcia, The Elimination of Affirmative Action: California's Degraded Educational System, 12 La Raza Law Journal 373 (Fall 2001) ... 21

Darlene Goring, Affirmative Action and the First Amendment: The Attainment of a Diverse Student Body Is A Permissible Exercise of Institutional Autonomy, 47 U. Kan. L. Rev. 591(1999) 16

John F. Kain and Daniel O'Brien,
Hopwood and the Top l0 Percent Law: How They Have Affected the College Enrollment Decisions of Texas High School Graduates, (Nov. 2001) at http://www.utdallas.edu/research/greenctr 21

Akhil Amar Reed and Neal Katyal, Bakke's Fate, 43 U.C.L.A. L. Rev. 1745 (1996) 6, 11

Richard Stockton College, Mission Statement, at http://www2.stockton.edu/stockton.html 2

Rutgers School of Law-Newark, Public Service, at www.newark.rutgers.edu/law/main.html..... ... 16

Rutgers, The State University of New Jersey,
Fact Book 2002-2003, Our Vision, statement at http://oirap.rutgers.edu/instchar/factbook02. html 1

Rutgers, The State University of New Jersey,
Office of the Vice President for Student Affairs,
Committee to Advance Our Common Purposes at http://studentaffairs.rutgers.edu/ctaocp.html 9

Dr. James E. Sulton, Jr., Mid-Year Report to the Commission on Higher Education, (December 17, 1999) at http://www.state.nj.us/highereducation/ed1299.html 13

Marta Tiendaetal, Closing the Gap: Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action,(Jan. 2003) at http://www.texastop10.princeton.edu/publications/tienda012103.pdf. 21

The College of New Jersey, Vision Statement, at http://www.tcnj.edu/about/history/vision.html. ... 1

U.S. Census Bureau, Census 2000, Redistricting Data ... 17

U.S. Commission on Civil Rights, Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education, (Nov. 2002) at http://www.usccr.gov/pubs/percent2.htm 20

U.S. Comm'n on Civil Rights, Toward an Understanding of Percentage Plans in Higher Education: Are they Effective Substitutes for Affirmative Action? (April 2000) at http//www.usecr.gov/percent/stmnt.htm. 21, 22

Victor V. Wright, Note, Hopwood v. Texas: The Fifth Circuit Engages in Suspect Compelling Interest Analysis in Striking Down an Affirmative Action Admissions Program, 34 Houston Law Review 871 (1997) 9

INTEREST OF THE AMICUS

Over 37 years ago, in a decision grounded in provisions of the New Jersey Constitution, the Supreme Court of New Jersey squarely held in Booker v. Bd. of Educ., 212 A.2d 1 (N.J. 1965), that ensuring diversity of students in public educational institutions is a State interest of the highest order. The New Jersey Supreme Court found that "leading educators stress the democratic and educational advantages of heterogeneous student populations and point to the disadvantages of homogeneous student populations," and stated that students "must learn to respect and live with one another in multi-racial and multi-cultural communities and the earlier they do so the better" so that "firm foundations may be laid for good citizenship and broad participation in the mainstream of affairs." Id., 212 A.2d at 6. While Booker involved elementary schools, the critical State interest discussed therein of ensuring the provision of public education in New Jersey in a "multi-racial and multi-cultural setting" has been recognized by the State to extend to institutions of higher education. See New Jersey Admin. Code, Executive Order No. 14 (1994) (noting the State interest in promoting student diversity in State colleges and universities in a restructuring of the State's higher education system).

Admissions practices of New Jersey institutions of higher education -- including Rutgers University (by far the largest State university, with over 50,000 students), the University of Medicine and Dentistry, The College of New Jersey and Richard Stockton College -- vary depending on each school's educational mission. What is common to these State schools, however, is the recognition of the educational value of providing education in a diverse environment. See Rutgers, The State University of New Jersey, Fact Book 2002-2003, Our Vision statement, available at http://oirap.rutgers.edu/instchar/factbook02.html., The College of New Jersey, Vision Statement, at

http//www.tcnj.edu/about/history/vision.html., and Richard Stockton College, Mission Statement, at http://www2.stockton.edu/stockton.html. (discussing the value to these schools resulting from student diversity). To ensure the educational benefits which result from a "multi-racial and multi-cultural" student body, race is one factor--among many other factors--considered as part of the admissions processes.

Thus, for example, Rutgers University School of Law-Newark, apart from grades and LSAT scores, considers race or ethnicity as an admissions factor, as part of a flexible, individualized review which also utilizes a myriad of non-racial factors such as extraordinary family and socio-economic circumstances, educational factors other than grades, extracurricular activities, community and volunteer services, employment history, and special achievements, for the purpose of selecting a diverse and vibrant student body. For its various undergraduate colleges, Rutgers--apart from high school grades, class rank, strength of the high school's academic program, SAT scores and the student's admission essay--considers race and ethnicity of applicants as part of a flexible review which also considers extracurricular activities, special talents, geographic location of applicants, participation in specialized academic programs, and achievement in the face of educational and economic disadvantage to foster a diverse student population. Similarly, The College of New Jersey and Richard Stockton College -- apart from SAT scores, high school grades and application essays--look at factors to foster a heterogeneous student body including race and ethnicity, but also including community activities, special talents and other factors apart from race by which students bring unique cultural perspectives. At the University of Medicine and Dentistry -- apart from test scores and college grades—race is a consideration in admissions among multiple other factors such as the applicant's interview, work history, community service and overall life experiences, for the goal of admitting a diverse student body.

The utilization of race as a consideration, among a myriad of other factors, in the admissions systems of these New Jersey universities fully comports with Justice Powell's controlling opinion in University of California v. Bakke, 438 U.S. 265 (1978): no racial quotas whatsoever are utilized and there are no race-based separate admissions tracks. Nor is any specific weight or number given to applicants based on race or ethnicity.

New Jersey, thus, has a critical interest in preventing the outcome sought by Petitioners in both Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002), cert. granted, 123 S.Ct. 617 (2002), and Gratz v. Bollinger, 122 F.Supp. 2d 811 (E.D. Mich. 2000), cert. granted, 123 S.Ct. 617 (2002): to overturn Justice Powell's controlling opinion in Bakke, which permits state universities to consider race in their admissions processes to promote the significant educational benefits which result from a heterogeneous student population. In the 24 years since Bakke, New Jersey universities, in their admissions systems, outreach efforts and otherwise, have carefully complied with the contours of Bakke, including its limitations on the use of race in admissions. Profound benefits resulting from student diversity--achieved without use of anything akin to racial quotas--have flowed to students of all races and ethnicities who have attended these New Jersey universities. Indeed, the State of New Jersey, with a population richly abundant in ethnic, racial and cultural diversity, has benefitted from these policies as well, as graduates of these schools have been well-prepared to make positive contributions in New Jersey's increasingly heterogeneous environment. The departure from the principles of Bakke which Petitioners seek would have a major, disruptive impact on New Jersey institutions of higher education, to the detriment of New Jersey students, the institutions themselves, and the State as a whole. It will promote a narrow-mindedness in students – a fear of difference – that is borne not necessarily of malice, but of ignorance of other perspectives and cultures.

SUMMARY OF ARGUMENT

This Court's watershed opinion in Bakke in 1978 confirmed that states have a compelling interest in achieving the profound academic benefits that flow from racially and ethnically diverse student populations at institutions of higher education. Bakke established a framework for the constitutionally permissible, limited consideration of race, as one factor among many, in admissions policies. Relied upon by higher education institutions in New Jersey and elsewhere to attain richly heterogeneous academic communities that benefit the students, the institutions, and the states themselves, the principles of Bakke are now embedded in the practices of universities of New Jersey and of other states and have been followed as precedent by lower courts. Given Bakke's continued vitality, this Court should reject Petitioners' invitation to depart from this landmark case, and, under principles of stare decisis, should apply Bakke to these matters.

Apart from its stare decisis effect, Bakke's holding that student diversity is a compelling state interest remains sound. Numerous studies, and the experience of New Jersey's own institutions, have demonstrated the educational benefits derived therefrom. Moreover, the long-recognized First Amendment right of state and private universities to academic freedom further supports the conclusion that pursuit of student diversity by public universities to advance educational goals is a compelling state interest.

Admissions plans such as those at issue here, which operate in a manner similar to the "Harvard plan" endorsed in Bakke by not utilizing quotas or separate race-based admissions tracks and by considering race as only one among other admissions factors, represent a constitutionally permissible, narrowly tailored means of achieving this compelling state interest. The claim by Petitioners and their supporting amici that "percentage plans" are a more narrowly tailored alternative for achieving student diversity ignore that they are not

appropriate for every jurisdiction because they depend on the existence of, and could serve to promote, a racially segregated school system, not a viable option in New Jersey and other states committed to desegregating their public schools. Each state must be given leeway, within constitutional bounds, to respond to local law and conditions in devising a narrowly tailored means of achieving student diversity. The admissions plans at issue in Grutter and Gratz, while not identical to New Jersey's, present a narrowly tailored approach for achieving the compelling state interest in student diversity. Therefore, the decisions below should be affirmed.

ARGUMENT

I. BASED ON THE PRINCIPLES OF STARE DECISIS, THIS COURT SHOULD UPHOLD THE DECISION IN BAKKE AND REAFFIRM THAT STATES HAVE A COMPELLING STATE INTEREST IN ACHIEVING STUDENT DIVERSITY THAT CAN BE ACHIEVED BY A CAREFULLY TAILORED RACE-CONSCIOUS ADMISSIONS POLICY.

A. The Principles of Bakke are Embedded in the Operation of Institutions of Higher Education in New Jersey and Other States.

As this Court has recognized, "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992). Adherence to the principles of stare decisis is of particular importance where the Court's decision "calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted

in the Constitution." Id. at 867. Bakke was decided in the context of a national debate concerning the propriety of race-conscious admissions programs at institutions of higher education. Like this Court's decision in Brown v. Board of Education, 347 U.S. 483 (1954), Bakke has had enormous impact on educational policies and practices in New Jersey and nationwide. Given the historical significance of Justice Powell's opinion in Bakke, and the fact that the standards enunciated in that case have become "embedded in routine...practice," Dickerson v. United States, 530 U.S. 428, 443 (2000), this Court should reject Petitioners' invitation to overturn the controlling principles of that decision.

When Bakke was decided 24 years ago, it provided a blueprint for development of constitutionally permissible admissions policies aimed at realizing the academic benefits resulting from student diversity at institutions of higher education. Justice Powell's decision was rightly viewed and reasonably relied upon as a guiding principle for educators striving to achieve the benefits of diversity at their institutions without infringing upon the constitutional rights of any applicants. In the ensuing years, many of the educational institutions of New Jersey crafted admissions policies modeled upon the "Harvard plan" approved by five Justices in Bakke.[1] These New Jersey admissions programs, in which race and ethnicity are taken into account along with a myriad of other factors, have been successful in achieving richly diverse student communities without the use of quotas or two-track race-based admissions programs condemned by Justice Powell. Now, nearly a quarter of a century after Bakke, its principles and standards have become embedded in these New Jersey institutions, and the resulting heterogeneity of their academic

[1]As observed in Akhil Amar Reed and Neal Katyal, Bakke's Fate, 43 U.C.L.A. L. Rev. 1745, 1769 (1996), "[a]n entire generation of Americans has been schooled under Bakke-style affirmative action, with the explicit blessing of -- indeed, following a how-to-do-it manual from -- U.S. Reports."

communities have become part of the identifying characteristics of these schools. Retreat from the principles of Bakke at this time would seriously disrupt the operations of New Jersey's institutions of higher education that have come to rely upon and benefit from the contributions of students from a wide variety of backgrounds and experiences.

B. Under the Methodology Set Forth in Marks v. United States, Justice Powell's Opinion In Bakke Is the Controlling Opinion.

Given the divided nature of this Court's decision in Bakke, any analysis of its precedential effect must begin with a determination of the precise holding of the case. As the Sixth Circuit cogently and thoroughly demonstrated below, Justice Powell's opinion constituted the narrowest rationale for this Court's ultimate decision in Bakke, and, therefore, pursuant to the methodology announced in Marks v. United States, 430 U.S. 188 (1977), it must be treated as the holding of the Bakke Court. Grutter v. Bollinger, supra, 288 F.3d at 739-742.

The crucial issue in Bakke was the degree to which race could be taken into account in academic admissions programs. Of the two opinions (Justice Powell's and Justice Brennan's) that upheld the use of race to some degree, Justice Powell's rationale was clearly narrower. He applied a more stringent standard of review -- strict rather than intermediate scrutiny -- to such race-based classifications, Bakke, 438 U.S. at 305, and therefore permitted a more limited consideration of race. Moreover, Justice Powell rejected Justice Brennan's broad view that academic institutions could make race-based decisions to counter general societal discrimination, id. at 297, n.36, and held that race could be a factor only where there was prior institutional discrimination or where there was a need to safeguard academic freedom by ensuring a diverse student body. Id. at 310-312. Significantly, both Justice Brennan and Justice Powell endorsed use of admissions programs akin to the

"Harvard plan" appended to Justice Powell's opinion, id. at 321, which has become a benchmark for educators seeking to develop constitutionally permissible policies. Therefore, as the Ninth Circuit explained in concluding that Justice Powell's opinion constituted the holding of Bakke, despite the "mix" of opinions, the "result was still clear enough to permit educators to rely upon the opinion that gave the decision its life and meaning — the opinion that avoided both polar possibilities." Smith v. University of Washington, Law School, 233 F.3d 1188, 1200 (9th Cir. 2000), cert. den. 532 U.S. 1051 (2001).

C. Bakke Is Entitled to Stare Decisis Effect.

None of the limited circumstances permitting departure from such controlling precedent apply here. In Casey, 505 U.S. at 854-855, this Court enunciated four factors to be considered when it reexamines a prior holding: 1) whether the prior rule has proven to be unworkable in practice; 2) whether the rule could be overturned "without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it," id. at 855; 3) whether development of the law in succeeding years has rendered the rule a "doctrinal anachronism discounted by society" ibid.; and 4) whether underlying factual premises have so changed as to render the rule obsolete or irrelevant. Application of these factors leads ineluctably to the conclusion that Bakke should be reaffirmed under the principles of stare decisis.

First, as New Jersey's experience demonstrates, the standards governing permissible race-conscious admissions programs enunciated in Bakke work. Guided by the "Harvard plan" endorsed by a majority of Justices in Bakke, the New Jersey institutions of higher education noted above have developed flexible admissions policies that consider all aspects of the individual applicant, including race, but also including characteristics such as special achievements, geographic factors, and extraordinary family and socio-economic circumstances. By crafting admissions policies that carefully

comport with the standards set forth in Bakke, New Jersey's colleges and universities have achieved immeasurable benefits from richly diverse student communities without the use of racial quotas or separate race-based admissions tracks.

Next, educators in New Jersey and elsewhere have widely viewed Justice Powell's opinion in Bakke as the governing law[2], and have relied upon the principles this Court set forth in constructing their admissions programs. These programs, in turn, by diversifying the student populations, have transformed the institutions. Thus, these schools of higher learning in New Jersey have come to depend upon and identify themselves with the educational benefits that inure from a heterogeneous student population. For example, Rutgers University promotes its "Committee to Advance Our Common Purposes," which is comprised of a "diverse representation of faculty, staff, students and community members" from three campuses. Goals of the committee include "foster[ing] inter-cultural dialogue and relations across diverse people, campuses and communities; promot[ing] the reduction of prejudice, hate and bias crimes; celebrat[ing] the distinctness of cultures and vast richness of diversity throughout Rutgers University; and enhanc[ing] the ties that bind 'our common purposes' between Rutgers University and community." The Committee sponsors a number of programs and administers grants designed to achieve these ends. See Rutgers, The State University of New Jersey, Office of the Vice President for Student Affairs, Committee to Advance Our Common Purposes, at http://studentaffairs.rutgers.edu/ctaocp.html. Similarly, integral to the mission of The College of New Jersey are the stated beliefs that "[t]he College's cultural, social, and intellectual life

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[2]See, e.g., Victor V. Wright, Note, Hopwood v. Texas: The Fifth Circuit Engages in Suspect Compelling Interest Analysis in Striking Down an Affirmative Action Admissions Program, 34 Houston Law Review 871, 891 (1997)(noting that "[f]ew would dispute that, before the Fifth Circuit's decision in Hopwood, Justice Powell's diversity rationale was widely accepted as the law of the land," and citations noted therein.)

are enriched and enlivened by diversity;" "[t]he College prepares its students to be successful, ethical and visionary leaders in a multi-cultural, highly technological, and increasingly global world;" and "[t]he College believes that an educated individual possesses an understanding of his or her own culture, an appreciation of other cultures, and the capacity to facilitate genuine cross-cultural interaction." The College of New Jersey, Core Beliefs, at http://www.tcnj.edu/about/history/beliefs.html. Plainly, having a heterogeneous student body is critical to the academic missions of many of New Jersey's higher educational institutions. If schools were no longer permitted to pursue diversity in the academic community through flexible admissions programs which take race into account among other factors, this change would affect not only admissions policies per se, but also the quality of the educational experience offered and the very nature and character of the institutions themselves. Therefore, retreat from the principles of Bakke would be disruptive to New Jersey and other states which have similarly followed Bakke in structuring higher education admissions programs.

With respect to the legal vitality of the Bakke decision, this Court has never repudiated its essential holding that the pursuit of a diverse student body is a compelling state interest in the higher education context. As Justice O'Connor noted in her concurring opinion in Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986), "a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." (O'Connor, J., concurring in part). Subsequent decisions of this Court focused on remedial affirmative action programs, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), and, while confirming Justice Powell's opinion in Bakke that strict scrutiny applies to all race-based classifications, they did not address the types of interests, apart from remediation, that could qualify as

compelling under a strict scrutiny analysis. Therefore, Croson and Adarand did nothing to erode Justice Powell's essential holding in Bakke that the academic benefits of student diversity serve a compelling state interest. This Court has never held that only remedial plans are constitutionally permissible; in fact, this Court acknowledged in Adarand that strict scrutiny would permit consideration of non-remedial purposes as compelling state interests. Adarand, 515 U.S. at 228. Petitioners' claim that remediation for past discrimination is the sole possible compelling state interest for race-conscious governmental action (Grutter Pet. bf. at 21, Gratz Pet. bf. at 40) is simply erroneous.

Further, as detailed in Part II B infra, the compelling state interest in student diversity firmly rests on a constitutional foundation not present in Croson and Adarand, the First Amendment right to academic freedom. See Bakke, 438 U.S. at 785-787. Thus, the contracting set-aside setting of Croson and Adarand is fundamentally distinct from the setting of Bakke (and here). Indeed, as explained in Bakke's Fate, supra, 43 U.C.L.A. L. Rev. at 1749:

> Contracting set-asides mean that "minority firms" win some projects and "white firms" do not; this can balkanize the races by encouraging their segregation. Education, in contrast, unites people from different walks of life. Instead of insular corporations performing various discrete contracts in isolation -- the "minority firm" adds the guardrail after the "white firm" lays the asphalt -- universities draw diverse people into spaces where they mingle with and learn from each other.... Integrated education... does not just benefit minorities--it advantages all students in a distinctive way, by bringing rich and poor, black and white, urban and rural, together to teach and learn from each other as democratic equals.

The First Amendment concerns present in Bakke's educational context, including the fundamental need to bring students of a variety of backgrounds together so that, through such interaction, students can develop into fully participatory members of our society, plainly distinguishes Bakke from Croson and Adarand, which involved rectifying past discriminatory treatment by, in effect, separating different racial groups through preferences for minorities.

Moreover, numerous lower courts have relied on Bakke in the context of the matters before this Court (unlike Croson and Adarand), analyzing challenges to programs at a variety of educational institutions. See, e.g., Tuttle v. Arlington County School Bd., 195 F. 3d 698 (4th Cir. 1999) cert. dism. 529 U.S. 1050 (2000) (assuming pursuant to Bakke that diversity may be a compelling state interest); Hampton v. Jefferson County Bd. of Educ., 102 F.Supp.2d 358 (W.D. Ky. 2000)(secondary school's interest in educational diversity could qualify as a compelling state interest); Davis v. Halpern, 768 F.Supp. 968 (E.D.N.Y. 1991)(applying Bakke's guidelines to challenge to law school's admissions policies); McDonald v. Hogness, 598 P.2d 707 (Wash. 1970), cert. den. 445 U.S. 962 (1980)(upholding challenged race conscious admissions program based on Bakke). Although some courts have refused to follow Bakke, see Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), cert. den., 518 U.S. 1033 (1996), or questioned its precedential value, see Johnson v. Board of Regents, 263 F.3d 1234 (11th Cir. 2001), these decisions are in the minority. After 24 years, Justice Powell's decision in Bakke continues to have vitality as a defining legal principle and a guiding force for educators.

Finally, applying the last factor enunciated in Casey, it is clear that the factual assumptions underpinning Bakke remain unchanged today. As more fully developed in Part II, infra, educators continue to recognize that a heterogeneous student population is essential to a vibrant and successful academic experience. As the former Executive Director to the New

Jersey Commission on Higher Education explained, "A growing body of research demonstrates that a diverse campus community benefits all students - minority and non-minority alike. Students have a richer learning experience and leave college better prepared to live and work in racially and ethnically integrated communities." Dr. James E. Sulton, Jr., Executive Director, Mid-Year Report to the Commission on Higher Education, (December 17, 1999), at http://www.state.nj.us/highereducation/ed1299.html.

Therefore, the principles articulated in Bakke continue to shape educational policies today. As New Jersey's experience shows, carefully developed programs that consider race as a plus among numerous other factors are used successfully to produce a diverse student population that enhances the educational experience for all students. New Jersey's institutions, like others across the Nation, have flourished under the influence of a heterogeneous academic community, and thus have come to rely upon the admissions policies that make such diversity possible. Because Bakke has been such a positive force in the development of these academic institutions, and because its doctrinal underpinnings remain firm, this Court should not hesitate to continue to give vitality to this landmark case in deciding the matters presently before the Court.

II. RACE AND ETHNICITY CAN BE CONSIDERED, ALONG WITH OTHER FACTORS, BY STATE UNIVERSITIES IN ADMISSIONS TO ACHIEVE THE EDUCATIONAL BENEFIT OF STUDENT DIVERSITY WHICH CONSTITUTES A COMPELLING STATE INTEREST.

A. Student Diversity In Higher Education Is a Compelling State Interest.

Apart from Bakke's stare decisis effect, the evidence presented by the University of Michigan in Gratz and Grutter, a long line of published studies, and the experience of state universities themselves (including those in New Jersey) demonstrate that the educational value resulting from student diversity is a compelling state interest sufficient to satisfy the strict scrutiny standard.

In Bakke, Justice Powell's conclusion that student diversity promotes the "essential" atmosphere in higher education of "speculation, experiment and creation," Bakke, 438 U.S. at 312, relied on a 1977 essay by the President of one of New Jersey's leading private universities, Princeton.[3] Princeton President William Bowen wrote that "a great deal of learning occurs...through interactions among" students of "different races, religions and backgrounds...who are able to...learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world." Bakke, 438 U.S. at 312, n. 48, quoting Bowen, Admissions and the Relevance of Race, Princeton Alumni Weekly, 7, 9 (September 26, 1977). In the 25 years since his essay, scholars have confirmed President Bowen's findings that the most effective way to educate is with a heterogeneous student body -- which includes racial and

[3]Notably, while the focus of the matters before this Court pertain to state universities subject to the Equal Protection Clause, Petitioners also have raised claims under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d et seq. Many private universities in New Jersey receive federal financial assistance and thus are subject to Title VI. As this Court generally has construed Title VI co-extensively with the Equal Protection Clause, Alexander v. Sandoval, 532 U.S. 275, 281 (2001), acceptance in these matters of Petitioners' claim that race-conscious admissions practices are unconstitutional (except to remedy past discrimination by the particular institution) potentially could detrimentally affect private universities in New Jersey which consider race among other factors in admissions to achieve a diverse student body.

ethnic diversity -- whose mix of experiences brings multiple viewpoints.

For example, a 1993 study by Dr. Alexander W. Astin, a leading scholar and researcher in the area of higher education, involved a survey of 25,000 students in 217 four-year colleges and universities over four years. Dr. Alexander Astin, University and Multiculturalism on the Campus: How are Students Affected, 25 Change 44, 45 (Mar/Apr. 1993). Dr. Astin analyzed the manner in which students were affected by their institution's relative diversity, including racial diversity, comparing data on students from such differing schools when they entered college in 1985, with follow-up data from 1989. The research showed that students who interacted more with those of different backgrounds tended to be more successful in college. Student experiences with diversity, including socializing with members of other racial and ethnic groups and participating in activities designed to promote cultural awareness, were positively associated with many measures of academic development. The data presented a clear pattern: emphasizing diversity as a matter of institutional policy, as well as providing students with curricular and extracurricular opportunities to confront racial and multicultural issues, have beneficial effects on a student's cognitive and affective development. Id. at 48. See also Association of American Universities, Diversity Statement: On the Importance of Diversity in University Admissions (Sept. 14, 1997) at http//www.aau.edu/issues/Diversity ("Our students benefit significantly from education that takes place in a diverse setting...[learning] from others who have background characteristics very different from their own").

Similar findings were made by the District Court in Gratz. The University of Michigan's expert, Professor Patricia Gurin, analyzed three sources of data: multi-institutional national data, the results of an extensive survey of students at the University of Michigan, and data drawn from a specific classroom program. She concluded that "[s]tudents who experienced the

most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual skills." Such students were also "better able to understand and consider multiple perspectives, deal with the conflicts that different perspectives sometimes create and appreciate the common values and integrative forces that harness differences in pursuit of common ground." Gratz, 122 F.Supp. 2d at 822 (citations omitted).

With reference to law schools, the setting of Grutter, the increased presence of racial and ethnic minority students and faculty in the classroom has been shown to have had a very beneficial impact on legal education. See Darlene Goring, Affirmative Action and the First Amendment: The Attainment of a Diverse Student Body Is A Permissible Exercise of Institutional Autonomy, 47 U. Kan. L. Rev. 591, 646-647 (1999) and articles and studies cited therein. Indeed, over 50 years ago in Sweatt v. Painter, 339 U.S. 629 (1950), in striking down de jure racial segregation at the University of Texas Law School, this Court observed:

> The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. [Id. at 634]

This passage in Sweatt has particular relevance in New Jersey, where Rutgers School of Law-Newark places great emphasis on its provision of legal education in clinical programs. See Rutgers School of Law-Newark, Public Service, at www.newark.rutgers.edu/law/main.html. For example, for a white student raised in a homogeneous environment, exposure to and interaction with fellow law students of different races

and ethnicities would better enable such student to effectively participate in this important component of Rutgers Law School's educational program, as such clinics serve the population of Newark, New Jersey, a city in which African-Americans and Hispanics constitute well over half the population. U.S. Census Bureau, Census 2000, Redistricting Data.

Therefore, a state university's ability to consider race and ethnicity in admissions to insure a diverse student population clearly promotes significant educational benefits, and constitutes a compelling state interest.

B. First Amendment Protections Attached to University Academic Determinations Further Support the Conclusion that the Educational Value of Student Diversity is a Compelling State Interest.

While Petitioners assert that the only constitutional provision relevant to the matters before the Court is the Fourteenth Amendment (see Gratz Pet. bf. at 33-37), the First Amendment right to academic freedom is directly implicated as well. In Sweezy v. New Hampshire, 354 U.S. 234 (1957), this Court squarely held that the First Amendment protects a university's right to academic freedom, a principle further discussed in Justice Frankfurter's concurrence, which stated that "...who may be admitted to study" is an essential university freedom. Id., 354 U.S. at 263 (Frankfurter, J., concurring)(citation omitted). See also Griswold v. Connecticut, 381 U.S. 479, 482 (1965)(the First Amendment encompasses "freedom of inquiry, freedom of thought, and freedom to teach...indeed the freedom of the entire university"); Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)("The Nation's future depends upon leaders trained through wide exposure to that which discovers truth 'out of a multitude of tongues...'"). Thus, Justice Powell's holding in Bakke that the

First Amendment allows "a university to make its own judgments as to education includ[ing] the selection of its student body," Bakke, 438 U.S. at 312, and that a university has the First Amendment "right to select those students who will contribute most to the 'robust exchange of ideas,'" id. at 313, was grounded in a long tradition of American jurisprudence. Bakke's authorization of race being utilized as a factor in admissions to insure student diversity, but its prohibition against racial quotas and separate race-based university admissions tracks, thus constitutes an appropriate and necessary balancing of the two constitutional provisions implicated in the setting of the matters before this Court.

And more recent decisions of this Court have expanded on these First Amendment principles to emphasize the deference which should be given to academic judgments of universities. In Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214 (1985), this Court held that "great respect for the faculty's professional judgment" should be given by courts in reviewing academic decision-making, id. at 225; and that federal courts are ill-suited "to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions--decisions that require 'an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial...decision-making'" Id. at 226, quoting Bd. of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78, 89-90 (1978). Under the principles of Ewing and Horowitz, the determination by university officials (including those in New Jersey) that a diverse student body produces significant educational benefits is clearly entitled to deference. See also Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 16 (1971) ("[s]chool authorities are traditionally charged with broad power to formulate and implement educational policy," and could devise integration plans "in order to prepare students to live in a pluralistic society..."). So long as Fourteenth Amendment-based rights of non-minority applicants are not violated by their being "foreclosed from all consideration" due to their race as a result

of quotas or separate race-based admissions tracks, Bakke, 438 U.S. at 318, the "good faith" of state universities which, in their academic judgment, use race as one admissions factor among many to achieve diversity should "be presumed." Id. at 319.

III. UNIVERSITY ADMISSIONS SYSTEMS WHICH CONSIDER RACE AMONG OTHER FACTORS IN ORDER TO OBTAIN THE EDUCATIONAL BENEFITS OF STUDENT DIVERSITY AND WHICH OPERATE IN A MANNER SIMILAR TO THE HARVARD PLAN ENDORSED IN BAKKE ARE NARROWLY TAILORED FOR PURPOSES OF EQUAL PROTECTION CLAUSE ANALYSIS.

In order to satisfy the strict scrutiny standard, the compelling state interest in student diversity must be achieved by narrowly tailored means. Adarand, 515 U.S. at 227; Bakke, 438 U.S. at 315. Plans which closely resemble the "Harvard plan" expressly endorsed by Justice Powell in Bakke (and by Justice Brennan in his partial dissent) -- such as those used by New Jersey institutions of higher education and those, as found by the Sixth Circuit in Grutter and the District Court in Gratz below, used by the University of Michigan Law School and the Michigan College of Literature, Science and the Arts ("LSA") -- meet the "narrowly tailored" test.

As a threshold matter, as proven by the University of Michigan Law School, Grutter, 288 F.3d at 750, the LSA, Gratz, 122 F.Supp. 2d at 830, and as demonstrated by numerous studies and articles, purely race-neutral criteria will not achieve student diversity at selective universities. For example, reliance on test scores is an ineffective means to achieve heterogeneity because "there are significant disparities

in the test scores of different racial and ethnic groups, a fact that may be linked to differences in educational opportunities, overrepresentation in low-performing schools, and in some cases the difficulties presented for students whose primary language is not English." U.S. Comm'n on Civil Rights, Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education, Ch.3, "Admissions Standards and Success Predictors"(Nov.2002)at http://www.usccr.gov/pubs/percent2.htm.

Implicitly recognizing this problem and also acknowledging the academic benefits of student diversity, the amicus briefs of the United States and the State of Florida in support of Petitioners proffer "percentage plans" as an allegedly race-neutral alternative for achieving student diversity, which purportedly demonstrate why the Michigan systems at issue are not "narrowly tailored." These plans, in use in California, Florida and Texas, guarantee admission to state institutions to students graduating within a certain top percentage of their high school classes. Specifically, Texas's Top 10 Percent Law, enacted in response to the Hopwood decision, guarantees students graduating in the top 10 percent of their high school class admission to a Texas public college or university. The Florida plan guarantees admission to one of Florida's 11 public institutions for students graduating in the top 20 percent of their high school classes, and the California law admits students with high school rankings in the top 4 percent to its state institutions.

Experience has shown that percentage plans are not a panacea, however. First, such plans have no applicability whatsoever in the context of selective graduate school admissions, the setting of Grutter. As a rule, graduate schools do not consider high school class standing in admission decisions, and, in any event, they draw from a national pool of undergraduate institutions, so they simply could not guarantee admission to any certain percentage of high-ranking high school graduates. Consequently, in states where race-conscious admissions plans have been replaced by percentage plans, there

has been a "devastating" decrease in minority enrollment in the states' graduate schools. U.S. Comm'n on Civil Rights, Toward an Understanding of Percentage Plans in Higher Education: Are they Effective Substitutes for Affirmative Action?(April 2000) at http://www.usecr.gov/percent/stmnt.htm.

Moreover, there is strong evidence that rather than promoting diversity, percentage plans have had a negative effect on the admissions of certain minority groups to selective undergraduate institutions. In Florida, "black and Hispanic students remain underrepresented in two of Florida's most selective universities compared with their proportions among high school graduates." Beyond Percentage Plans, supra, Ch.6, "The Road to Diversity: Percentage Plans Plus." Similarly, in Texas, four years after implementation of the percentage plan, enrollment of black and Hispanic students at the University of Texas-Austin decreased, most notably among black students, with similarly disappointing results at the State's selective law and medical schools. Ibid. As the Commission on Civil Rights concluded, "Analysis of admissions in these states reveals that no significant improvement has been made in the rates of minority enrollment at undergraduate or graduate/professional levels, and in many cases, rates have declined." Ibid. See also Eugene Garcia, The Elimination of Affirmative Action: California's Degraded Educational System, 12 La Raza Law Journal 373 (Fall 2001); John F. Kain and Daniel M. O'Brien, Hopwood and the Top 10 Percent Law: How They Have Affected the College Enrollment Decisions of Texas High School Graduates, (Nov. 2001) at http://www.utdallas.edu/research/greenctr; Marta Tiendaetal, Closing the Gap: Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action (Jan. 20003) at http://www.texastop10.princeton.edu/publications/tienda012103.pdf.

Even if percentage plans were successful in achieving diversity at state colleges and universities, these plans, which, as explained below, are premised upon a feeder school system that is segregated, simply will not work in every locality. For example, because New Jersey has been steadfast in its efforts to eliminate segregation in its public schools, percentage plans would not be appropriate here. Therefore, each state must have the flexibility, within constitutionally permissible parameters, to develop approaches for achieving diversity in higher education that are suited to the unique character of the state.

It is widely recognized that the efficacy, if any, of percentage plans depends on the existence of racially segregated school systems. As the United States Commission on Civil Rights noted with respect to the "One Florida Plan," "[t]he Plan is an unprovoked stealth acknowledgment — and acceptance — that the existing school and housing segregation will never change and that longstanding efforts to remedy race discrimination that was legal in Florida have been abandoned." U.S. Comm'n on Civil Rights, Toward an Understanding of Percentage Plans, supra. See also, Michelle Adams, Isn't It Ironic? The Central Paradox at the Heart of 'Percentage Plans', 62 Ohio State Law Journal 1729 (2001).

Use of a plan that is inextricably dependent upon the existence of a segregated public school system would be an anathema to New Jersey, which has labored intensely for the past century to desegregate its primary and secondary schools. As the New Jersey Supreme Court declared, "[t]he history and vigor of our State's policy in favor of a thorough and efficient public school system are matched in its policy against racial discrimination and segregation in the public schools." Jenkins v. Twp. of Morris School District, 279 A.2d 619, 626 (N.J. 1971). New Jersey's courts have emphasized the State's strong public interest in eradicating school segregation. See, e.g., Englewood Cliffs Bd. of Educ. v. Englewood Bd. of Educ., 788 A.2d 729, 744 (N.J. 2002)(reaffirming responsibility of Commissioner and State Board of Education to take

appropriate action to remedy racial imbalance at high school); Jenkins, supra, 279 A.2d at 629 (same). Thus, percentage plans premised on racial imbalance at the secondary schools are not a feasible or desirable option for New Jersey. Nor, contrary to the arguments of Petitioners and the above-noted amici, should they be the only constitutionally permissible method for the University of Michigan Law School and the LSA to achieve the compelling state interest in student diversity.

While sharing the essential characteristics of taking race and ethnicity into account in admissions but not utilizing quotas or separate race-based admissions tracks, the admissions systems of the New Jersey schools described in this brief also are not identical to those used by LSA or by Michigan Law School. Most notably, the identified New Jersey schools, unlike the LSA, do not assign any "points" or any other specified weight based on an applicant being a member of an underrepresented minority group (though they have the essential similarity of using race and ethnicity as but one of a myriad of factors, without quotas and separate race-based tracks).

But the critical point of noting the differences between New Jersey's admissions systems and those of the States of Florida, Texas and California on the one hand, and the University of Michigan on the other, is not that New Jersey's systems are inherently superior. Rather, in matters as crucial to a state as the functioning of its higher educational institutions, a state must have leeway to shape such systems in response to local conditions and to state law. Although some states have experimented with percentage plans, they are not the only constitutionally permissible alternative to a quota-like race-based admissions program. Narrow tailoring does not mean "one size fits all." See Bush v. Vera, 517 U.S. 952, 977 (1996), in which Justice O'Connor, in her plurality opinion, stated that "the 'narrow tailoring' requirement of strict scrutiny allows the states a limited degree of leeway in furthering...[compelling] interests". That education is a

quintessential area for according states "a limited degree of leeway" is evident from this Court's decision in San Antonio Dist. v. Rodriguez, 411 U.S. 1 (1973), which, in rejecting an Equal Protection Clause challenge to Texas' school funding system, recognized the need for state and local latitude in educational decision-making, holding that "[n]o area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education." Id. at 50. In the higher education context, what would be a narrowly tailored means of achieving the compelling interest in diversity may not necessarily be identical for each state, as the analysis must take into account such localized factors as the nature of the applicant pool, the selectivity of the institution, and the school's goals and priorities.

Moreover, granting the states latitude in devising narrowly tailored means of achieving the compelling state interest in student diversity is further warranted under the long line of this Court's recent federalism cases, which emphasize that embedded in the Constitution is the "presupposition . . . that each State is a sovereign entity in our federal system." Alden v. Maine, 527 U.S. 706, 729 (1999), quoting Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54 (1996). See also U.S. v. Lopez, 514 U.S. 549, 581 (1995)(Kennedy, J., concurring)(under "our federalism," in the area of such "traditional concern" to a state as education, a state must have the flexibility to devise its own "solutions where the best solution is far from clear"); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000). Such "sovereign entities" should have the ability -- within the parameters of the Equal Protection Clause, as balanced by the First Amendment rights of universities to academic freedom -- to devise narrowly tailored admissions plans that are appropriate to the individual circumstances present in each state.

In Bakke, Justice Powell held that the University of California's two-track admissions system was not narrowly tailored, but that a system such as the "Harvard plan" would be

deemed to be narrowly tailored. Bakke, 438 U.S. at 317. As detailed on pp. 1-2 supra, the admissions systems in the New Jersey institutions of higher education noted above are fully consonant with the Harvard plan and thus are narrowly tailored, in that race is considered as only one of a number of factors in an individualized assessment of each applicant. And, while differing from New Jersey's systems in certain respects, the University of Michigan plans at issue in these matters also are consistent with the guidelines set forth in Bakke.[4] The Sixth Circuit in Grutter expressly found "that the University of Michigan Law School's consideration of race and ethnicity is virtually indistinguishable from the Harvard Plan Justice Powell approved in Bakke", Grutter, 288 F.3d at 747; and the District Court in Gratz found that the LSA's post-1998 admissions system was narrowly tailored insofar as it closely resembled the type of plan endorsed by Justice Powell, Gratz, 122 F.Supp.2d at 827-831. Such admissions plans, which avoid separate admissions tracking and quotas and which consider race or ethnicity only as one among many factors, fall squarely within the parameters established in Bakke of permissible means of achieving student diversity, and should be deemed to be narrowly tailored.

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[4]Petitioners also argue in their briefs (Grutter Pet. bf. at 42, Gratz Pet. bf. at 28) that the plans of both Michigan Law School and the LSA are not narrowly tailored since the consideration of race and ethnicity to achieve diversity has no termination date. However, as aptly explained by the District Court in Gratz, "diversity in higher education, by its very nature" is not a "remedy" but rather is an "ongoing interest" of universities, given the educational benefits derived therefrom. Gratz, 122 F.Supp. 2d at 823-824. And if progress is made in improving educational opportunities for minorities in earlier school years, there readily could be natural temporal limits to race-conscious means of achieving diversity. See Grutter, 288 F.3d at 792.

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit Court of Appeals in Grutter v. Bollinger and the judgment of the District Court in Gratz v. Bollinger should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, et al.,

Respondents.

JENNIFER GRATZ and PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF *AMICI CURIAE* HUMAN RIGHTS ADVOCATES AND THE UNIVERSITY OF MINNESOTA HUMAN RIGHTS CENTER IN SUPPORT OF RESPONDENTS

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International Covenant on Civil and Political Rights (Civil and Political Covenant), *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (*entered into force* March 23, 1976; *entered into force for the United States* September 8, 1992) ..... *passim*

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Human Rights Advocates and the University of Minnesota Human Rights Center submit this brief *amicus curiae* in support of Respondents.[1] The parties have granted permission for the filing of all *amicus curiae* briefs and the consent letters have been lodged with the Clerk of this Court. Human Rights Advocates is a non-profit California corporation founded in 1978 with national and international membership. It has Special Consultative Status in the United Nations. It endeavors to ensure that the most basic protections are afforded to everyone, and has submitted briefs in cases involving individual and group rights where international standards offer assistance in interpreting both state and federal statutes at issue. Examples of amicus briefs that Human Rights Advocates has filed include those in the following cases: *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987); *Greenham Women Against Cruise Missiles v. Reagan*, 755 F.2d 34 (2nd Cir. 1985); *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996); *In Re Stanford, cert. denied*, 123 S. Ct. 472 (Mem), *dissenting opinion* (2002).

The University of Minnesota Human Rights Center was inaugurated December 1988 on the occasion of the fortieth anniversary of the Universal Declaration of Human Rights. The principal focus of the Human Rights

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[1] Pursuant to Rule 37.6, *Amici Curiae* affirm that no counsel for any party authored this brief in whole or in part and that no person or entity other than *Amici Curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

Center is to help train effective human rights professionals and volunteers. The Human Rights Center assists human rights advocates, monitors, students, and educators.[2]

Amici would like to take the opportunity to inform this Court of the applicable treaty standards, as well as the constitutional standards involved in this case.

BRIEF AMICUS CURIAE SUMMARY OF THE ARGUMENT

In the interest of achieving a diverse student body, the University of Michigan Law School's ("Law School") admission policy allows for consideration of factors which "may help achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts." *Grutter v. Bollinger*, 288 F.3d 732, 736 (6th Cir. 2002). The Court of Appeals for the Sixth Circuit correctly applied the law in upholding the Law School's admission policy. A reversal of this decision would conflict with U.S. treaty obligations. The Court of Appeals opinion reversed the trial court's decision and vacated the injunction prohibiting the Law School from considering race and ethnicity in its admissions decisions. The Court of Appeals upheld the Law School's admissions policy and found it to be virtually identical to that approved by the Court in *University of California v. Bakke,* 438 U.S. 265, 98 S. Ct. 2733 (1978).

[2] Positions of the Human Rights Center do not necessarily reflect the views of the Regents of the University of Minnesota.

Grutter, 288 F.3d at 747. The court found that the Law School has a compelling interest in achieving a diverse student body and that this is permissible under *Bakke*, so long as race and ethnicity are used only as positive factors in the admissions process and quotas are not used. *Id.* at 745-46. *Amici* concerned that a reversal of the Court of Appeals decision would be contrary to the United States' treaty obligations which are now part of the Law of the Land under the Supremacy Clause of the United States Constitution.[3]

Amici would like to bring to the Court's attention the treaty standards applicable to this case under the International Convention on the Elimination of All Forms of Racial Discrimination (Race Convention), *opened for signature* March 7, 1966, 660 U.N.T.S. 195 (*entered into force* January 4, 1969; *entered into force for the United States* November 20, 1994), and the International Covenant on Civil and Political Rights (Civil and Political Covenant), *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (*entered into force* March 23, 1976; *entered into force for the United States* September 8, 1992). In turn, *Amici* urge this Court to interpret the policy in question so that it conforms to obligations under those duly ratified treaties. A decision to the contrary could impair the ability of local and state governmental entities to institute measures designed to meet obligations under the treaties and the United States Constitution. Hence, it is critical that this Court consider the treaty obligations

[3] Since no opinion has been issued in *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000), *amici* have focused their comments on the *Grutter* case. However, the treaty standards are applicable to the *Gratz* case as well.

when construing the application of the constitutional standards applicable to this case.

ARGUMENT

I. Treaty Provisions are the Supreme Law of the Land Under the U.S. Constitution

Under the United States Constitution Article VI, section 2 of clause 2, "all treaties made or which shall be made, under the authority of the United States shall be the Supreme Law of the Land, and the Judges in every State shall be bound thereby, anything in the Constitution or Law of any State to the contrary notwithstanding." U.S. CONST. art. VI, § 2, cl. 2. When a treaty and state law conflict, the treaty controls. *See Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968); *Clark v. Allen*, 331 U.S. 503, 508 (1947); *see also Missouri v. Holland*, 252 U.S. 416, 433-35 (1920) (concluding that the validity of a treaty was not undermined by a possible infringement on states' rights under the Tenth Amendment unless it violated an express prohibition of the Constitution). Also, courts should construe treaties "in a broad and liberal spirit, and when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred." *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924). In this case, there is no conflict between the treaty and the state practices being challenged. Also, there is no conflict with any express provisions in the Constitution.

The United States ratified the International Convention on the Elimination of All Forms of Racial Discrimination, which entered into force for the United States on

November 20, 1994. 140 CONG. REC. S7634 (June 24,1994). As of December 9, 2002, 167 states have become parties to the Race Convention and pledged to eradicate racial discrimination within their borders. *See* the United States High Commissioner on Human Rights status of treaty ratifications (last modified Dec. 9, 2002), available at http://www.unhchr.ch/pdf/report.pdf. Previously, the United States had become a party to the International Covenant on Civil and Political Rights on September 8, 1992. 138 CONG. REC. S4781-84 (April 2, 1992). The United States is now one of 149 countries that are parties to that treaty. *See* the United Nations High Commissioner on Human Rights status of treaty ratifications (last modified Dec. 9, 2002), available at http://www.unhchr.ch/pdf/report. pdf.

The Race Convention and the Civil and Political Covenant, as ratified treaties, are the Supreme Law of the Land. The United States is now bound to protect the rights enumerated in those treaties. Both treaties establish committees to monitor compliance with treaty provisions. Under the Race Convention, this body is called the Committee on the Elimination of Racial Discrimination. Race Convention, art. 8-15. The enforcement body established by the Civil and Political Covenant is the Human Rights Committee. Civil and Political Covenant, art. 28-45.

II. A Reversal of the Decision of the Sixth Circuit Would Impair the Ability of State and Local Governmental Entities to Institute Measures Designed to Meet U.S. Treaty Obligations

The Race Convention and the Civil and Political Covenant elaborate on the basic principles of equality and

nondiscrimination. The Race Convention focuses specifically on discrimination and thus addresses a wide range of categories of rights in which discrimination is prohibited. It provides that State Parties to the treaty must attempt to prohibit and to eliminate racial discrimination and to guarantee the equal right to enjoyment of civil and political rights. Race Convention, art. 5. Furthermore, it contains very specific provisions mandating affirmative action programs to remedy discrimination and provides that such actions shall not be deemed discrimination. Race Convention, art. 2(1).

The critical definition of racial discrimination is set forth in Article 1(1) of the Race Convention:

> [A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

The Race Convention, however, also provides an exception for special measures that are "taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights or fundamental freedoms. . . ." art. 1(4). This is an exception designed for affirmative action programs and for other measures states may take to further the aims of the treaty.

The Race Convention outlines the fundamental obligations of State Parties to take steps to erase discrimination within their borders and obligates States Parties to "undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms. . . ." Race Convention, art. 2(1). It also requires State Parties to ensure protection of rights within social, economic, cultural and other fields by taking "special and concrete measures . . . for the purpose of guaranteeing [racial groups or individuals belonging to them] the full and equal enjoyment of human rights and fundamental freedoms." Race Convention, art. 2.

The provisions in the Civil and Political Covenant provide protection to much broader categories of persons and define the civil and political rights in greater detail. Part II establishes the general duties of State Parties, which include the obligation to "take the necessary steps . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." Civil and Political Covenant, art. 2(2). Articles 2, 3 and 26 set forth the basic principle of equal protection of the laws. Article 2(1) requires that State Parties provide the enumerated rights to all individuals within their jurisdiction without regard to "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 3 specifically guarantees "the equal right of men and women to the enjoyment of all civil and political rights set forth in the . . . Covenant." Article 26 reinforces the equal protection language in Article 2 by stating that all persons are equal before the law and are entitled to equal protection regardless of any of the specified bases.

The Human Rights Committee has also considered whether distinctions are permissible under the Civil and Political Covenant which requires that the rights under the treaty be provided without regard to "race, colour, sex, language, religion, birth or other status." Civil and Political Covenant, art. 2(1). The Committee recognized that "not all differentiation of treatment constitutes discrimination if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant." U.N. GAOR, Hum. Rts. Comm., 37th Sess., 984th mtg., at 4, U.N. Doc. CCPR/C/21/Rev.1/Add.1 (1989).[4]

Petitioner seeks to eliminate the Law School's affirmative action program that benefits minorities. Petitioner takes the position that affirmative action programs are inherently discriminatory. *See* Petition for Writ of Certiorari at 26, 29. That view of affirmative action conflicts with the definition of "racial discrimination" in the Race Convention, which provides that actions "taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection . . . in order to ensure . . . equal enjoyment or exercise of human rights or fundamental freedoms shall not be deemed racial discrimination." Race Convention, art. 1(4). Indeed, by eliminating programs that seek to address the lack of equality in certain areas, Petitioner

[4] *See also, Prevention of Discrimination: The Concept and Practice of Affirmative Action: Report of the Special Rapporteur*, Sub-Comm. on the Promotion and Protection of Human Rights, 53rd Sess., Agenda Item 5, U.N. Doc. E/CN.4/Sub.2/2002/21 (June 17, 2002), for a report on the issue of affirmative action at the international and national arenas.

may force the Law School to perpetuate racial discrimination in violation of the Race Convention.[5]

This Court made clear in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), that a race-based preference program may be a constitutional means of remedying discrimination. Justice O'Connor in the majority opinion recognized that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand*, 515 U.S. at 237. Thus, "[w]hen race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases." *Id.* at 237. Petitioner requests that the Court abandon affirmative action programs that seek to promote diversity, even those government programs "narrowly tailored to further a compelling interest," in violation of the Constitution and the provisions of the two treaties. Indeed, the treaty obligations themselves can constitute a compelling state interest to justify the establishment of such programs. *See* Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. CIN. L. REV. 423, 468 (1997).

[5] This is similar to the position of Justice Stevens, who was joined by Justice Ginsberg, in his dissent in *Adarand Contractors, Inc. v. Pena*, 515 U.S. 200, 243 (1995), where he noted that there is a difference between racial classifications that are used for the purpose of discrimination and those that have the goal of remedying discrimination.

A prohibition of affirmative action programs will directly conflict with the obligation of the United States as a party to the Race Convention, under Article 2(2) to take "special and concrete measures ... for the purpose of guaranteeing [racial groups or individuals belonging to them] the full and equal enjoyment of human rights and fundamental freedoms." It may also impinge on the obligation in the Civil and Political Covenant to take "necessary steps ... to adopt such laws or other measures as may be necessary to give effect to the rights recognized" in that treaty. Civil and Political Covenant, art. 2(2). Indeed, the Human Rights Committee in 1995, after considering a report from the United States on its progress on ensuring the enjoyment of rights under the Covenant, made the specific recommendation that affirmative action should be adopted in order to eliminate discriminatory attitudes and prejudice toward minority groups and women. *See* Consideration of Reports: Comments of the Human Rights Committee, United States of America, U.N. GAOR, Hum. Rts. Comm., 53rd Sess., U.N. Doc. CCPR/C/79/Add.50 (1995) at ¶ 30.

Finally, the Race Convention mandates that the United States should take affirmative steps "to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race ... to equality before the law, notably in the enjoyment of ... (e) [e]conomic, social and cultural rights, in particular: ... (v) the right to education and training." Race Convention, art. 5(e)(v). In this way, Petitioner's request may also impair the ability of government entities to meet that obligation, since it places a burden on minority groups seeking to take part in education and training.

Thus, it is imperative that this Court considers treaty language in determining whether the University's programs at issue violate the Constitution because of the potential negative impact that the ruling can have on the United States' treaty obligations.

III. The Application of the Self-Executing Doctrine

This Court developed the doctrine of "self-executing" treaties to limit the Constitutional rule that treaties are the law of the land. *See Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829). Under that doctrine, only clauses of treaties that specify duties which directly confer rights may be enforced directly with the courts.[6] Courts have applied various theories when discussing that doctrine. *See* Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995). Under one test, a self-executing clause is "equivalent to an act of the legislature whenever it operates by itself without the aid of any legislative provision." *Foster*, 27 U.S. (2 Pet.) at 314. Another test looks for the "intent of the parties" reflected in the treaty's words and, when the words are

[6] The holding in *Foster* was not in complete conformity with prior decisions upholding the application of treaties. *See* Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571, 577 (1991). Furthermore, *Foster* must be read in conjunction with *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833), where the Court admitted error in its first analysis of the treaty in question. Nonetheless, the basic rule remains, that only clauses of treaties that specify duties that directly confer rights may be enforced directly with the courts.

unclear, in circumstances surrounding the treaty's execution. *See Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988); *Cook v. United States*, 288 U.S. 102, 119 (1933); *Jones v. Meehan*, 175 U.S. 1, 10-23 (1899); *Chew Heong v. United States*, 112 U.S. 536, 539-43 (1884); *Percheman*, 32 U.S. (7 Pet.) at 65-68; *Foster*, 27 U.S. (2 Pet.) at 310-16.

The intent of the parties may be difficult to ascertain when multilateral treaties such as the Race Convention and the Civil and Political Covenant are involved, and it is questionable that the intent of only one of the parties would determine the effect of a particular clause. Multilateral treaties rarely make clear the process by which parties are to incorporate its provisions into national law. FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 586 (2d ed. 1996). Many countries, such as the United States, incorporate treaties without separate action by the legislature. *See* Riesenfeld & Abbott, *supra* note 3, at 575. Indeed, the original purpose of the Supremacy Clause was to alter the British rule that all treaties are "non-self-executing" in order to require the state courts as well as the federal courts to enforce treaties directly. *See* Vázquez, at 698-700.

Some courts have listed factors they considered in ascertaining intent. *See Frolova v. Union of Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985); *People of Saipan v. United States Dep't of Interior*, 502 F.2d 90, 97 (9th Cir. 1974). In *Frolova v. USSR*, the court fashioned the following factors: the language and purposes of the agreement as a whole, the circumstances surrounding its execution, the nature of the obligations imposed by the agreement, the availability and feasibility of alternative enforcement mechanisms, the implications of permitting a

private cause of action, and the capability of the judiciary to resolve the dispute. *See Frolova*, 761 F.2d at 373.

Under the *Frolova* factors, the Civil and Political Covenant articles addressing affirmative action are self-executing. First, the language and purpose of the treaties are clear in protecting the human rights of individuals. Second, Article 3 imposes an obligation to State Parties to provide for effective remedies. It provides as follows:

> Each State Party to the present Covenant undertakes
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his rights thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

Civil and Political Covenant, art. 3.

Third, because the United States has not ratified the Optional Protocol to the Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 59, U.N. Doc. A/6316 (1966), *entered into force* Mar. 23, 1976, 999 U.N.T.S. 302, which provides for an individual right to petition the Human Rights Committee, there are no other enforcement mechanisms available.

Fourth, since the treaty provides rights to individuals, there is no reason to believe that individuals should not have a private cause of action to enforce the provisions. Finally, the judiciary is the most capable institution for addressing whether the treaty has been violated since it has traditionally been the means whereby individuals in the United States enforce their constitutional rights.

Despite the clarity of many of the provisions in the Civil and Political Covenant, the Senate ratified it with a declaration that it was not self-executing. *See* 138 CONG. REC. S4784-01 (daily ed., April 2, 1992). The same was done with the Race Convention. *See* 140 CONG. REC. S7634 (daily ed., June 24, 1994). It is questionable whether the Senate, instead of the courts, can make such a determination. *See* Connie de la Vega & Jennifer Fiore, *The Supreme Court of the United States Has Been Called Upon to Determine the Legality of the Juvenile Death Penalty in* Michael Domingues v. State of Nevada, 21 WHITTIER L. REV. 215, 220 n. 33 (1999). Further, such a declaration should not be given effect because it runs counter to the object and purpose of the treaty, which is to protect the individual rights enumerated therein. *See* Riesenfeld & Abbott, *supra* note 6, at 608. This Court, however, need not address those points since the legislative history indicates that the Senate merely intended to prohibit private and independent causes of action. *See* 138 CONG. REC. S4784. In cases such as this, the governmental entities would not be using the treaties to assert a private cause of action. They would use it defensively and thus is not invoking a separate cause of action. *See* John Quigley, *Human Rights Defenses in U.S. Courts*, 20 HUM. RTS. Q. 555, 581-82 (1998).

The defensive use of a treaty is a judicially accepted means by which litigants have been successful in enforcing treaty provisions without having courts make a determination regarding whether the provisions are self-executing. *See, e.g., Kolovrat v. Oregon*, 366 U.S. 187 (1961) (allowing defensive use of a treaty to escheat proceeding under Oregon law); *Ford v. United States*, 273 U.S. 593 (1927) (allowing use of a treaty as a defense to personal jurisdiction); *Patsone v. Pennsylvania*, 232 U.S. 138 (1914) (recognizing the defensive use of a treaty in a criminal case, but ultimately holding that there was no conflict between the treaty and state law). Hence, this Court need not address the non-self-executing declaration and can apply the treaty provisions to this case.

IV. The Treaties Are Helpful for Interpreting United States Standards

International human rights standards have often been useful tools for interpreting laws in the United States. *See, e.g., Lareau v. Manson*, 507 F. Supp. 1177 (D. Conn. 1980). *See generally* Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3 (1983); Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue,* 1 RUTGERS RACE & L. REV. 193 (1999).

In 1995, the United States' delegation to the Human Rights Committee stated that "courts of the [United States] could refer to the Covenant and take guidance from it." Statement of Conrad Harper, Legal Advisor, U.S. Department of State, to the United Nations Human Rights Committee, U.N. GAOR, Hum. Rts. Comm., 53rd Sess.,

1405th mtg., U.N. Doc. HR/CT/404 (1995). Hence, as a means to ensure compliance with the treaty obligations, the courts of this country should seek guidance from the Civil and Political Covenant in interpreting United States laws. Similarly, courts could seek the same interpretive guidance from Race Convention provisions. Failure to do so will undermine the United States credibility as a State Party to these, as well as other treaties.

The treaty obligations above are useful for interpreting the Constitution as well as federal statutory provisions of encouraging state and local governments to voluntarily remedy past discrimination. For example, this Court has recognized that in passing Title VII, Congress intended to encourage public and private employers to voluntarily enact race- and gender-based affirmative action programs in order to accomplish the national goal of "break[ing] down old patterns of racial segregation and hierarchy." *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979). By denying state and local entities the power to voluntarily redress past discrimination through race- and gender-conscious means, courts will not only impede the furtherance of congressionally mandated goals, but will also impede the goal of eradicating racial and gender discrimination mandated by the Race Convention and the Civil and Political Covenant.

Ratification of treaties is not to be treated lightly, and such action by the President and two-thirds of the Senate evidences the acceptance of the treaty. The documents should, therefore, provide meaningful guidance to the Court.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to uphold the ruling of the Sixth Circuit in this case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

BARBARA GRUTTER,
Petitioner,
v.
LEE BOLLINGER, *et al.*,
Respondents,
and
JENNIFER GRATZ AND PATRICK HAMACHER
Petitioners,
v.
LEE BOLLINGER, *et al.*
Respondents

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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IN THE

Supreme Court of the United States

No. 02-241 and 02-516

BARBARA GRUTTER,
Petitioner,
v.
LEE BOLLINGER, *et al*,
Respondents,
and
JENNIFER GRATZ AND PATRICK HAMACHER
Petitioners,
v.
LEE BOLLINGER, *et al*.
Respondents

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* MICHIGAN GOVERNOR JENNIFER M. GRANHOLM

IDENTITY AND INTEREST OF *AMICUS* MICHIGAN GOVERNOR JENNIFER M. GRANHOLM

This *amicus curiae* brief is filed on behalf of Jennifer M. Granholm, Governor of the State of Michigan.[1] Pursuant to

[1] All parties have consented, pursuant to Rule 37(3)(a) of the Rules of the Supreme Court of the United States, to the filing of amicus briefs in

Mich. Const. 1963, art. V, § 1, Governor Granholm serves as the Chief Executive Officer of the State of Michigan. As Governor, she exercises general supervisory authority over all principal departments of state government. Mich. Const. 1963, art. V, § 8. The authority vested in the Governor under the latter provision includes the right to "initiate court proceedings in the name of the state to enforce compliance with any constitutional or legislative mandate, or to restrain violations of any constitutional or legislative power, duty or right by any officer, department or agency of the state or any of its political subdivisions."

The principal issue to be decided in these appeals is whether the admissions policies of the University of Michigan's Law School and its College of Literature, Science, and the Arts—policies that include consideration of race and ethnic origin as one of a broad array of factors used in making admission decisions—are constitutional. These policies seek to effectuate the University's well-considered judgment that having a racially and ethnically diverse student body is essential to the fulfillment of its educational mission. The University of Michigan is a political subdivision of the State of Michigan, established as an autonomous entity pursuant to Mich. Const. 1963, art. VIII, § 5. Because Michigan's Constitution and laws jealously guard against any interference with the educational autonomy specially conferred on Michigan's universities, this case is unquestionably of interest to the people of the State of

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support of either party. In accordance with Rule 37(6), Amicus certifies that this brief is a modified and expanded version of a similar brief filed below by then-Attorney General Granholm and her staff; the present version of the brief was authored entirely by Counsel of Record and the Governor's own Legal Counsel and his staff, all of whom are identified on the cover of the brief; and, finally, that no party other than *amicus curiae* has made any monetary contribution to the preparation or submission of this amicus brief.

Michigan and warrants participation by Michigan's Governor as *amicus curiae*.

Moreover, it cannot seriously be disputed that providing an education to their citizens is one of the most important functions performed by the states and their political subdivisions. An additional vital interest of the people of the State of Michigan is the critical importance of protecting state control over education from encroachment by the federal judiciary where that control would disrupt a constitutionally justifiable policy choice. It is this educational autonomy, conferred by both the First Amendment of the United States Constitution and art. VIII, § 5 of Michigan's own Constitution, that the Governor seeks to uphold by filing this amicus brief.

SUMMARY OF ARGUMENT

In the seminal case of *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), this Court concluded that a properly devised university admissions program involving the competitive consideration of race and ethnic origin would not violate the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 320, 328 (opinion of Powell, J., joined by Brennan, White, Marshall, and Blackmun, JJ.) Justice Powell's controlling opinion in *Bakke* examined each of the goals asserted by the university in defense of its use of race in its admissions process and concluded that only one—obtaining the educational benefits that flow from a diverse student body—was constitutionally permissible. *Id.* at 311-312.[2] In so ruling, Justice Powell

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[2] Justice Powell's opinion is controlling with regard to its statements that rely on the First Amendment's protection of academic freedom because it garnered the support of four justices of the Brennan plurality. They noted that California law had vested plenary legislative and administrative power in the University of California's Board of Regents and that nothing in the Equal Protection Clause justified limiting the scope

relied on the Court's long-honored doctrine of "academic freedom," grounded in the First Amendment, and recognized the right of educational institutions to engage in academic decision-making with limited judicial interference based on the unique and vital role they play in a democratic society. *Id.* at 312-313.

In the case now before this Court, the University of Michigan has devised admissions policies that take race and ethnic origin into account as one among many factors it reviews in making admissions decisions. The University has done so based on its considered and eminently reasonable judgment that enrolling a racially diverse student body is essential to its mission of providing a quality education to its students, a judgment that has produced a diverse student body, with an outstanding record of academic achievement, to the great benefit of the people of this state. The Governor is aware that Respondents, as well as a number of distinguished *amici curiae*, will ably address the critical issue of whether, under the Equal Protection Clause, the enrollment of a diverse student body is a "compelling interest" that institutions of higher education may seek to promote by means of an admissions program that considers race as one factor to achieve that result. She further anticipates that Respondents and her fellow *amici* will likewise address extensively the reasons why the University's admissions policies are in fact "narrowly tailored" to meet this compelling interest. Accordingly, the Governor will not repeat those arguments in this brief but rather recommends and supports the able briefing of Respondents and her fellow *amici* to this Court.

This *amicus* brief instead focuses on the federal and state constitutional authority of the University to make such

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of the Regents' power to make academic choices. *Bakke*, 438 U.S. at 366, n. 42 (opinion of Brennan, J.)

academic decisions and urges the Court to pay appropriate deference to those choices. *Amicus* asserts that such deference is warranted both under well-established federal constitutional principles and under the provisions of Michigan's own Constitution.

ARGUMENT

THE UNIVERSITY OF MICHIGAN'S DETERMINATION THAT IT HAS A COMPELLING INTEREST IN ACHIEVING A DIVERSE STUDENT BODY IN ORDER TO ADVANCE ITS EDUCATIONAL MISSION FALLS WITHIN THE INSTITUTIONAL AUTONOMY AFFORDED TO UNIVERSITIES BY THE FIRST AMENDMENT AND BY ART. VIII, § 5 OF THE MICHIGAN CONSTITUTION AND SHOULD, THEREFORE, BE AFFORDED DEFERENCE BY THIS COURT.

"The process of education has naturally enough been the basis of hope for the perdurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards." *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (concurring opinion of Frankfurter, J.) The Supreme Court has consistently sounded the theme that education is of crucial importance to our political system and "fulfills a most fundamental obligation of government to its constituency." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979) (quoting *Foley v. Connelie*, 435 U.S. 291, 297 (1978)). One of the primary purposes of education is to prepare "individuals for participation as citizens." *Id.* (citing *Brown v. Board of Education*, 347 U.S. 483, 493 (1954)). Indeed, of all the functions served by state and local governments, "education is perhaps the most important." *Brown*, 347 U.S. at 493.

From this profound appreciation and respect for education in our democratic system has flowed a natural corollary of

judicial deference to educational decision-making crystallizing in the doctrine of "academic freedom."[3] The foundation for this doctrine was eloquently described by Justice Frankfurter in his concurring opinion in *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957), where he first enumerated the often-quoted "four essential freedoms" of a university:

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, *and who may be admitted to study*. [emphasis added]

In *Sweezy*, the Court was called upon to decide whether the State violated the due process rights of Paul Sweezy, a lecturer at the university, when it jailed him for contempt based upon his refusal, on First Amendment grounds, to cooperate with the State's investigation into subversive activities. Chief Justice Warren, writing for the Court, found that the State had unconstitutionally violated Sweezy's liberties; he specifically cautioned that the areas of political expression and academic freedom are areas in which "government should be extremely reticent to tread." *Id.* at 250. The Chief Justice went on to explain that "[t]he essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth." *Id.* In his concurring

[3] For a thorough discussion on academic freedom, institutional autonomy, and the attainment of a diverse student body, *see* Darlene C. Goring, *Affirmative Action and the First Amendment: The Attainment of a Diverse Student Body is a Permissible Exercise of Institutional Autonomy*, 47 U. Kan. L. Rev. 491 (1999).

opinion, Justice Frankfurter emphasized that a free society depends on free universities, and that this requires "the exclusion of governmental intervention in the intellectual life of a university." *Id.* at 262.

This same point was made by Justice Douglas a few years later in *Griswold v. Connecticut*, 381 U.S. 479, 482-483 (1965), where he explicitly premised protection for academic freedom on the First Amendment:

> In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry, freedom of thought, and freedom to teach . . . *indeed, the freedom of the entire university community* . . . . Without those peripheral rights the specific rights would be less secure. [citations omitted; emphasis added]

The doctrine of academic freedom became even more clearly grounded in the First Amendment in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). In *Keyishian*, the Court struck down a state statute that required faculty members to sign certificates stating that they were not Communists. In balancing the State's interest in assuring its teachers were not "subversives" against the faculty's right to academic freedom, the Court recognized that some areas of society should be free of excessive interference so as to assure they function effectively:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The

> classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, (rather) than through any kind of authoritative selection."

385 U.S. at 603 (citations omitted).

Four years later, in *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971), the Court explicitly recognized that the broad power of educational authorities to formulate educational policy extends even to a determination to achieve a degree of racial balance. Although the particular controversy before the Court concerned a school desegregation controversy and involved primary and secondary schools rather than colleges and universities, Chief Justice Burger, writing for the Court, spoke broadly concerning the authority and discretion of educational authorities. While recognizing that this authority is, of course, subject to constitutional guarantees, the Chief Justice stated that "school authorities have wide discretion in formulating school policy, and . . . as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements." *Id.* at 45.

Against this backdrop, Justice Powell's opinion in *Bakke* is a natural and principled application of the recurring constitutional thread that had been woven since *Brown v. Board of Education*. In ruling that the University of California's goal of attaining a racially diverse student body was constitutionally permissible, Justice Powell carved out a narrow justification for consideration of race in admissions decisions: to ensure a diverse student body. He relied in part on the academic freedom doctrine, noting that this doctrine "long has been viewed as a special concern of the First Amendment." *Bakke*, 438 U.S. at 312 (opinion of Powell, J.) He further relied specifically on the "four essential freedoms"

of a university previously articulated by *Sweezy*, including the freedom "to determine for itself on academic grounds . . . who may be admitted to study" and concluded that "the freedom of a university to make its own judgments as to education includes the selection of its student body." *Id.*

In *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), the Court made clear that academic freedom is a doctrine that applies not only to individuals but to educational institutions as well—and to the University of Michigan in particular. The plaintiff in *Ewing* had been dismissed from the University's accelerated medical school program based on a negative evaluation of his academic credentials; he claimed he had a protected property interest in continued enrollment that was violated by his dismissal. Citing *Bakke, Keyishian, and Sweezy*, the Court declared that, even assuming the existence of the asserted property interest, the Court was reluctant "to trench on the prerogatives of state and local educational institutions" and acknowledged a "responsibility to safeguard their academic freedom" as a special concern of the First Amendment. *Id.* at 226. The Court stressed that "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students but also . . . on autonomous decision-making by the academy itself." *Id.* at 226 n. 12 (citation omitted).[4] Justice Powell's concurring opinion was even

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[4] The Court in *Ewing* cited *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78 (1978), a case in which the Court upheld the university's dismissal of a medical student based on an evaluation showing poor performance. Writing for the Court in *Horowitz*, Justice Rehnquist acknowledged that academic decisions requiring an expert evaluation of cumulative information are "not readily adapted to the procedural tools of judicial or administrative decision-making." *Id.* at 90. Explaining a possible underpinning of the Court's deference to universities, one scholar has noted that the doctrine of institutional

more explicit. He agreed fully with the Court's emphasis on the "respect and deference that courts should accord academic decisions made by the appropriate university authorities" and admonished that judicial review of academic decisions, including admission decisions, "is rarely appropriate." *Id.* at 230 (opinion of Powell, J.)

The doctrine of institutional academic freedom, or "institutional autonomy," embodied in these decisions has been followed in numerous cases decided by the lower federal courts. *See, e.g., Lovelace v. Southeastern Massachusetts University*, 793 F.2d 419, 426 (1st Cir. 1986) (upholding a university's decision not to renew faculty member's contract for his alleged failure to inflate grades and to lower academic standards and emphasizing that a university has a recognized right to govern its institution according to the "four essential freedoms" that supersedes an individual faculty member's right to academic freedom); *Doherty v. Southern College of Optometry*, 862 F.2d 570, 576 (6th Cir. 1988) (affirming the dismissal of a breach of

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academic freedom may have its roots in common law academic abstention:

> The constitutional right of institutional academic freedom appears to be a collateral descendent of the common law notion of academic abstention. This heritage is made explicit in [*Ewing*], where the Court . . . suggests that these views recommend themselves as protection for academic freedom. And the "four freedoms" of *Sweezy* reflect the kinds of university decisions courts have refused to review under common law principles. Institutional academic freedom can be viewed as academic abstention raised to constitutional status . . . .

J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 Yale L. J. 251, 326-27 (1989) (footnotes omitted). Byrne goes on to characterize cases like *Horowitz* as counseling courts to appreciate "that universities proceed on assumptions different from society as a whole and that an insistence by courts on conforming to legal standards or procedures will likely destroy something uniquely valuable in higher education." *Id.* at 326.

contract claim in a disability discrimination case because it arose "in an academic context where judicial intervention in any form should be undertaken only with great reluctance"); *Martin v. Helstad*, 578 F. Supp, 1473, 1482 (W.D. Wis. 1983) ("[a]cademic institutions are accorded great deference in their freedom to determine who may be admitted to study at the institution").

Hopwood v. State of Texas, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996), does not undermine the force of these decisions. In *Hopwood*, the Fifth Circuit ruled that the University of Texas Law School could not use race as a factor in its law school admissions to further its goal of achieving diversity in its student body. The Fifth Circuit explicitly rejected the university's reliance on Justice Powell's opinion in *Bakke*, stating "[it] is not binding precedent on this issue." *Id.* at 944. *Hopwood's* reasoning, however, is flawed and internally inconsistent; this Court should not rely on it for several reasons.

First, and perhaps most significantly, Judge Smith's opinion [5] in *Hopwood* offers so little considered analysis of the university's First Amendment institutional autonomy defense as to have virtually ignored it. In a short footnote, the panel acknowledged that the university's First Amendment right to assemble the student body of its choice was "somewhat troubling." However, the panel simply dismissed that claim, making no attempt to refute it on any legal basis except to distinguish *Sweezy* as involving individual, rather

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[5] Judges Smith and DeMoss joined in the lead opinion; Judge Wiener filed a special concurring opinion in which he disagreed with the panel's conclusion that diversity can never be a compelling governmental interest in a public graduate school. 78 F.3d 932, 962 (opinion of Wiener, J., concurring). He would have assumed without deciding that diversity *is* a compelling state interest and would have proceeded to then address the issue of whether implementation of the university's policy was narrowly tailored to meet its diversity interest.

than institutional, academic rights. 78 F.3d at 943, n. 25. Moreover, in doing so, the panel made no mention of *Ewing* and its explicit statement regarding institutional rights.

Second, the panel inexplicably began its analysis with a statement that, subsequent to *Bakke*, "Supreme Court decisions regarding education state that non-remedial state interests will never justify racial classifications." Yet nowhere in its opinion are any such cases identified or analyzed. Indeed, only cases such as *Adarand Contractors, Inc. v. Pena*, 515 U.S. 200 (1995) and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) are discussed. The panel characterizes these cases as having implicitly "overruled" *Bakke*, despite the panel's own quotation of Justice O'Connor's concurrence in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 286 (1986), in which she noted that a "state interest in the promotion of racial diversity has been found sufficiently 'compelling,' *at least in the context of higher education*, to support the use of racial considerations in furthering that interest." 78 F.3d at 945, n. 27 (emphasis added). Cases such as *Croson* and *Adarand*, which deal with highway construction and government contracting, clearly do not implicate the kind of First Amendment constitutional protections appropriate in the educational context[6] and, accordingly, are of little value to this Court in resolving the issues before it.

In cases such as *Sweezy, Griswold, Keyishian, Bakke*, and *Ewing*, this Court has charted a clear and consistent course of according deference to the academic freedom and autonomy

[6] Judge Wiener's concurring opinion in *Hopwood* identifies this very flaw in the panel's opinion, concluding that "[t]his unique context [constructing an entering class at a public graduate or professional school], first identified by Justice Powell, differs from the employment context, differs from the minority business set aside context, and differs from the redistricting context; it comprises only the public higher education context . . . ." 78 F.3d at 965, n. 21.

of universities. In these and other decisions, the Court has consistently respected and deferred to the specialized judgments made by our educational institutions including judgments concerning the composition of their student bodies. It has repeatedly expressed its view that universities, not courts, are best entrusted with the crucial job of assuring that our Nation's "marketplace of ideas" continues to thrive. The Court should continue to follow that clear course in evaluating the University of Michigan's admissions policy in the instant case. The "essentiality of freedom" in American universities is as self-evident, and as critical, today as it was in 1957 when *Sweezy* was decided. The First Amendment protects the University of Michigan's admissions decision-making process against undue judicial interference and, accordingly, this Court should grant considerable deference to the University's determination that, in fulfilling its educational mission, it has a compelling interest in achieving a diverse student body.

These notions of academic freedom and institutional autonomy are of particular importance in Michigan. Like California,[7] Michigan has devised its system of higher education based on the firm principle that university autonomy best serves the goal of educating its citizens.[8] To that end, Michigan's Constitution confers a unique autonomous status on its public universities and their governing boards. Specifically, art. VIII, § 5 of Michigan's

[7] *See, e.g., Bakke*, 438 U.S. at 366, n. 42 (opinion of Brennan, J.)

[8] In fact, in 1850 Michigan became the first state to enact a constitutional provision mandating the separate governance of its state university, the University of Michigan. Mich. Const. 1850, art. XIII, § 8. *See* Byrne, *supra* note 4, at 327-328.

Constitution vests plenary authority over educational matters in the University of Michigan's Board of Regents, providing that:

> The regents of the University of Michigan and their successors in office shall constitute a body corporate known as the Regents of the University of Michigan . . . . [The] board shall have general supervision of its institution and the control and direction of all expenditures from the institution's funds . . . .

This constitutional mandate of institutional autonomy was no mere accident; to the contrary, it was grounded in experience. Under Michigan's 1835 Constitution, the Legislature controlled and managed the University of Michigan, our State's first public university. *See* Mich. Const. 1935, art. X, § 5. This approach failed, however, and prompted extensive debate about the future of the University during the Constitutional Convention of 1850. *See Federated Publications, Inc. v. Michigan State University Board of Trustees*, 460 Mich. 75, 85, 594 N.W.2d 491, 496 (1999) (citing *Sterling v. Regents of the University of Michigan*, 110 Mich. 369, 374-8, 68 N.W. 253, 255-6 (1896)). What emerged from this debate was a consensus that the Legislature should be divested of its power and that control of the university should instead be placed in an autonomous elected board.[9] Michigan's Supreme Court has described the

[9] As explained by Professor Byrne:

> When Michigan constitutionalized institutional autonomy in 1850, it did so against a history of frustrating failures to establish respectable state universities in America . . . . The legislature was perceived to manage the university for practical, political ends, rather than for long-term scholarly and educational objectives. The solution adopted—the election for eight year terms of officials responsible only for university governance—was an ingenious innovation, accommodating conflicting values and fostering a university known and admired throughout the world.

Byrne, *supra* note 4, at 328-329.

status of the University's governing board under this new system as "the highest form of juristic person known to the law, a constitutional corporation of independent authority, which, within the scope of its functions, is co-ordinate with and equal to that of the legislature." *Board of Regents of the University of Michigan v. Auditor General*, 167 Mich. 444, 450, 132 N.W. 1037, 1040 (1911). Under this new system, led by its independent board of regents, the University thrived. *Sterling*, 110 Mich. at 377, 68 N.W. at 255. The regent system has been in place ever since and the University of Michigan has continued to maintain its position as one of our country's finest educational institutions.

Just recently, in *Federated Publications*, the Michigan Supreme Court forcefully reaffirmed the principle that Michigan's Constitution guarantees the University full autonomy over educational matters. There, the Court held that Michigan's Legislature lacked the power to require the University to comply with Michigan's Open Meetings Act when conducting a search for a new University President finding that such a requirement would infringe upon the University's constitutional autonomy in managing its own affairs. *Federated Publications*, 460 Mich. at 78, 594 N.W.2d at 493. In so ruling, the Court reiterated that "[l]egislative regulation that clearly infringes on the university's educational or financial autonomy must . . . yield to the university's constitutional power." *Id.* at 87, 594 N.W.2d at 497. The Court observed that Michigan's Constitution "grants the [university] governing boards authority over the absolute management of the University" and that the Court has "'jealously guarded' these powers from legislative interference." *Id.* at 87, 594 N.W.2d at 497 (citing *State Board of Agriculture v. Auditor General*, 226 Mich. 417, 424, 197 N.W. 160, 161 (1924) and *Board of Control of Eastern Michigan University v. Labor Mediation Board*, 384 Mich. 561, 565, 184 N.W.2d 921, 922 (1971)). Although universities may be subject to certain general state laws such

as the public employees relations act, even those laws "cannot extend into the university's sphere of educational authority . . . ." *Id.* at 87-88, 594 N.W.2d at 497. The constitutional constraints on legislative authority over the University, the Court noted, extend even to the appropriations process: "although the Legislature may attach conditions to an appropriation, the conditions cannot invade university autonomy." *Id.* at 88, 594 N.W.2d at 497. In short, "[w]ithin the confines of the operation . . . of the University, it is supreme." *Id.* at 87, 594 N.W.2d at 497 (quoting *Regents of the Univ. of Michigan v. Employment Relations Comm.*, 389 Mich. 96, 108, 204 N.W.2d 218, 224 (1973) and *Branum v. Bd. of Regents of the Univ. of Michigan*, 5 Mich. App. 134, 138-9, 145 N.W.2d 860, 862 (1966)).

The unique autonomy of the University under Michigan's Constitution is also a compelling reason why the so-called "percent plans," advocated by some as an alternative mechanism for achieving diversity in university admissions programs, are not viable in Michigan. These plans, variations of which have been attempted in Texas, Florida, and California, generally involve a guarantee that a fixed percentage of the graduating class of each high school in the state will be admitted to the state's university system. Critics of such plans have raised numerous concerns. *See, e.g.*, Catherine L. Horn and Stella M. Flores, *Percent Plans in College Admission: A Comparative Analysis of Three States' Experiences*, The Civil Rights Project, Harvard University (February 2003).[10] While such criticisms are largely beyond the scope of this brief, there is at least one that is of particular concern in Michigan.

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[10] The full text of this study is available via the internet at: http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf

Percent plans typically rely to a significant extent on a statewide university system in order to assure that, if there is not sufficient space in a particular institution for all of the eligible "percent" applicants, the applicant will be able to enroll in another institution in the same statewide system. The constitutional autonomy of the University of Michigan precludes this approach. The University of Michigan, under our Constitution, is independent and does not function as a part of an integrated statewide system. Thus, if the number of guaranteed "percent" applicants exceed the available spaces, there is nowhere else the University is able to guarantee admission. Changing this situation would require a substantial alteration of the State's existing and constitutionally mandated higher education structure. For this reason, the "percent plan" approach simply does not represent a viable mechanism for assuring diversity in admissions at the University of Michigan.

CONCLUSION

Both the First Amendment of the United States Constitution and art. VIII, § 5 of Michigan's Constitution confer upon the University of Michigan the right, as a separate autonomous entity, to make academic choices with only limited judicial scrutiny. Decisions regarding the composition of a university's student body are quintessentially within the sphere of that constitutionally protected autonomy. The importance of preserving that essential freedom cannot be overstated. Because the University's determination that it has a compelling interest in achieving a diverse student body in order to provide the best educational experience for its students falls squarely within the protection afforded by the doctrine of institutional autonomy under both the First Amendment and the Michigan Constitution, this determination should be afforded deference

by this Court. For these reasons, Governor Granholm urges this Court to uphold the constitutionality of the University of Michigan's admissions policies designed to achieve a diverse student body.

Respectfully submitted,

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Nos. 02-241 and 02-516

In The
Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, et al.,

Respondents.

JENNIFER GRATZ AND PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF CARNEGIE MELLON UNIVERSITY AND 37 FELLOW PRIVATE COLLEGES AND UNIVERSITIES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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SAINT LOUIS UNIVERSITY
SYRACUSE UNIVERSITY
THE CATHOLIC UNIVERSITY OF AMERICA
THE GEORGE WASHINGTON UNIVERSITY
THE UNIVERSITY OF NOTRE DAME du LAC
THE UNIVERSITY OF MIAMI
THE UNIVERSITY OF ROCHESTER
THE UNIVERSITY OF SAN FRANCISCO
THE UNIVERSITY OF SCRANTON
VILLANOVA UNIVERSITY
WASHINGTON AND LEE UNIVERSITY
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CASES

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Regents of the University of California v. Bakke, 438 U.S. 265 (1978).....*passim*

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The Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819).....17

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MISCELLANEOUS

Bowen, William G., "Admissions and the Relevance of Race," *Princeton Alumni Weekly* (September 26, 1977)..... 7

Bowen, William G. & Bok, Derek, *The Shape of the River* (1998).....7, 13, 15, 16

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Bowen, William G. & Rudenstine, Neil L., *Race-Sensitive Admissions: Back to Basics* (February 3, 2003) *available at* http://www.mellon.org/publications/Admisions/load.htm 8, 12, 13, 16

Bucks, Brian, *Affirmative Access Versus Affirmative Action: How Have Texas' Race-Blind Policies Affected College Outcomes?* (February 5, 2003) *available at* http://www.utdallas.edu/research/greenctr/Papers/pdfpapers/paper33.pdf 12

Horn, Catherine L. and Flores, Stella M., *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences*, The Civil Rights Project Harvard University (February 2003) *available at* http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf.....11

Kain, John F. & O'Brien, Daniel M., *Hopwood and the Top 10 Percent Law: How They Have Affected the College Enrollment Decisions of Texas High School Graduates* (February 5, 2003) *available at* http://www.utdallas.edu/research/greenctr/Papers/pdfpapers/paper26.html.....12

Kane, Thomas J., "Racial and Ethnic Preferences in College Admissions," in *The Black-White Test Score Gap* (1998).....15

Marin, Patricia and Lee, Edgar K., *Appearance and Reality in The Sunshine State*, The Civil Rights Project Harvard University (February 2003) *available at* http://www.civilrightsproject. harvard.edu/research/affirmativeaction/florida.pdf.....12

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STATEMENT OF INTEREST

Amici Carnegie Mellon University, American University, Belmont University, Boston College, Brandeis University, Bucknell University, California Institute of Technology, Case Western Reserve University, College of the Holy Cross, DePaul University, Dickinson College, Drexel University, Duquesne University of the Holy Spirit, Elizabethtown College, Emory University, Fairleigh Dickinson University, Gettysburg College, Goucher College, Johns Hopkins University, Marquette University, New School University, New York University, Northwestern University, Occidental College, Pepperdine University, Rhode Island School of Design, Saint Louis University, Syracuse University, The Catholic University of America, The George Washington University, The University of Notre Dame du Lac, The University of Miami, The University of Rochester, The University of San Francisco, The University of Scranton, Villanova University, Washington and Lee University, and Washington University in St. Louis submit this brief in support of Respondents.[1] *Amici* respectfully urge the Court to affirm, in accordance with Justice Powell's opinion in *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), that some consideration of race, as one of many factors in the selection of students for admission to a college or university, comports with the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S. § 2000d *et seq.*

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[1] This brief is submitted with the consent of the parties. Pursuant to Rule 37.6, *Amici* affirm that no party or their counsel authored, or paid for, this brief in whole or in part.

Amici are selective private colleges and universities of national and international prominence. As the appended individual statements of interest show, *Amici* differ markedly in their educational missions, philosophies and constituencies. Some offer undergraduate and graduate degrees in a wide range of subjects and professions. Others emphasize highly specialized fields, such as mathematics, the physical sciences, or the arts. Still others pursue spiritual, as well as academic goals.

Amici are united in their pursuit of excellence in education, and believe meaningful diversity among their students, including racial diversity, is essential to that shared commitment. Long before Justice Powell's opinion in *Bakke*, *Amici* sought to achieve racial diversity on their campuses. *Amici* have done so not because they believe students of the same race have the same point of view, but because race is one of many factors that contribute to each student's perspective and enriches interactions among students.

Achieving meaningful diversity is challenging and an undertaking to which *Amici* have devoted, and continue to devote, substantial resources. *Amici* must make difficult choices because they receive many more applications from qualified students than they are able to accept for enrollment. This affords *Amici* the opportunity, and places upon them the responsibility, to consider how the admission of each candidate would enhance the character and quality of their institution. *Amici*, therefore, evaluate every candidate for admission as an individual, taking into account an array of factors that reflects their institution's educational mission. *Amici* have avoided any sort of quota system and do not endorse such a system.

Amici have also learned that admissions decisions based on racially "neutral" factors alone – like socioeconomic status or geographic origin (which *Amici* also take into account) – almost always fail to produce meaningful racial diversity. While public university systems with large enrollments and multiple campuses may be able to achieve some diversity through race "neutral" programs that guarantee admission to large numbers of students, such programs simply will not work for private colleges and universities with limited enrollments, a single campus, and students from around the world.

Amici do not view grade point averages or test scores as the sole measures of a candidate's qualification for admission, but consider many additional attributes to determine the students who best "fit" their institution. While recognizing the importance of grades and test scores, many *Amici* have declined admission to high school valedictorians and students with perfect SAT scores when other candidates had stronger qualifications for admission measured more broadly. *Amici* also believe the challenges of racial diversity are best met directly and openly through some consideration of race in evaluating individual candidates for admission, and they fail to see how it is preferable to use race "neutral" proxies to try to achieve what is unquestionably a "racial" goal.

For *Amici*, the essential question is whether our nation desires significant inclusion of African Americans, Latinos and Native Americans in selective colleges and universities. If so, *Amici* respectfully submit this compelling goal cannot be achieved without some consideration of race in the selection of students for admission.

ARGUMENT

A. The Court Should Reaffirm Justice Powell's Opinion In *Bakke* That Diversity, Including Racial Diversity, Serves Compelling Interests In Excellence, Leadership, And Experimentation In Higher Education

Justice Powell eloquently explained in *Bakke* why "[t]he attainment of a diverse student body," including a racially diverse student body, "is a *constitutionally permissible* goal for an institution of higher education." *Bakke*, 438 U.S. at 311-12 (emphasis added).

First, "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment" and embraces "'the four essential freedoms' of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Id.* at 312 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J. concurring)). As Justice Powell observed, a "robust exchange of ideas" is of "transcendent value to us all," and an institution seeking the right to select "those students who will contribute the most" to such an exchange must be viewed as "seeking to achieve a goal that is of paramount importance in the fulfillment of its mission." *Id.* at 313.

Second, "[t]he atmosphere of 'speculation, experimentation and creation' – so essential to the quality of higher education – is widely believed to be promoted by a diverse student body." *Id.* at 312. Indeed, "[f]ew students and no one who has practiced law would choose to study in an academic vacuum removed from the interplay of ideas and

the exchange of views with which the law is concerned." *Id.* at 314.

Third, graduates should be equipped "to render with understanding their vital service to humanity." *Id.* Further, "it is not too much to say that the 'nation's future depends upon leaders trained through exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Id.* at 313 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

Since *Bakke*, the Court has never wavered in its recognition of the unique role higher education serves in our society. In *Metro Broadcasting*, Justice Brennan, speaking for the Court, reiterated that "'a diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 568 (1990) (quoting *Bakke*, 438 U.S. at 311-12), *overruled on other grounds, Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Similarly, in *Wygant*, Justice O'Connor stated in concurrence, "although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (O'Connor, J., concurring).

For the 25 years since *Bakke*, diversity within a student body, including racial diversity, has been widely acknowledged as a compelling goal for higher education. The regulations implementing Title VI, for example, follow *Bakke* and expressly provide that when an institution's

programs and services are "not in fact equally available to some racial or nationality groups," the institution "may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups." 34 C.F.R § 100.5(i). "For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide such group with more adequate service." *Id.* Title VI funding has opened the door to higher education for many qualified students, and *Amici* have relied on its regulatory framework and funding to ensure their campuses are open to qualified students of diverse races and backgrounds.

In the cases now before the Court, there is no credible dispute as to the truths spoken by Justice Powell in *Bakke* – that a racially diverse student body serves and enriches the higher education of *all* students and is essential to the training of leaders for our pluralistic world. Indeed, the evidence that meaningful interaction among students of different racial backgrounds improves the quality of education for all students is extensive and unchallenged. *Grutter v. Bollinger*, 288 F.3d 732, 759-769 (6th Cir. 2002) (Clay, J., concurring). As former Princeton University President, William G. Bowen, has observed:

> [A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a variety of interests, talents and perspectives; and who are able directly, or indirectly, to learn from their differences and to stimulate one another to reexamine their most deeply and widely held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, 'People do not learn very much when surrounded only by the likes of themselves.'

William G. Bowen, "Admissions and the Relevance of Race," *Princeton Alumni Weekly* 7, 9 (September 26, 1977).

The *amicus* briefs filed in support of petitioners thus acknowledge the importance of ensuring that educational institutions "are open and accessible to a broad and diverse array of individuals, including individuals of all races and ethnicities" and of "[m]easures that ensure diversity, accessibility and opportunity." United States Brf. in *Grutter*, at 9-10. Florida confirms that "because of its ethnically and racially diverse population, Florida has an interest in promoting diversity in higher education." Florida Brf., at 1.

If, as acknowledged by petitioners and their *amici*, the "central purpose" of the Equal Protection Clause is to "create a Nation of equal citizens . . . where race is irrelevant to personal opportunity and achievement" [United States Brf. in *Grutter*, at 13 (citing *Wygant*, 476 U.S. at 277, and *Palmore v. Sidoti*, 466 U.S. 429, 432 (1986)], it is unimaginable that this clause precludes colleges and universities from fostering the same goal when composing a learning environment for all students. Equal opportunity for citizens of all races does not require indifference to race; instead, it requires appreciation and mutual respect that can only be achieved through productive and robust interaction. *See* William G. Bowen & Derek Bok, *The Shape of the River*, at 7 (1998) ("Enrich[ing] the education of all . . . students by including race as another element in

assembling a diverse student body of varying talents, backgrounds, and perspectives" is a goal shared by institutions of higher learning, business, and government alike, in part because of our Nation's increasingly heterogeneous society.)

Diversity on campus, moreover, assures *Amici's* responsiveness to their communities. Without exception, *Amici* have learned that their students and supporters *expect* the enriched and robust academic exchange that can be achieved only on a campus of diverse students. *See* William G. Bowen & Neil L. Rudenstine, *Race-Sensitive Admissions: Back to Basics*, at 2-3 (February 3, 2003) *available at* http://www.mellon.org/publications/Admissions/load.htm (explaining that survey responses from more than 90,000 alumni of selective institutions show "nearly 80 percent of those enrolled in 1976 and 1989 felt their alma mater placed the right amount of emphasis – or not enough – on diversity in the admissions process").

Amici do *not* include race as part of their quest for diversity because they believe each member of a racial minority has the same point of view. To the contrary, *Amici* recognize race as one of the innumerable factors that ineluctably affect and mold a student's perspective and individuality. In honoring Justice Thurgood Marshall, Justice O'Connor observed that he brought to the Court "a special perspective" because he was intimately familiar with the plight of those who regularly encountered racial discrimination. Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 Stan. L. Rev. 1217, 1217 (1992). No one would suggest Justice Marshall brought a pre-ordained "African American" perspective to the Court – there is no such thing. Rather, he brought his own

perspective that was necessarily shaped in some measure by his race. Thus, racial diversity is not meant to bring, and does not bring, a "racial" perspective to higher education. It *does* ensure, however, the wide array of students needed to fulfill higher education's promise of "speculation, experimentation and creation." *Bakke*, 438 U.S. at 312.

B. The Court Should Reaffirm Justice Powell's Opinion In *Bakke* That Race May Be Considered, As One Of Many Factors, In A Narrowly Tailored Effort To Achieve Meaningful Diversity In Higher Education

In considering whether a race-sensitive measure is "narrowly tailored" to achieve a compelling interest, the courts must determine (1) whether that interest can be achieved through race-neutral alternatives and (2) the harm imposed by the measure. *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 510 (1989). Petitioners and their *amici* argue even limited consideration of race when reviewing candidates for admission is never appropriate because race-neutral means to achieve meaningful diversity are always available. To that end, petitioners and their *amici* point to guaranteed admissions programs used by some large public universities and to supposedly race-neutral criteria they claim could be used to enroll a diverse student body.

Whether or not these race-neutral strategies work for large public university systems, they could *not* work for selective private colleges and universities. The limited size of private colleges and universities makes any guaranteed admissions program unworkable, much less the programs adopted by California, Texas, and Florida, which guarantee

admission to the top four, 10 and 20 percent of graduating seniors within their states, respectively. Those public university systems each enroll over 100,000 students at multiple campuses. Even if every graduating high school senior eligible under those state programs elected to enroll, these massive university systems could accommodate them. California Institute of Technology, however, enrolls only 942 undergraduate students at a single campus. Even the largest *Amicus* could not accommodate a fraction of the candidates who would be eligible for guaranteed admission based on class rank.

Nor were *Amici* established to serve only local residents or other limited pools of candidates. The California, Texas and Florida public university systems serve their respective taxpayers and thus confine their guaranteed admissions to high schools within their state. But *Amici* recruit nationally and internationally. Thus, they cannot limit the pool of high schools that offer candidates for admission.

Guaranteed admissions would also destroy one of the most important contributions *Amici* make to our system of higher education – their individuality and uniqueness of academic mission. The optimal mix of students differs from school to school. A small liberal arts college may seek a different assortment of students than a flagship state university. A college that focuses on the performing or fine arts may place a premium on applicants' musical or artistic interest and ability. A college that emphasizes agricultural studies may recruit candidates with farming or ranching backgrounds. A sectarian institution may consider demonstrated religious conviction as important

as grades and test scores. Thus, not only does their size preclude the use of admission programs based on class rank, but *Amici* have no desire to guarantee admission to *any* subset of candidates identified by a simple litmus test.

Moreover, to a large degree, the touted success of the "race-neutral" admissions programs offered by California, Texas and Florida university systems is illusory. Those programs fail to achieve the fundamental goal of diversity in education – to enrich the education of *all* students by exposing them to an array of experiences, perspectives, and social interactions, including some related to race. For example, the United States asserts that the California, Texas and Florida "percent" programs enhance diversity within their university "systems." United States Brf. in *Grutter,* at 17-21. But a state "system" of public universities (*e.g.*, 33 campuses in two California systems, 27 campuses in three Texas systems, and 11 public universities in Florida) is *not* a proper benchmark for diversity. Students at one campus in a state "system" have no greater exposure to students at another campus in the same "system," than they have to students at any other distant campus. Only diversity on a *campus* matters.

Yet, in California, Texas and Florida, diversity has *decreased* at their most selective, and prominent, campuses. *See* Catherine L. Horn and Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences*, The Civil Rights Project Harvard University, at 58 (February 2003) *available at* http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf ("The percent plans seem to have the least impact on the most competitive campuses, which have persisting losses in spite of many levels of efforts to

make up for affirmative action."); Brian Bucks, *Affirmative Access Versus Affirmative Action: How Have Texas' Race-Blind Policies Affected College Outcomes?* at 6 (February 5, 2003) *available at* http://www.utdallas.edu/research/greenctr/Papers/pdfpapers/paper33.pdf (showing that under Texas' program, the number of African American students attending the state's flagship schools has fallen roughly 45 percent and the number of Hispanic students has fallen roughly 30 percent); Patricia Marin and Edgar K. Lee, *Appearance and Reality in The Sunshine State*, The Civil Rights Project Harvard University, at 36 (February 2003) *available at* http://www.civilrightsproject.harvard.edu/research/affirmativeaction/florida.pdf ("Even a brief discussion of the policies and practices on the state's two most selective campuses reveals a strikingly different picture than that portrayed by state leaders. There is simply no evidence that the Talented 20 program had any significant impact in dealing with the termination of affirmative action in admissions on these campuses.").

Further, the California, Texas, and Florida admissions programs are not, in fact, "race neutral." Those programs depend entirely upon continued segregation among the states' high schools. *See* John F. Kain & Daniel M. O'Brien, *Hopwood and the Top 10 Percent Law: How They Have Affected the College Enrollment Decisions of Texas High School Graduates*, at 30-31 (February 5, 2003) *available at* http://www.utdallas.edu/research/greenctr/Papers/pdfpapers/paper26.html ("[A]nother disturbing feature of [Texas'] top 10 Percent Law is its dependence on school and residential segregation to achieve the goal of increasing the representation of disadvantaged minorities at the state's selective public universities."); *Race-Sensitive Admissions: Back to Basics*, at 13-15 ("[D]o we really want to endorse an

admissions approach that depends on de facto segregation at the secondary-school level?").

Nor are admissions programs that focus solely on grades and class rank educationally sound. Such programs cut across a state's graduating high school class with the refinement of a meat ax: they exclude well qualified minority students who attended competitive secondary schools, while including lesser qualified minority students from lower performing schools. They may also reward students for taking "easy" classes or remaining at inferior high schools to maintain high grade point averages, while punishing students who accept the challenge of advanced classes or highly competitive schools.

In contrast to rote, guaranteed admissions programs, selective colleges and universities evaluate individuals, rather than statistics. The "best" grades do not necessarily mean the "best" qualified for admission to a college or university. While high school academic success is an important factor, *Amici* look at considerably more – like the applicant's curriculum, writing skills, extra-curricular activities, artistic talents, athletic ability and leadership skills – to decide which students best "fit" their mission and philosophy. *Race-Sensitive Admissions: Back to Basics*, at 4-5, 8-9; *The Shape of the River*, at 24-25 ("[O]ne often hears that students with top scores and the highest grades should be admitted "on the merits," as if these measures were the sole legitimate basis for admission and that other considerations were somehow insubstantial or even morally suspect. This is patently false. Deciding which students have the most 'merit' depends on what one is trying to achieve.").

Amici also cannot ignore the racially disparate impact of other factors commonly considered in admissions decisions. The College Board, which administers the SAT's, publishes data on its website demonstrating that, among college-bound seniors taking the tests in 2002, the differences between the mean scores for "White" students and for African-American students were 97 points for Verbal and 106 points for Math, out of a maximum of 800 points on each test. http://www.collegeboard.com/prod_downloads/about/news_info/cbsenior/yr2002/pdf/threeC.pdf. Two percent of the African American students taking the test last year scored above 650 in either Verbal or Math, while the comparable figures for White students were 12 percent and 15 percent, respectively. *Id.* Similar, if somewhat less dramatic, disparities in test scores also hamper Native American and Hispanic students. *Id.* High school grades, another seemingly race-neutral factor, also can disadvantage qualified minority applicants. According to the College Board, African Americans, Latinos and Native Americans, apply to college with notably lower grade point averages than do non-minority students. *See* http://www.collegeboard.com/press/releases_main.

Amici are acutely aware that such allegedly race-neutral factors tend to skew admissions against meaningful diversity, and thus are unanimous in considering race as one positive factor, among many factors, in admissions decisions. Through years of admitting minority students based on their overall qualifications, and not solely their grades and test scores, *Amici* have proven that these students prosper in, and make unique contributions to, higher education.

Some have suggested *Amici* could use proxies for race, like low income or social disadvantage, to enhance minority enrollment on their campuses. But *Amici* already consider, and give appropriate weight to, such factors. Moreover, income is simply a poor proxy for race. In a study of 1992 high school graduates, the Brookings Institution found that, among high school graduates with family incomes below $20,000 and test scores in the top 10 percent, only one in six was African American. Thomas J. Kane, "Racial and Ethnic Preferences in College Admissions," in *The Black-White Test Score Gap,* at 431, 450 (Christopher Jencks and Meredith Phillips eds., 1998). Thus, as Bowen and Bok observe, the "substitution of a class-based system would drastically reduce the quality of the eligible pool of Black and Hispanic applicants, seriously impeding the goal of preparing the ablest minority leaders for society and the professions." *The Shape of the River*, at 51.

Because "race neutral" admissions plans cannot achieve the compelling need for diversity in higher education, the Court must consider whether *Amici's* limited consideration of race, as one of many factors, in selecting students for admission imposes "*disproportionate* harm on the interests, or *unnecessarily* trammel[s] the rights, of innocent individuals directly and adversely affected by [such] racial preference." *Wygant*, 476 U.S. at 287 (emphasis added) (O'Connor, J., concurring). Here, the relevant inquiry is *not* whether an applicant would have been admitted had he or she been a member of an underrepresented minority, but whether he or she would have been admitted had race not been considered at all. Viewed in this light, *Amici's* admissions programs plainly withstand strict scrutiny since they have a negligible impact on

other students' chances of admission. *The Shape of the River,* at 9 (finding limited consideration of race at a subset of selective colleges and universities reduced majority applicants' prospects for admittance from 26.2 to 25 percent); *Race-Sensitive Admissions: Back to Basics,* at 9-11.

Finally, if a diverse student body is a compelling goal in higher education – as most agree – *Amici* believe it far better to pursue diversity directly and honestly, rather than by proxy. "Surely the best way to achieve racial diversity is to acknowledge candidly that minority status is one among many factors that can be considered in an admissions process designed to judge individuals on a case-by-case basis." *Race-Sensitive Admissions: Back to Basics*, at 16.

C. The Court Should Preserve Academic Freedom And The Spirit Of Experimentation Vital To Higher Education By Preserving The Ability Of Colleges And Universities To Consider Race As One Of Many Factors When Selecting Students For Admission

Our colleges and universities, like our Nation as a whole, continue to struggle with the legacy of racism and bigotry. If higher education is to contribute to the understanding and eradication of that legacy, it must explore it and challenge it – not merely as a historical artifact, but as a dynamic characteristic of contemporary society. Like the search for excellence in education itself, which admits no single path or model, the pursuit of diversity and understanding in higher education should be left to colleges and universities that "perform their role as laboratories for experimentation to devise various solutions where

the best solution is far from clear." *United States v. Lopez,* 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

Amici, as private, not public, institutions of higher education, have a special role in this quest. As Chief Justice Marshall observed nearly two hundred years ago in *The Trustees of Dartmouth College v. Woodward,* 17 U.S. 518, 634 (1819), private colleges and universities benefit our Nation by charting their academic missions free of political pressures and exigencies. "The eleemosynary institutions do not fill the place which would otherwise be occupied by government, but that which would otherwise remain vacant. . . . It is probable that no man ever was, and that no man ever will be, the founder of a college, . . . believing that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the legislature." *Id.* at 647.

Our private colleges and universities have long made beneficial use of their academic freedom to foster and achieve meaningful diversity. In fact, many *Amici* were founded in response to the bigotries of the day and to embark on the quest for equality to which they remain committed today. For example:

- Dickinson College was founded in 1783 by Dr. Benjamin Rush, a signer of the Declaration of Independence and one of the country's earliest proponents of student diversity. A staunch abolitionist who helped establish the first African-American church in Philadelphia, Dr. Rush encouraged students to study modern languages and foreign cultures.

- Gettysburg College was founded in 1832 by abolitionist Samuel S. Schmucker under the name Pennsylvania College. Another well-known abolitionist, Thaddeus Stevens, author of the Fourteenth Amendment, provided the College's original six acres.

- Brandeis University was founded in 1948 by the American Jewish Community in part to respond to quotas limiting the access of Jews to higher education.

Thus, *Amici* are progenitors of and heirs to our Nation's commitment to openness and inclusion. *Amici* continue to invest themselves in this undertaking, taking the time and committing the resources to consider many factors, including race, in deciding who they will admit to their institutions. As a result, they have fostered innovation, leadership, and academic excellence, while infusing our national commitment to higher education with the vibrancy of their own diversity.

CONCLUSION

Amici do not suggest every college or university must consider race in the same way, or even at all, when selecting students for admission. They do suggest, however, that selective private colleges and universities cannot achieve meaningful diversity on their campuses without continuing to have that academic tool at their disposal. Whatever the Court may believe might work in large public university systems, *Amici's* circumstances are significantly different. *Amici* respectfully ask the Court to allow them

to continue to steer the course of the river shaped by *Bakke* for the good of their students, their respective institutions, and our Nation.

Respectfully submitted,

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APPENDIX: INDIVIDUAL STATEMENTS OF INTEREST OF *AMICUS CURIAE*

CARNEGIE MELLON UNIVERSITY

Carnegie Mellon University is a national research university of approximately 8500 students and 3000 faculty, research and administrative staff. Based in Pittsburgh, Pennsylvania, Carnegie Mellon comprises seven colleges and schools, including the Carnegie Institute of Technology (the college of engineering), the College of Fine Arts, the College of Humanities and Social Sciences, the Mellon College of Science, the Graduate School of Industrial Administration, the School of Computer Science, and the H. John Heinz III School of Public Policy and Management. Especially in technology, business, public policy and the arts, Carnegie Mellon University is among our nation's leading institutions of higher learning.

Under the leadership of its President, Jared L. Cohon, Carnegie Mellon University has made diversity, and the vitality it brings to the university and its students, one of its top strategic priorities. Dr. Cohon explained, in his 1999 Statement on Diversity, that:

> Diverse perspectives and backgrounds breed the intellectual vitality essential for the health and progress of the university. Indeed, Carnegie Mellon has earned a reputation for interdisciplinary collaboration which has spawned important innovations in research, education and institutional structure. It seems obvious that the people collected at any moment in time will necessarily shape the nature and the outcome of those collaborations and those people are influenced not only by their intelligence and creativity but also by their backgrounds.

> Simply put, becoming more diverse will make Carnegie Mellon and the work it does better. Certainly, our students will be better-educated for having learned and lived in a multicultural community. Our research and service will be different – and some of it better in its transfer to and impact on society – as a result of the multiple perspectives brought to us by diversity. And, I believe, we can be a more effective organization when diversity is an attribute of our trustees, administration and staff.

http://www.cmu.edu/president/diversity.html. In 1999, moreover, the University established its Diversity Advisory Council to identify initiatives, build awareness of diversity issues and support for the university's initiatives, and monitor progress. The Council, chaired by Dr. Cohon, includes students, faculty, staff, administrators, trustees, alumni and leaders of the Pittsburgh community, and it annually reports on the state of diversity at the University.

Along with a doubling in its applications for admission over the past decade, and increased selectivity in admissions, Carnegie Mellon has endeavored, and will continue to endeavor, to create an inclusive campus that fosters excellence in education and research, and that enriches its students, faculty, and staff. In this pursuit, the University strives to assure every individual the opportunity to reach her or his potential, to feel a sense of belonging, and to make contributions that are valued and respected.

Carnegie Mellon has greatly increased its diversity, yet its strives for more. In keeping with this goal, Carnegie Mellon considers race, as one of many factors, in its selection of qualified students for admission. In the fall of 2002, minority representation in the university's freshman

class was 12 percent, up from 9 percent the year before. Equally important, minority students enrolled at Carnegie Mellon have generally succeeded at levels comparable to non-minority students. In fact, the attrition rate for the freshman class of 2001 was lower for minority students – less than 2 percent – than for any other group.

Carnegie Mellon University respectfully urges the Court to reaffirm its authority to consider race as one factor in its decisions on admissions, which has allowed it to seek meaningful diversity among the talented students it enrolls each year and, thereby, to enhance its excellence in education, research and service to our nation.

AMERICAN UNIVERSITY

American University was chartered by an Act of Congress in 1893 and founded under the auspices of The United Methodist Church. It has a long and distinctive tradition of affirming the values of human rights and dignity, social justice, individual freedom, and diversity. It is one of the most diverse universities in the country, with students from all 50 states and more than 160 countries. The success of its educational enterprise rests upon a unique blend of academic programs with ideas and perspectives provided by people from very diverse backgrounds. This diversity is integral to the unique identity and offerings of the University.

As "a private university with a public responsibility," the University is committed to preparing leaders who are broadly educated, spiritually deep, passionately engaged, and capable of translating in a complex environment the lasting values that are the hallmarks of a humane and civilized world. As a global university, American University

actively promotes international understanding. This is reflected in the make-up of its student body and faculty, the international scope of its programs in dozens of countries, its curriculum, the research of its faculty, assistance to governments and societies throughout the world, and the regular presence of world leaders on campus.

American University believes that a key ingredient in accomplishing its obligations to prepare global citizens and leaders is to ensure the direct engagement of its students with diverse peoples, cultures, ideas, and traditions. This rich diversity of educational experience is assured by allowing, among other factors, the consideration of race in evaluating an applicant for admission to the University. The resulting diversity enhances the academic inquiry and discourse that enlivens and sustains the special character of the American University experience, providing our students with a deeper understanding of an equally diverse world.

BELMONT UNIVERSITY

Belmont University, located in Nashville, Tennessee, is a comprehensive teaching university bringing together the best of liberal arts and professional education in a Christian community of learning and service. Belmont offers undergraduate degrees in 57 major areas of study and graduate degrees in nine disciplines. The university's mission is to be a student-centered Christian community providing an academically challenging education that enables men and women of diverse backgrounds to engage and transform the world with disciplined intelligence, compassion, courage and faith. As a Baptist-affiliated institution in the South, Belmont feels a special responsibility to

carry out this mission by pursuing programs of recruitment and enrollment that insure the student body is as ethnically and racially diverse as possible. The University believes it cannot effectively fulfill its commitment to be a Christian community of learning and service without affirmative efforts to reflect the diversity of humanity on its campus.

BOSTON COLLEGE

Boston College was founded by the Jesuits in 1863 to serve the sons of Boston's Irish immigrants. Today, as a national Catholic university with 12 undergraduate and graduate schools and colleges, and a multitude of research institutes, Boston College serves the sons and daughters from the United States and 102 nations. Through more than 13 decades of growth and change, the University has held fast to the ideals of its founders to serve as an engine of opportunity for an increasingly diverse population with new resources marshaled to challenge students to become good citizens of the world – by putting knowledge into action for future generations.

The transformational mission of teaching and research is, at its core, dependent upon harnessing the contributions of students: rich and poor; majority and minority; immigrant, international, and native born. To continue to evolve and serve changing future populations, colleges must be able to pursue their unique missions without impediments to be effective within a diverse system of higher education. Boston College, must be accorded the autonomy to seek and enroll students who will benefit from this University's advanced and innovative education programs.

The opponents of some current college enrollment policies for building student diversity seem to conceive of college admission as a "winner-take-all competition" in which students with the highest test scores should gain admission to a specific college of their own choosing. These views reflect a fundamental misunderstanding of our educational mission and admission practices. Being required to admit students by a formula, either by test scores or by a percentage plan, would diminish our accumulated expertise and wisdom for making sound educational decisions. Because Boston College is a Catholic university with an explicitly defined service mission, we are in a very strong position to claim the latitude as educational experts and practitioners to pursue a diverse student body on our campus to achieve worthwhile formative and societal goals.

At Boston College, as at most colleges and universities, applicants are assessed individually by an admission committee based upon a number of dimensions. Boston College does not consider race in isolation nor admit students based upon race exclusively. Race should not be singled out as a factor that may not be considered in admission assessments, while geographic location, individual artistic, and other personal characteristics are allowed. Boston College's record of consistently high graduation rates across all student segments is the strongest empirical evidence that our admission practices work to ensure student success, and thereby efficiently produce citizen-leader alumni/ae with the skills to contribute to the nation's interests and aspirations.

Boston College has served well waves of immigrant populations in the Boston area, and will develop emerging talent in this country and internationally to educate

accomplished leaders and professionals. As a Jesuit and Catholic university, we hope to retain admission practices that value the whole person, and that are supported by management tools to validate fairness and effectiveness. Given our historical mission, we seek a close connection with societal needs. Always looking to the future, we also seek to chart a strategic direction for continued excellence and service to others.

Our mission would be materially undermined if Boston College were not able to consider all individual and cultural aspects in assessing potential for students to enter our specialized academic programs. Not considering race, ethnicity, or nationality as part of an individual's credentials and personal biography, would be, in our best judgment, inherently unfair, and result in a less dynamic educational environment by limiting admission assessments of the achievements and academic potential of applicants.

BRANDEIS UNIVERSITY

Brandeis University was founded in 1948 by the American Jewish community as a private, coeducational and nonsectarian institution of higher learning and research. While Brandeis maintains a special relationship with the Jewish community, it is not affiliated with any religious organization and offers no theological instruction. From the first, the University has welcomed students and faculty of all backgrounds and beliefs in fulfillment of a mission that emphasizes academic excellence, the creation and transmission of new knowledge, open and vigorous intellectual inquiry, a commitment to social justice and diversity broadly defined. Brandeis strives to reflect the

heterogeneity of the United States and of the world community in which its graduates will spend the remainder of their lives.

Named for one of America's most distinguished jurists, Brandeis University is passionate about the importance of a broad and critical liberal arts education in enriching the lives of students and preparing them for the fullest possible participation in a changing society. In identifying students for admission, the University seeks to build a select community of men and women who, in its judgment, can best contribute to and benefit from the educational environment and opportunities Brandeis offers. Factors considered for admission, in addition to specific quantifiable measures, include the breadth and rigor of a student's high school program; extra-curricular and co-curricular interests and activities; special talents; evidence of leadership; geography, including country of origin in the case of international students; gender and race, among others.

Diversity in the student body as well as the faculty is judged inseparable from the University's commitment to academic excellence and the creation of a campus community in which vigorous intellectual debate and the free exchange of ideas are paramount values. The quality of academic debate and the exchange of ideas and alternative points of view are directly influenced by the various perspectives and worldviews of the participants. Race, gender, socio-economic status, ethnicity, religion and a variety of life experiences provide a lens through which individuals view ideas, the world and their place in it. To deprive institutions of higher education of the ability to consider students for admission, not on the basis of fixed numerical quotas or rigid guidelines, but on the basis of subjective judgments involving the many factors and

personal characteristics that directly contribute to the academic experience, including such factors as race and gender, would lessen the ability of America's institutions of higher education, both public and private, to provide the rich educational environment that is the envy of the world.

CALIFORNIA INSTITUTE OF TECHNOLOGY

The California Institute of Technology (Caltech) is one of the world's major research centers with an outstanding faculty, including four Nobel Laureates. Caltech conducts instruction in science and engineering for a student body of approximately 900 undergraduates and 1000 graduate students who maintain a high level of scholarship and intellectual achievement. Caltech's mission is to expand human knowledge and benefit society through research integrated with education. Caltech scientists investigate the most challenging, fundamental problems in science and technology in a singularly collegial, interdisciplinary atmosphere, while educating outstanding students.

Although Caltech is known for its quantifiable qualities such as a freshman class with the highest average SAT scores in the Nation, it is the unquantifiable parts of Caltech's culture that contribute greatly to another Caltech goal – helping students develop a realistic view of their future roles as creative members of society. Students at Caltech are encouraged to collaborate with one another in all aspects of their studies in order to foster the collegial and cooperative relationships that stimulate intellectual growth and thought. Diversity enhances this experience since each individual's ideas and viewpoints are influenced by their own life experiences. Caltech feels strongly that a diverse student body enriches the learning environment

for all students. Without a diverse student body, our students will be deprived of the opportunity to broaden their own perspectives by interacting with students whose backgrounds differ from their own, thus placing them at a disadvantage as they make their way in the world. If Caltech was prevented from considering factors such as race, gender, socio-economic status, and life experiences as part of the many factors to be considered in admissions, Caltech will also be prevented from providing the robust educational environment necessary to achieve the highest quality education.

DICKINSON COLLEGE

One of the original 16 colonial colleges, Dickinson College, located in Carlisle, Pennsylvania, is a residential liberal arts college offering undergraduate programs in 39 major fields to young men and women from across the country and around the world. Academic home to 2200 students from 43 states and 23 foreign countries, Dickinson is widely regarded as a highly selective institution of national renown.

According to the Charter of 1783, Dickinson College was founded to empower young people with liberal learning, virtuous principles and preparation for important offices in society so that they might be informed, responsible and active citizens. Dickinson's founder, signer of the Declaration of Independence, Dr. Benjamin Rush, was one of the country's earliest proponents of the need to expose students to diverse populations. A staunch abolitionist who helped establish the first African-American church in Philadelphia, Rush also encouraged students to study modern languages and foreign cultures. Generations of

Dickinsonians have reaffirmed this vision which continues to guide us in the complex world of the 21st century.

Dickinson is, above all, dedicated to giving its students an education that prepares them to become the leaders of a global society that is increasingly diverse and challenging. Through its academic program and student life initiatives, the College strives to create a culture of commitment among its students that is characterized by civility and respect for oneself and others, and that affirms the diversity of persons, ideas and circumstances. Dickinson firmly believes that differing opinions, beliefs, customs and cultures are powerful teachers and that exposing oneself to the unfamiliar encourages one to think, learn, grow and discover. Dickinson's commitment to prepare its graduates to successfully confront the challenges and opportunities of a diverse world is, above all, dependent upon the College's ability to attract a student body that mirrors both national and global diversity. It is imperative, therefore, that Dickinson continue to recruit a diverse student population, including diversity based upon race. While racial diversity is but one of many factors considered in the admissions process, it is an indispensable component of a vibrant and challenging campus community.

Attracting and retaining a student population that is rich in diversity, including racial diversity, has led to the development of unique intellectual and residential programs that are designed to promote greater interaction and understanding among students from diverse backgrounds. These programs include:

- Through the American Mosaic Project, students from a wide range of disciplines engage in a semester of fieldwork immersion in a multicultural community.

Within the past five years, students have focused on the African-American community in Steelton, Pennsylvania and the community of migrant workers in nearby Adams County. Recently, Dickinson added an international component to the Mosaic as faculty and students engaged in a month of archival and oral history collection in Patagonia.

- Funding from the William and Flora Hewlett Foundation has made it possible for Dickinson to create "clusters" of its Freshman Seminar program that directly focus on multicultural and diversity issues. Students from a wide range of backgrounds and academic interests are brought together to encourage vibrant and thought-provoking discussion. The seminars have helped to forge unity and acceptance among students from a variety of backgrounds at the beginning of their collegiate careers. This approach is only possible because the College is able to enroll students from a wide range of racial, ethnic and cultural backgrounds.

- Dickinson is also the recipient of a three-year grant from The Henry Luce Foundation to establish a program in Diaspora and community studies. This project gives students the opportunity to explore the movement of cultures and populations over time, thus integrating two major areas of scholarly concern – global education and the study of America.

- In partnership with Spelman College in Atlanta and Xavier University in New Orleans, the "Crossing Borders" program allows students from the three institutions to study in three locations over the span of one academic year. "Crossing Borders" students begin their yearlong study with a six-week summer program at Dickinson's study center in Cameroon, West Africa. During the fall semester,

the students attend classes at Dickinson and in the spring, Spelman and Xavier students return to their home institutions while Dickinson students attend one of those universities. Through this dynamic experience, students are challenged to make connections between the different cultures and engage in honest and open discussions about cultural identity and diversity.

- Dickinson is also a participant in the "Posse" program. This national program recruits academically qualified students from urban public high schools to attend colleges and universities as a group or "posse." Attending as a "team" allows students to support each other as they adjust to life outside of the city. A recent article in the local borough newspaper praised Dickinson's involvement in the Posse Program indicating that efforts to increase an appreciation of diversity on campus are having an impact on the broader community as well.

- Under the auspices of the Office of Multicultural Affairs, a team of six undergraduate students provides the campus community with opportunities to broaden their views of the world through diversity education, programming, community outreach and leadership development.

Dickinson's commitment to "engage the world" and to ensure that its students receive every opportunity to understand, appreciate and accept the diversity of our society is integrated into every aspect of our academic and residential life programs. The design and success of these efforts are dependent upon the College's ability to enroll a student body that is as ethnically, culturally and racially diverse as the broader society in which we live.

DREXEL UNIVERSITY

Drexel University was founded upon the principle of diversity as an educational goal, and it remains committed to that principle today. In 1892, noted financier, philanthropist, and advisor to U.S. Presidents, Anthony J. Drexel created the **Drexel Institute Art, Science and Industry** to provide *higher education to men and women of the working class* – people who were not welcome in the colleges and universities of that day. A.J. Drexel envisioned a learning environment in which young men and women, on an equal basis, would learn skills and acquire knowledge in subjects that would prepare them for rewarding careers. Engineering and technology was then, and remains today, one of the best routes to economic security. **Woman's Medical College of Pennsylvania**, now Drexel University College of Medicine, was created in 1848 by prominent leaders of the medical profession to allow *women to learn the healing arts* at a time when it was unacceptable for women to have lives outside the home. The graduates of "Woman's Med" have practiced medicine in poor and underserved communities for more than 150 years; those women doctors were pioneers in bringing preventive medicine, and medical research, to the benefit of others around the globe.

Today, Drexel University educates its students through experiential learning, combining service with technology, and helps prepare them for leadership roles not only in their chosen professions, but also in their communities. It is very much a part of our educational mission to expose our students to differences in race, gender and class, to help them learn to appreciate what difference offers, and to teach them to recognize and overcome bias, prejudice and discrimination, so that they

may understand that our diversity creates our richness and strength as a nation and as a people. Drexel's cooperative education program encourages students to learn how to work together by placing them in real business settings – communities that, by their nature and as a result of the globalization of commerce and industry, are increasingly diverse. Drexel's curriculum requires that every first-year student participate in the Anti-Defamation League's nationally-renowned "A World of Difference" program as well as perform public service in the Philadelphia public schools, which today primarily serve non-affluent, non-white students. Drexel is also a campus affiliate chapter of the National Coalition Institute, an internationally-recognized consortium that is dedicated to eliminating the mistreatment of people due to differences of any kind.

By participating in these programs and by requiring our students to have these experiences, we teach them the true meaning of citizenship – civic engagement and respect for the individual. But that is simply not enough. We know that the best, most durable education comes from the students themselves. These critically important lessons demand that our students reflect the diversity of the communities in which they will live and work. By creating a diverse student body, we have not compromised academic standards in the slightest – indeed, the average SAT scores of our students have climbed steadily over the past seven years as we have added new programs focused on encouraging minority students to attend and succeed. We have embraced diversity because we know that there is no other way to ensure that our students are properly prepared for a diverse world when they leave academia. Race must be a factor in that education. There is simply no

other way to strengthen our nation. For that reason, we will continue to honor our Founders' visions and create a purposefully diverse student community as an essential part of our educational mission.

DUQUESNE UNIVERSITY OF THE HOLY SPIRIT

Duquesne University of the Holy Spirit, located in Pittsburgh, Pennsylvania, is a Catholic University founded by the Congregation of the Holy Spirit in 1878. Duquesne offers programs in 10 schools, including Business, Liberal Arts, Leadership, Natural and Environmental Sciences, Law, Education, Health Sciences, Pharmacy, Nursing and Music, and has a current enrollment at nearly 10,000 students. The University's mission is to serve God by serving students through commitment to excellence in education, through profound concern for moral and spiritual values, and through the maintenance of an ecumenical atmosphere open to diversity. Duquesne University of the Holy Spirit believes it cannot effectively fulfill this mission without affirmative efforts to cultivate diversity on its campus.

EMORY UNIVERSITY

Emory University is a leading national research university known for its outstanding undergraduate college of arts and sciences, its graduate and professional schools, its demanding academics, and its state-of-the-art research facilities. Emory is a member of the Association of American Universities. Founded by the Methodist Church in 1836, Emory has long been one of the most ethnically and religiously diverse university communities in the United States.

The University awards approximately 3,200 degrees annually and its academic standards are among the nation's highest, as is the caliber of its 11,600 students, including 6,300 undergraduates and 5,300 graduate and professional students, and 2,686 faculty members. Nine out of 10 first-year students are among the top 10 percent of their high school class.

In our admissions and hiring, Emory is committed to diversity and welcomes students, faculty, and staff who are diverse in many ways including ethnicity, race, gender, religion, geography, philosophy, sexual orientation, and physical ability. At the same time, we are unified in our goal of achieving academic excellence and preparing students for life and work in a global society. We strive to offer multicultural education in the curriculum, instruction, and services provided to our students.

Currently, the University attracts students from every state and more than 75 other countries. Approximately 30 percent of our undergraduates are non-Caucasian. The diversity at Emory consistently stimulates and improves the intellectual life on our campus. Maintaining this diversity is critical to the education of our students and their preparation for becoming productive and effective members in our increasingly diverse society.

GETTYSBURG COLLEGE

Gettysburg College is committed to diversity as a core principle. We welcome and respect racial, ethnic and cultural differences. This core principle is deeply rooted in the history of our country and the College, which was founded in 1832 by abolitionist Samuel S. Schmucker under the name Pennsylvania College. Another well-known

abolitionist, College Trustee Thaddeus Stevens, author of the 14th amendment, provided the College's original six acres.

Gettysburg's commitment to diversity comes from all sectors – trustees, administrators, faculty, alumni, parents and students. Gettysburg College affirms its commitment to diversity among faculty, students and staff in order to enrich the educational experience for all and to help prepare our students to become good citizens in our pluralistic society. We hope that the decision by the Court will not make it more difficult for institutions of higher learning to recruit a more diverse student population. Without the ability to consider race as one of many factors that qualify our students for admission, this commitment to diversity cannot realistically be realized under today's social conditions.

GOUCHER COLLEGE

Since its founding in 1885 as the Woman's College of Baltimore, Goucher College has been firmly committed to excellence in liberal arts and sciences education. Goucher was among the first in the nation to introduce independent study, field work, early admissions, accelerated college programs and individualized majors. The College was also one of the first liberal arts institutions in the mid-Atlantic region to abandon old-fashioned quotas that tended to exclude and discriminate against people on the basis of race or ethnicity. Goucher is now a co-educational, residential liberal arts college offering undergraduate majors in 18 departments and five interdisciplinary areas, as well as several graduate programs, to students from across the country and around the world.

A key element of Goucher's educational mission is to help each student develop an appreciation for individual and cultural diversity, a sense of social responsibility and a system of personal and professional ethics. We are committed to the development and education of students who are able to contribute to, participate in and learn from the increasing and diverse cultural groups both on the college campus and in a demographically changing society. One priority of the recently-adopted strategic plan for the College is to support increased diversity on campus and continue to develop an atmosphere of inclusiveness, mutual respect, and acknowledgment that the discussion and critical evaluation of every point of view is crucial to the development of a balanced understanding of the challenges we face and the inquires we undertake. To this end, Goucher is currently striving to increase the diversity of its students, faculty and staff.

Goucher joins this brief because of our strong commitment to diversity among all members of the campus community. We believe that commitment cannot be realized under the restrictions on admission criteria and assessment proposed by the plaintiffs. Our mission will be compromised, and our goals unattained, if we are denied the ability to consider all factors, including race, in the process of evaluating candidates for admission.

NEW SCHOOL UNIVERSITY

New School University was founded in 1919 in Greenwich Village in New York City. Today the University is a thriving, urban university with eight schools, some 7,547 students pursuing undergraduate and graduate degrees in the liberal and performing arts, including the

social and political sciences, public policy, classical and jazz and contemporary music, fine and applied art and design, drama, creative writing and media studies. In addition, over 26,000 adult education continuing and non-credit students enroll every year. Located in the intellectual and cultural heart of New York City, New School seeks to provide its students with the capacity, passion and will to make the world a better place. Among its eight schools and colleges may be found three world-class art schools: Parsons School of Design, Mannes College of Music and Actors Studio Drama School. The University's colleges for liberal arts and humanities instruction include the Graduate Faculty, where the famous "University in Exile" provided a haven for European scholars fleeing totalitarianism in the 1930's, the Eugene Lang College and the founding school for adults, The New School. Finally, the Jazz & Contemporary Music Program and Milano Graduate School of Urban Management complete the University's eight divisions.

Diversity continues to have a profound impact on the history and development of New School University. According to recent census data, New York City has become the world's most diverse city and the institution's history reflects the belief that intellectual, cultural and constituent diversity are vital to a life-changing education for students, 24% of whom are students of color and additional 20% of whom are foreign nationals from 95 different countries. As these numbers suggest, New School University recruits students and faculty worldwide.

Achieving an environment where intellectual, cultural and constituent diversity thrive requires more than a numerical evaluation of student backgrounds and prior achievement. New School University is committed to an

admissions process that considers the unique experience of each applicant and examines whether both the university community at large and the student can benefit from that student's admission. New School's mission is to offer an education to women and men from all walks of life and all parts of the globe who want to pursue learning in free and creative association unconstrained by conventional boundaries, for their own self-improvement, the advancement of their professions, and the improvement of the city and world in which they live. In our view, "a university is not a machine for achieving a particular purpose or producing a particular result; it is a manner of human activity."[1]

New School University joins the brief because the admission process advocated by the plaintiffs in these cases is antithetical to what this University views as its mission and to its very vision of what a "University" should be. This is separate and distinct from its view that as a matter of law and public policy, the principles of the Bakke case should be reaffirmed herein.

NORTHWESTERN UNIVERSITY

Established in 1851, Northwestern University today is one of the country's leading private research universities,

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[1] Michael Oakeshott, "The Idea of a University," (1950) in *The Voice of Liberal Learning*, ed. Timothy Fuller (Yale University Press, 1989). "There is plenty that might properly be criticized in our universities but to quarrel with them because they are not clear what their 'function' is to make a mistake about their character. A university is not a machine for achieving a particular purpose or producing a particular result; it is a manner of human activity." p. 96

with an annual budget of more than $1 billion. Approximately 15,800 full-time and part-time students are enrolled in the University's 11 colleges and schools, which are located on campuses in Evanston and Chicago, Illinois.

Northwestern's undergraduate student body is among the country's best by almost any measure. The class entering in the fall of 2001 includes residents of all 50 states and 32 foreign countries; 83% of these students graduated in the top 10 percent of their high school classes. At Northwestern, we believe that the excellence of a university is directly proportional to the quality of its intellectual community. People from similar backgrounds can and do learn from each other. However, new approaches to knowledge are most likely to be discovered when scholars from a wide variety of backgrounds are brought together to interact with and challenge one another. In a community like ours, social diversity is a mainspring of intellectual and creative progress and contributes directly to academic excellence.

Such diversity is an important component in the education of our students. As we prepare students to assume leadership positions in our highly diverse, multicultural society, it is essential that they enjoy the opportunity to interact with and learn from other students whose backgrounds and perspectives differ from their own. From such interaction comes a broadening of understanding that will equip them, intellectually and otherwise, to function effectively in our democratic society.

In order to foster that interaction, we have designed our undergraduate, graduate and professional admissions programs to take race into account as one of many considerations in our evaluations of individuals who apply

to become students at Northwestern. No one factor is determinative, and in executing their responsibilities our admission staffs evaluate applicants' overall capacity to learn and contribute as individuals to the life of the University. We explicitly enjoin the admissions staffs not to use quotas.

Northwestern continues to believe strongly that diversity enhances the educational program and mission of the University. We believe further that the pursuit of diversity among students, faculty, and staff is related to our institutional mandate to achieve the highest order of excellence in the work of the University. Finally, our commitment to diversity is grounded in our commitment to do the right thing. We have a responsibility to extend the benefit of a Northwestern education to highly-talented young men and women from all segments of our society.

OCCIDENTAL COLLEGE

Occidental College is a nationally ranked, residential liberal arts college of 1,800 students at the forefront of interdisciplinary, intercultural education. Founded in Los Angeles in 1887, it is one of the oldest colleges in California and one of the few leading liberal arts colleges located in a major city. Its students, drawn from across the country and around the world, have won two Rhodes Scholarships and scores of other prestigious fellowships and awards over the past decade. Occidental has one of the most diverse student bodies in the country and is regarded as a national leader in the creation of what the New York Times calls "culturally competent graduates."

Diversity – whether geographic or religious, socioeconomic or cultural, ethnic or political – has always been

a fundamental part of a liberal arts education. Exposure to other ideas, to other experiences, to other ways of thinking or of seeing the world, being forced to confront your assumptions and defend your own point of view – all this is a fundamental part of an Occidental education. Our experience tallies with the results of national surveys, including one conducted by the Foundation for Academic Standards & Tradition, that have found that students prefer diverse campuses. Occidental's diversity is an important factor in our ability to attract top students, and in placing our graduates in rewarding careers. Executives from dozens of blue-chip U.S. companies agree with Don Cornwell, CEO of Granite Broadcasting Corp., member of the Business-Higher Education Forum, and a 1969 Occidental graduate: "Our audience is growing more diverse, so the communities we serve benefit if our employees are racially and ethnically diverse." In short, Occidental agrees with President Bush's view that "our institutions of higher education should reflect our diversity . . . [and that] university officials have the responsibility and the obligation to make a serious, effective effort to reach out to students from all walks of life."

Like many liberal arts colleges, Occidental takes a holistic approach to admitting students, considering a wide variety of factors: standardized test scores, prior academic record, strength of the students' high school curriculum, writing samples, letters of recommendation, extracurricular activities, and special talents. Geography, gender, and ethnicity are also among the many factors considered. Test scores alone are not sufficient to assess a student's artistic, musical, or athletic abilities, nor do they measure a student's ability to succeed despite difficult personal circumstances or the challenges of being the first

person in their family to attend college. Some critics appear to equate diversity with a lowering of standards. Occidental's experience belies this view. Applications to the college have risen 138 percent over the past five years; only 43 percent of applicants were admitted last year. SAT scores have risen steadily, averaging 1300 for students admitted to the Class of 2006. Yet Occidental was ranked third nationally in diversity among liberal arts colleges in U.S. News and World Report's 2003 rankings.

Occidental joins in this brief because limiting its assessment of applicants to a narrowly defined set of test scores and grades would severely compromise its ability to pursue its unique mission and provide the best possible education for its students.

RHODE ISLAND SCHOOL OF DESIGN

Since its founding in 1877, Rhode Island School of Design (RISD) has earned a worldwide reputation as the preeminent college of art and design in the country. Today, the college enrolls approximately 1,900 undergraduate and 300 graduate students from across the United States and more than 50 countries, offering degree programs in the fine arts, architecture and design disciplines, and art education. Its more than 16,000 alumni include sculptor, performance artist, and MacArthur "genius grant" winner Janine Antoni; musician and filmmaker David Byrne; New Yorker cartoonist Roz Chast; glass artist Dale Chihuly; Tim Hunter, the designer of the flame cauldron for the Salt Lake City Olympic Games; fashion designer Nicole Miller; painter (and actor) Martin Mull; Nike shoe designer Jane Pallera; author and illustrator Chris Van Allsburg, a two-time winner of the Caldecott Award for

children's literature; Oscar-nominated filmmaker Gus Van Sant; and silhouette artist and MacArthur "genius grant" winner Kara Walker. Its current faculty include architect, author, and illustrator David Macaulay, also a winner of the Caldecott Award; and Friedrich St. Florian, the designer and architect of the National World War II Memorial.

Philosophically, one of RISD's most fundamental tenets is that artists must think globally and help to shape the world in which we live. The arts are the only truly universal language, and it often has been artists who, through that language, have built the first bridges of understanding between different nations, different cultures, different beliefs. RISD, therefore, seeks to teach its students not only the technical skills, but also the perspectives, that will enable them to fulfill that important responsibility.

To accomplish that goal, RISD must have flexibility to bring together a diverse group of students whose backgrounds, interests, and experiences can inform, inspire, and even provoke each other's work. While RISD does consider prior academic record and standardized test scores – and while it is highly selective in that regard, admitting only about one-third of its undergraduate applicants and one-fourth of its graduate applicants each year – those measures simply cannot capture, by themselves, the essence of what makes a successful art and design student, let alone a successful artist or designer. Instead, RISD necessarily follows a highly individualized review process of the type endorsed by Justice Powell in *Bakke*, taking into account an almost open-ended set of unweighted factors when it shapes each class in accordance with its mission. Those factors include (but are

neither limited to, nor dominated by) race and ethnicity, because, in RISD's view, an understanding of culture – both one's own and that of others – is the basis for the creation of culture.

Simply put, higher education is not a "reward" or "entitlement" for those students who performed the "best" in their prior academic work, and colleges and universities should not be viewed as merely passive recipients of those students, with no further interest in who they are once they arrive or after they graduate. The strength of the American system of higher education is that each institution has the freedom, and the responsibility, to adopt and actively pursue its own unique mission – to seek to change the world in some way by seeking to educate and change a few of its inhabitants. An institution cannot effectively create its desired "outputs," however, if it cannot control its "inputs." RISD joins in this brief, because an admissions program of the kind advocated by the plaintiffs in these cases, relying largely on traditional academic measures and limiting its discretion to shape its classes, would seriously compromise RISD's, and every institution's, ability to pursue its core mission.

SAINT LOUIS UNIVERSITY

Saint Louis University is a Jesuit, Catholic university ranked among the top research institutions in the nation. The University's mission is the pursuit of truth for the greater glory of God and for the service of humanity. Founded in 1818, it is the oldest university west of the Mississippi River and the second oldest Jesuit University in the United States. The University fosters the intellectual and character development of more than 11,000

students on campuses in St. Louis and Madrid, Spain. In 1944, Saint Louis University was the first university in Missouri, and the first institution of higher learning in one of the 15 former slave states, to admit African-American students. Among the University's many points of pride is its ranking as one of the country's top 50 universities in the awarding of doctoral degrees to African-American students.

As a Jesuit, Catholic university, Saint Louis University has a special commitment to ensuring that it provides opportunities for all students; and the University works diligently to recruit a racially and ethnically diverse student body. To achieve this, the University has instituted innovative programs, including a transitional program in the School of Medicine, to assist minority students in developing the knowledge and skills requisite to the achievement of a post-graduate degree. Saint Louis University's commitment to social justice and racial diversity is best achieved, we believe, by placing admission emphasis on achievement and recommendation, rather than standardized tests alone. The University also believes Justice Powell's opinion in *Bakke* is a sound decision that allows Saint Louis University and other institutions of higher learning the freedom to institute programs and policies that attract and admit a diverse student body at the undergraduate and graduate levels, and permits this University to pursue its ultimate goal of producing men and women, of all races and ethnic backgrounds, that make a difference in their communities and their world.

THE UNIVERSITY OF NOTRE DAME DU LAC

The University of Notre Dame, located outside South Bend, IN, is a highly selective, private, Catholic university founded in 1842 by the Congregation of Holy Cross. Though its 11,000 students are predominantly Catholic, the University is committed to racial, ethnic and socio-economic diversity.

Four out of five undergraduates live on campus, and the residential character of the University is one of its distinctions. Since there are no fraternities or sororities at Notre Dame, social life is centered on a student's residence hall, in which usually he or she lives for all four years. Students come to Notre Dame to learn not only how to think but also how to live, and often the experiences alumni carry from residence hall communities remain vivid over a lifetime.

In its mission statement published each year in the student handbook, Notre Dame asserts that "the University seeks to cultivate in its students not only an appreciation for the great achievements of human beings but also a disciplined sensibility to the poverty, injustice and oppression that burden the lives of so many." In its quest each year to admit an entering class from 60 nations, all 50 states, and a full-range of backgrounds, Notre Dame considers race as one of many factors in its admissions decisions. The University strives to prepare its students for a multi-cultural society in which they might prosper, spiritually and materially, and do good for mankind.

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In the
Supreme Court of the United States

Barbara Grutter,
Petitioner,

v.

Lee Bollinger, et al.,
Respondents.

and

Jennifer Gratz and
Patrick Hamacher,
Petitioners,

v.

Lee Bollinger, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL COALITION OF BLACKS FOR REPARATIONS IN AMERICA (N'COBRA) AND THE NATIONAL CONFERENCE OF BLACK LAWYERS (NCBL) IN SUPPORT OF RESPONDENTS

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Jordan J. Paust, *Race-Based Affirmative Action and International Law*, 18 Mich. J. Int'l L. 659 (1997) 22

William Shakespeare, Julius Caesar, Act 3, Scene 2 13

William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* (1977) 16

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INTERESTS OF AMICI CURIAE IN SUPPORT OF RESPONDENT

Amicus National Coalition of Blacks for Reparations in America (N'COBRA) was founded in 1987 to work with individuals and other organizations to obtain reparations for the crimes against humanity known as chattel slavery and *de jure* and *de facto* racial discrimination.

Amicus National Conference of Black Lawyers (NCBL) was founded in 1968, with the mission of serving as the legal arm of the movement for Black liberation, protecting human rights, achieving self-determination of Africa and African communities and working in coalition to assist in ending oppression of all peoples.[1]

SUMMARY OF ARGUMENT

Affirmative action in education is supported by Respondents on two grounds: remedial action for past and present discrimination and promotion of campus diversity. This brief focuses exclusively on the first proposition, and recasts it in the language of reparations: affirmative action in education is justified as reparations for the crimes of slavery and *de jure* racial discrimination. Such reparations are not only permissible under the Equal Protection Clause of the Fourteenth Amendment, but may well be required in order to fulfill its mission.

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[1] This brief is submitted with the consent of the parties, as lodged with the Clerk per the Docket Sheets. Pursuant to Rule 37.6, counsel represent that this brief was not authored in whole or in part by counsel for any party. All expenses of amici have been borne by their own resources, without support from any party. Counsel have served *pro bono publico*.

The Fourteenth Amendment is not a purely 'color blind' enactment, but is a necessary legal tool for equality in the aftermath of chattel slavery. Use of the Fourteenth Amendment to strike down reparations for African Americans is strikingly inapposite to its purpose, language and intent.

Strict scrutiny is not required in the cases before the Court today. Suspect racial classification is not required under a remedial affirmative action analysis, since the recipients are identified on the basis of a common injury rather than race. If the injured persons are in fact identified racially, that identification was made by the oppressors rather than the oppressed. Consequently, a less stringent level of review is appropriate here.

The remedial use of affirmative action is entirely consistent with Equal Protection, as demonstrated in the obligations of the United States under the *Convention on the Elimination of All Forms of Racial Discrimination*.

The Michigan affirmative action educational programs before the Court today should be upheld as reparations to African Americans. If remand is necessary, lower courts should be instructed to uphold the programs to the extent they satisfy this compelling state interest.

ARGUMENT

THE FOURTEENTH AMENDMENT SUPPORTS AFFIRMATIVE ACTION IN EDUCATION AS REPARATIONS FOR THE CRIMES OF SLAVERY AND *DE JURE* RACIAL DISCRIMINATION

I. AFFIRMATIVE ACTION IN EDUCATION DESIGNED AS REPARATIONS FOR THE CRIMES OF SLAVERY AND *DE JURE* RACIAL DISCRIMINATION IS NOT PROHIBITED BY THE FOURTEENTH AMENDMENT

Throughout most of its history, the United States has been an exceedingly hostile place for Africans and their descendants.[2] Slavery, genocide and *de jure* racial discrimination are now recognized as either crimes against humanity or contrary to international law under treaties ratified by the United States. See *International Convention on the Elimination of All Forms of Racial Discrimination*, Dec. 21, 1965 (adopted by General Assembly), K.A.V. 2307, 5 I.L.M 352 (1966), 660 U.N.T.S. 195, 216-218, art. 1, ¶ 4, art. 2, ¶ 2 (requiring remedial affirmative action until the effects of racial discrimination are overcome) *ratification in* 140 Cong. Rec. 14,326 (1994); *Convention on the Prevention and Punishment of the Crime of Genocide*, Dec. 9, 1948 (adoption by General Assembly), K.A.V. 2303, 78 U.N.T.S. 277, 278-280, art. I ("genocide...is a crime under international law"); *Additional Article to the Treaty for the Suppression of the African Slave Trade*, Feb. 17, 1863 (signed), U.S.-G.B., T.S. 127, 18 Stat. (2) 345; *Treaty*

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[2] Other minority groups were targets of hostility and discrimination as well. See, *e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 244-245 (Stevens, dissenting opinion) (discussing discrimination against Japanese-Americans and Native Americans).

between United States and Great Britain for the Suppression of the Slave Trade, Apr. 7, 1862 (signed), U.S.-G.B., T.S. 126, 13 Stat. 645; *Treaty of Peace and Amity between His Britannic Majesty and the United States of America (The Treaty of Ghent)*, Dec. 24, 1814 (signed), U.S.–G.B., T.S. 109, 8 Stat. 218, art. 10, ("the Traffic in Slaves is irreconcilable with the principles of humanity and Justice").

In the light of such history, affirmative action may certainly be used as a remedy:

> "The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part and concurring in the judgment).

In *United States v. Paradise*, 480 U.S. 149 (1987), at least eight[3] Justices agreed that remedial affirmative action was not prohibited by the Constitution. *United States v. Paradise*, 480 U.S., at 167 ("The Government unquestionably has a compelling interest in remedying past and present discrimination by a state actor") (Brennan, J., plurality opinion); *Id.*, at 187 (the remedy "was narrowly drawn to achieve the goal of remedying the proven and continuing discrimination") (Powell, J., concurring opinion); *Id.*, at 194-195 ("The relief [here] ... must unavoidably consider race... [Courts] may, and in some cases must,

[3] The position of Justice White on this particular issue in *Paradise* is not clear, *United States v. Paradise*, 480 U.S., at 196 (White, J., dissenting), but in *United States v. Fordice*, 505 U.S. 717 (1992), he supported additional remedial measures by Mississippi's college and university system in light of past discrimination.

resort to race-conscious remedies to vindicate federal constitutional guarantees") (Stevens, J., concurring in the judgment); *Id.*, at 196 ("the Federal Government has a compelling interest in remedying past and present discrimination") (O'Connor, J., dissenting opinion). As recently as *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), at least seven of the nine Justices confirmed the continued vitality of remedial affirmative action. See *Adarand*, 515 U.S., at 2113-2114 (O'Connor, J.), at 2120 (Stevens, J., dissenting), at 2133 (Souter, J., dissenting), at 2135-36 (Ginsburg, J., dissenting).

For most of this Court, then, the question turns on the particulars -- the design and implementation of remedial affirmative action, and the appropriate standards of review.

II. THE CIVIL WAR AMENDMENTS WERE ADOPTED IN PART AS A REMEDY FOR THE CRIMES OF SLAVERY AND DO NOT REQUIRE 'COLOR BLIND' JURISPRUDENCE

A. THE HISTORICAL CONTEXT OF REPARATIONS FOR THE CRIMES OF SLAVERY

Congress embodied a variety of motivations in passing the Civil War Amendments. See *Brown v. Board of Education*, 347 U.S. 483, 489 (1954) ("The most avid proponents ... undoubtedly intended them to remove all legal distinctions... Their opponents, just as certainly were antagonistic to both the letter and the spirit"). Economic reparations for formerly enslaved Africans were discussed, but "a strong consensus developed among moderates and conservatives favoring equal protection of the law for all men." Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 Harv. C.R.-C.L. L. Rev. 1, 12 (1995).

Some federal attempts were made to provide economic reparation to formerly enslaved Africans. On January 16, 1865, General Sherman issued Field Order 15 that provided, among other things, up to forty acres of "tillable ground" to "respectable negroes, heads of families." Commission for Positive Education, *The Forty Acres Documents: What Did the United States Really Promise the People Freed From Slavery?* 52 (1994). However, consistent with the perspective that Congress preferred viewing the passage of the Civil War Amendments as reparations for the previously enslaved Africans and their descendants, in the Freedmen's Bureau Acts Congress provided land for a price to "loyal refugees" and thus the land was no longer free. 13 Stat. 507, 508-509 (1865). The Second Freedmen's Bureau Act revoked General Sherman's grant of up to forty acres and required validation of claims in order to purchase up to twenty acres of land. 14 Stat. 173, 175-176 (1866).

In the 1890s, the Ex-Slave Mutual Relief, Bounty and & Pension Association was formed. Under the leadership of Callie House and Rev. Isaiah Dickerson , this organization rallied the support of approximately 600,000 "ex-slaves" and their descendants to lobby Congress for the passage of legislation such as Senate Bill 4718, that called for a pension for "ex-slaves" and their descendants.[4] This effort was unsuccessful, as were attempts to obtain material reparations through litigation in the early 1900s[5] and in 1995. See *Cato v. United States*, 70 F.3d 1103 (9th Cir. 1995).

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[4] S.B. 4718, 55th Cong. (1898); see also Linda Allen Eustace & Imari A. Obadele, *Eight Women Leaders of the Reparations Movement USA* 6-8 (2000).

[5] Eustace & Obadele, *Eight Women Leaders.*, at 9.

The century following the Civil War is known as "Jim Crow." During Jim Crow, African Americans were excluded by government action from full participation in the social, political and economic institutions of the United States. C. Vann Woodward, *The Strange Career of Jim Crow* (1955). The cruel legacies of Jim Crow in education are very clear at the University of Michigan as well as throughout the United States. This historical record compels the demand for reparations, continued today by N'COBRA and NCBL, as well as other groups. Adjoa A. Aiyetoro, *The National Coalition of Blacks for Reparations in America: Its Creation and Contribution to the Reparations Movement, in* Should America Pay?: Slavery and the Raging Debate Over Reparations 209-210 (Ray Winbush, ed. 2003).

Education is a significant issue within the reparations movement for African Americans in the United States. Some legislative bodies have passed reparations legislation that focuses on the importance of education, recognizing that education is a major arena of discrimination, and therefore a focus of remedy.[6] Affirmative action in education is securely founded on principles of redress and reparation.

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[6] Adjoa A. Aiyetoro, *The National Coalition of Blacks for Reparations in America (N'COBRA): Its Creation and Contributions to the Reparations Movement, in* Should America Pay?: Slavery and the Raging Debate on Reparations 217 (Raymond A. Winbush, ed. 2003) (The Detroit City Council unanimously approved a resolution introduced by Councilman Clyde Cleveland to establish a $40 billion education fund for descendants of enslaved Africans); see also Kenneth B. Nunn, *Rosewood, in* When Sorry Isn't Enough 435-436 (Roy L. Brooks, ed. 1999) (Florida legislature passed Rosewood Compensation Act for the destruction of this African American community by white violence. The Act included the establishment of a scholarship fund for "minority persons with preference given to the direct descendants of the Rosewood families").

B. WHITE SUPREMACY UNDER 'COLOR BLIND' JURISPRUDENCE

For a fleeting moment immediately following the Civil War, the prospects for formerly enslaved Africans and other persons of color appeared bright. The Thirteenth Amendment abolished chattel slavery in all its forms. The Fourteenth Amendment transformed formerly enslaved Africans into citizens, and guaranteed due process and equal protection. The Fifteenth Amendment then extended the voting franchise to African American men. Large numbers voted in subsequent elections, and many held elective office in state governments and Congress. John Hope Franklin & Alfred A. Moss, Jr., *From Slavery To Freedom: A History of African Americans* 238-246 (7th ed. 1994).

The mood of tolerance and reparation for the devastation of slavery did not long endure. Before the adoption of the Fourteenth Amendment in 1866, several States created 'Black Codes' to perpetuate and enforce white supremacy, "to keep the colored race in a condition, practically, of servitude." *Civil Rights Cases*, 109 U.S. 3, 43 (1883) (Harlan, J., dissenting opinion). The Fourteenth Amendment was designed "[t]o meet this new peril to the black race, that the purposes of the nation might not be doubted or defeated." *Civil Rights Cases*, 109 U.S., at 43 (Harlan, J., dissenting opinion). As white supremacy became more entrenched, African Americans were disenfranchised economically and politically. See, *e.g.*, *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (Rehnquist, J.) ("the Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks...to establish white supremacy"); Leon F. Litwack, *Trouble In Mind: Black Southerners In the Age of Jim Crow* (1998). Nor were the efforts to maintain white supremacy limited to the turn of the last century. In

Louisiana v. United States, 380 U.S. 145 (1965), Justice Black described the continuing ingenuity of the State of Louisiana in denying the voting franchise to African American citizens. The process began when the Louisiana Constitution of 1898 implemented a 'grandfather clause,' *Louisiana v. United States*, 380 U.S., at 147-148, and continued in an unbroken string of devious innovation into the 1950's, when a "legislative committee to preserve white supremacy" was activated. *Id.*, at 149. Finally, in 1965, this Court found Louisiana's voting practices to violate the Fifteenth Amendment. *Louisiana v. United States*, 380 U.S., at 153.

White supremacy as an official ideology could not have survived a robust interpretation of the Civil War Amendments in favor of African Americans. The Court eventually agreed with this interpretation nearly a century later. See *Jones v. Mayer Co.*, 392 U.S. 409 (1968); *Loving v. Virginia*, 388 U.S. 1 (1967); *United States v. Mississippi*, 380 U.S. 128 (1965); *Louisiana v. United States*, 380 U.S. 145 (1965); *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241 (1964); *Brown v. Board of Education*, 347 U.S. 483 (1954). In the intervening nine or ten decades, the Civil War Amendments suffered retrenchment to the detriment of African Americans, supporting the myth of white supremacy and African American inferiority. White supremacy flourished under the banners of states' rights, limitations on federal power, narrow readings of the Constitutional text, and 'color blind' jurisprudence.

In *United States v. Cruikshank*, 92 U.S. 542 (1875), the Court dismissed indictments brought under the Enforcement Act of 1870, 16 Stat. 140. With gruesome facts, the defendants had been found guilty in the Circuit Court for the District of Louisiana of depriving Constitutional and other rights due to "citizens of the United

States, of African descent and persons of color." *United States v. Cruikshank*, 92 U.S., at 548. In a federalism discourse on the near-exclusive authority of states to define and protect the lives of citizens found therein, Chief Justice Waite shortened the reach of the Fourteenth Amendment, *Id.*, at 554-555, and dismissed the indictments. *Id.*, at 556-57, 559.

In *The Civil Rights Cases*, 109 U.S. 3 (1883), the Court found unconstitutional provisions of the Civil Rights Act of 1875, which prohibited racial discrimination in certain public accommodations. 18 Stat. 335. The Court found that these forms of discrimination were not "badges or incidents of slavery" prohibited under the Thirteenth Amendment and required a showing of state action before proceeding under the Fourteenth Amendment. *The Civil Rights Cases*, 109 U.S., at 24-26. Absent the requisite discriminatory state action, the statute was ruled unconstitutional in the sense that the Constitution did not authorize Congress to exercise power to regulate these forms of discrimination. *Ibid.* Eighty-one years later, Congress revisited the issue with the Civil Rights Act of 1964, upheld by the Court reading the identical texts of the Constitution. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (applying a commerce clause analysis).

In a group of cases decided in a single Term, the Court employed its 'color blind' jurisprudence while ignoring the racially disparate effects, examining state laws which excluded African Americans from juries. Each case involved appeals of African Americans accused of murdering whites. *Strauder v. West Virginia*, 100 U.S. 303 (1878); *Virginia v. Rives*, 100 U.S. 313 (1879); see also *Ex Parte State of Virginia*, 100 U.S. 339 (1878). The Court allowed facially 'color blind' statutes to stand, while striking down blunter attempts to keep African Americans out of jury

pools. In *Strauder v. West Virginia*, 100 U.S., at 310, a state law clearly excluding African Americans from jury pools was found to have violated the Equal Protection Clause of the Fourteenth Amendment. However in *Virginia v. Rives*, 100 U.S., at 321-323, a more sophisticated, facially 'color blind' Virginia juror selection system was upheld, even though it had the effect of excluding all African Americans. The drafting lesson was not lost on the States, which soon designed 'color blind' statutes with clear discriminatory intent and effect. Just such a juror qualification law was upheld in *Gibson v. Mississippi*, 162 U.S. 565 (1896), involving a provision under the infamously racist Mississippi Constitution of 1890. The 'color blind' language of *Gibson* sounds compelling: "the constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the general government, or by the states, against any citizen because of his race," *Gibson v. Mississippi*, 162 U.S., at 591 *quoted in Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 216 (1995) (O'Connor, J.) *quoting Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Nevertheless, the petitioner was identified as a "Negro of the African descent and color black," *Gibson v. Mississippi*, 162 U.S., at 567 and the murder victim was "a white man." *Id.*, at 569. In the era of Jim Crow, the wisdom of a 'color blind' approach was lost on the millions condemned to oppression. See Leon F. Litwack, *Been In the Storm So Long: The Aftermath of Slavery* (1979).

Similar 'color blind' language can be found in a line of unfortunate cases praising the Civil War Amendments while gutting their protections. See *The Civil Rights Cases*, 109 U.S. 3, 24 (1883) ("The thirteenth amendment has respect, not to distinctions of race, or class, or color, but to slavery. The fourteenth amendment extends its protection to races and classes, and prohibits any state legislation which has the effect of denying to any race or class, or to any

individual, the equal protection of the laws.") (finding the Civil Rights Act of 1875 unsupported by the Civil War Amendments); *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896) ("The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law") (permitting "equal, but separate" public accommodation on Louisiana railroads); *Corrigan v. Buckley*, 271 U.S. 323, 331 (1926) ("all persons and citizens shall have equal right with white citizens to make contracts and acquire property") (dismissing case for want of jurisdiction, permitting enforcement of racially restrictive real estate covenants); and *Hirabayash v. United States*, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people") (upholding wartime curfew restrictions upon persons of Japanese ancestry) *quoted in Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, at 214 (1995) (O'Connor, J.). In *Hodges v. United States*, 203 U.S. 1, 16-17 (1906), no Constitutional infirmity was found against a private conspiracy to forcibly prevent African American citizens from working, solely on the basis of their race and color. The 'color blind' analysis of the Court stated:

> "While the inciting cause of the [Thirteenth] Amendment was the emancipation of the colored race, yet it is not an attempt to commit that race to the care of the nation. It is the denunciation of a condition, and not a declaration in favor of a particular people. It reaches every race and every individual, and if in any respect it commits one race to the nation, it commits every race and every individual thereof." *Hodges v. United States*, 203 U.S., at 16-17.

These cases are the oration of Brutus, praising the one he has slain;[7] they were the federal pillars of white supremacy for nearly a century, shamelessly professing 'color blind' equality while turning a blind eye to the harsh reality of life as an African American during Jim Crow.

C. JUSTICE HARLAN AND THE CIVIL WAR AMENDMENTS

Not every Justice uniformly supported a shameless version of 'color blind' jurisprudence. A few lone voices of dissent may be heard during Jim Crow, most notably the pen of Justice Harlan. Modern proponents of 'color blind' jurisprudence are fond of quoting Justice Harlan's dissent in *Plessy v. Ferguson* without noting his clear purpose to protect and uplift African Americans. See, *e.g.*, *Berea College v. Kentucky*, 211 U.S. 45, 67 (1908) (Harlan, J., dissenting) (the Kentucky statute is "an arbitrary invasion of the rights of liberty and property guaranteed by the 14th Amendment against hostile state action") (majority upholds a Kentucky statute which forbids Berea College from teaching white and black students together); *Hodges v. U.S.*, 203 U.S. 1, 37 (1906) (Harlan, J., dissenting) ("The interpretation now placed on the 13th Amendment is, I think, entirely too narrow, and is hostile to the freedom established by the Supreme Law of this land") (majority denies federal jurisdiction to allegations of conspiracy to deny blacks the right to contract and seek employment); *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting) ("Our constitution is color blind ... it is therefore to be regretted ...

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[7] "If then that friend demand why Brutus rose against Caesar, this is my answer: – Not that I loved Caesar less, but that I loved Rome more...As Caesar loved me, I weep for him; as he was fortunate, I rejoice at it; as he was valiant, I honour him: but, as he was ambitious, I slew him. There is tears for his love; joy for his fortune; honour for his valour; and death for his ambition." William Shakespeare, Julius Caesar, Act 3, Scene 2.

for a state to regulate the enjoyment of citizens of their civil rights solely upon the basis of race ... the judgment this day rendered will, in time, prove to be quite as pernicious as ... the Dred Scott Case") (majority affirms 'equal, but separate' common carrier transportation in Louisiana as permissible under the Thirteenth and Fourteenth Amendments); but see *Gibson v. Mississippi*, 162 U.S. 565 (1896) (Harlan, J.).

In his dissent in *The Civil Rights Cases*, 109 U.S. 3, at 26, Justice Harlan attempted to focus the Court's attention upon the "substance and spirit of the recent amendments of the constitution," as well as the Civil Rights Act of 1866, now codified at 42 U.S.C. § 1981. He insisted that the Thirteenth Amendment should be read to give Congress the power "to the extent at least of protecting the race, so liberated, against discrimination, in respect of legal rights belonging to freemen, where such discrimination is based upon race." *Id.*, at 37. The legacies of slavery did not disappear upon emancipation, but "such discrimination is a badge of servitude, the imposition of which congress may prevent under its power, through appropriate legislation, to enforce the thirteenth amendment." *Id.*, at 43.

The Justices in *The Civil Rights Cases* would support Respondents in the cases before this Court today. The Court struck down the Civil Rights Act of 1875 essentially on federalism grounds – that such power to remedy private discrimination had not been granted to Congress and thus was reserved to the States, but noting with approval that States themselves could prohibit such discrimination. *The Civil Rights* Cases, 109 U.S., at 25. If the State of Michigan had passed a *Michigan* Civil Rights Act in 1875, the Court would have upheld it as a State power not forbidden under the Thirteenth and Fourteenth Amendments. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) ("[T]he Court in the Civil Rights Cases ... noted with

approval the laws of 'all of the states' prohibiting discrimination."). This present Supreme Court should do no worse.

III. STRICT SCRUTINY IS NOT THE PROPER STANDARD OF REVIEW FOR REMEDIAL AFFIRMATIVE ACTION

A. RACIAL CLASSIFICATIONS ARF INCIDENTAL TO REMEDIAL AFFIRMATIVE ACTION

Amici are not unmindful of this Court's announced standards of strict scrutiny for racial classifications in cases such as *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995) ("any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny"). As the number of minority groups covered by racial preferences has multiplied, the wider utilization of race as a category has attracted strict scrutiny. See, *e.g.*, *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 477-478, 506 (O'Connor, J.) ("the gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation"). Although reparations narrowly tailored to the crimes of slavery and *de jure* racial discrimination could meet the strict scrutiny test, a less stringent Constitutional standard should apply.

The choice of race as a classification system to deny fundamental human rights for Africans was made by the oppressors, not the Africans. The category originated in white supremacy in the Colonial period, and was later imprinted upon the Constitution. Several provisions of the

Constitution bore racial distinctions, such as the Slave Import clause, U.S. Const., Art. I, Sec. 9, the Three-Fifths clause, U.S. Const. Art. I, Sec. 2, Cl. 3, *amended by* Amend. XIV, Sec. 2, and the provisions regarding citizenship which were interpreted in *Dred Scott v. Sandford*, 60 U.S. 393 (1856), to deny citizenship to African descendants. See William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* (1977); Don E. Fehrenbacher, *The Slaveholding Republic* (2001). For approximately a century following Emancipation, *de jure* racial discrimination flourished. Government supplied the racial definitions and enforced compliance.

When remedies are fashioned for these crimes, the alarm is raised with feigned surprise that all of the beneficiaries are members of a particular race. How could it possibly be otherwise? If all of the oppressed people are of a certain race then it is highly disingenuous to complain of that very fact when a remedy is designed. Perhaps this circumstance should not be viewed as a racial classification at all; it is fundamentally a classification based on common injury. Reparations for such crimes can be narrowly tailored to benefit the oppressed and their descendants without becoming a racial classification, perhaps even to the satisfaction of Justice Scalia: "individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race." *Adarand*, 515 U.S., at 239 (Scalia, J., concurring in part and concurring in the judgment). Such reparations do not require racial classification at all because the classification is based on common injury. A few examples will illustrate:

In *Korematsu v. United States*, 323 U.S. 214 (1944), the Court upheld the internal relocation and confinement of persons of Japanese ancestry during the Second World War.

Decades later, groups of Japanese Americans sued for damages, *United States v. Hohri*, 482 U.S. 64 (1987). See also The Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (1988) (authorizing payment of reparations to Japanese Americans interned during World War II).

While the Civil Liberties Act of 1988 primarily benefits persons of Japanese ancestry, that fact is incidental. The racial category was applied by the wartime commanders and leaders who insisted on exclusion and internment. The Civil Liberties Act of 1988 does not employ a suspect racial classification, but merely seeks to remedy, after careful Congressional study, injustice committed on the basis of race. See *Obadele v. United States*, 52 Fed. Cl. 432 (2002).

Likewise, in the last decades, many Holocaust victims and their descendants have received hundreds of millions of dollars in reparations for crimes against humanity during the era of the Nazi regime. See Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* 3-156 (2000). Most of the Holocaust reparation recipients are Jewish, although other distinct ethnic groups have also received some reparations, such as the Roma. Are these ethnic, religious or racial categories 'immediately suspect,' *Korematsu v. United States*, 323 U.S. 214, 216 (1944), or are they merely reflective of the crimes against humanity, and thus entirely appropriate? Reparations to survivors and their descendants are entirely appropriate and do not run afoul of the Equal Protection Clause of the Fourteenth Amendment.

The history of systemic racism in America is hideous and corrosive, and the Fourteenth Amendment does not require race crimes to be ignored. Freed from the albatross of a "suspect racial classification" analysis, affirmative action in education designed as reparations for the crimes of

slavery and *de jure* racial discrimination should be subject to mere ordinary Constitutional scrutiny, rather than any stricter formulation.

B. THE REMEDIAL PURPOSES OF THE FOURTEENTH AMENDMENT ARE OF PARAMOUNT IMPORTANCE AND SHOULD NOT BE SUBJECTED TO STRICT SCRUTINY

This Court first interpreted the Thirteenth, Fourteenth and Fifteenth Amendments in *The Slaughter-House Cases*, 83 U.S. 36, 67 (1872), enshrining the Civil War Amendments in the heroic language of "human rights," *The Slaughter-House Cases*, 83 U.S., at 67-68, and clearly described the purpose of the Amendments:

> "[T]he one pervading purpose in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *Id.*, at 71.

So certain was the Court of the exclusive focus of the Civil War Amendments, that Justice Miller mused:

> "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other." *The Slaughter-House Cases*, 83 U.S., at 81.

This Court has long recognized that any remedial program under the Civil War Amendments must be balanced against a desire to transcend the pernicious use of racial categories. One should not lose sight, however, of the magnitude of the gap between white and African American citizens, both in 1865 and today. An important purpose of the Civil War Amendments was to close that gap in important respects, and yet much of that goal was frustrated for a century by the law. See Part II, *ante*.

Remedial affirmative action may be utilized without creating a permanent "racial entitlement" as feared by Justice Scalia in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239 (Scalia, J., concurring in part and concurring in judgment). As Justice Harlan explained:

> "My brethren say that when a man has emerged from slavery, and by the aid of beneficient legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws." *The Civil Rights Cases*, 109 U.S. at 61.

Have the laws of Michigan, other States and the federal laws of the United States, from Emancipation to today, treated African Americans as "the special favorite of the law?" Absolutely not. Certainly from Reconstruction to 1964, white supremacists held the upper hand.

Have African Americans "shaken off" the consequences of the disaster of enslavement and enjoyed the same economic and social conditions as white Americans? Absolutely not. Unlike descendants of immigrant groups that came to the United States willingly, African Americans still are disadvantaged in Michigan and throughout the United States in terms of education, wealth, income, health and employment, direct manifestations of past and present systemic racial discrimination. See *Respondents' Briefs on the Merits*.

The emergence of affirmative action in the last generation ushered a remedial response to these continuing consequences of chattel slavery, including its progeny, *de jure* discrimination. To abandon this remedy when the gap remains wide is to abandon the mission of the Civil War Amendments.

IV. REMEDIAL AFFIRMATIVE ACTION IS CONSISTENT WITH UNITED STATES TREATY OBLIGATIONS UNDER THE *CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION*

The *Convention on the Elimination of All Forms of Racial Discrimination (CERD)* forbids all racial discrimination and demands recognition of human rights and fundamental freedoms on an "equal footing." *Convention on the Elimination of All Forms of Racial Discrimination*, K.A.V. 2307, 5 I.L.M. 352 (1966), 660 U.N.T.S. 195, 216-218, art. 2, ¶ 1. In this regard, the *CERD* adopts a rule roughly congruent with the Equal Protection clause.

The *CERD* also recognizes an exception for remedial affirmative action, so long as the remedy does not outlast the

injury. *Convention on the Elimination of All Forms of Racial Discrimination*, K.A.V. 2307, 5 I.L.M. 352 (1966), 660 U.N.T.S. 195, 216-218, art. 1, ¶ 4, art. 2, ¶ 2. Under *CERD*, remedial affirmative action is not only permissible, but may be obligatory.

At last count, one hundred and fifty-seven nations have ratified the *CERD*, including the United States, one of the last to ratify. The United States Senate ratified the *CERD* on June 24, 1994, 140 Cong. Rec. 14,326 (1994), by the required two-thirds majority. U.S. Const. art. II, § 2. Under Article VI of the Constitution, ratified treaties become supreme Federal law, overruling contrary Federal laws, as well as contrary provisions in State laws or State Constitutions. U.S. Const. art. VI.

The Senate ratification contained several reservations, none of which touched upon Equal Protection or affirmative action. 140 Cong. Rec., at 14,326. The Senate also included a declaration that the *CERD* was not "self-executing," *ibid.*

On December 10, 1998, President Clinton issued Executive Order 13107, establishing the policy of the United States to respect and fully implement certain human rights treaties, including the *CERD*. Exec. Order No. 13107, 3 C.F.R. 234 (1999).

Even in light of the Senate's declaration, and giving minimal effect to Executive Order 13107, the *CERD* represents a valid treaty obligation of the United States, supporting the remedial use of affirmative action as consistent with both racial non-discrimination and equal protection. Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 Mich. J. Int'l L. 301 (1999). While a mere treaty never

overrides the United States Constitution, this Court should pause thoughtfully before restricting remedial affirmative action in education on Equal Protection grounds, and consider the provisions of the solemn treaty ratified by the vast majority of world's nations, including the United States of America. Jordan J. Paust, *Race-Based Affirmative Action and International Law*, 18 Mich. J. Int'l L. 659 (1997).

CONCLUSION

For the foregoing reasons, the decision of the court of appeals in *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), and the decision of the district court in *Gratz v. Bollinger*, 122 F. Supp.2d 811 (E.D. Mich. 2000), should be affirmed.

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IN THE

Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

—v.—

LEE BOLLINGER, *et al.*,

Respondents.

JENNIFER GRATZ and PATRICK HAMACHER,

Petitioners,

—v.—

LEE BOLLINGER, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMHERST, BARNARD, BATES, BOWDOIN, BRYN MAWR, CARLETON, COLBY, CONNECTICUT, DAVIDSON, FRANKLIN & MARSHALL, HAMILTON, HAMPSHIRE, HAVERFORD, MACALESTER, MIDDLEBURY, MOUNT HOLYOKE, OBERLIN, POMONA, SARAH LAWRENCE, SMITH, SWARTHMORE, TRINITY, VASSAR, WELLESLEY, AND WILLIAMS COLLEGES, AND COLGATE, WESLEYAN AND TUFTS UNIVERSITIES, *AMICI CURIAE*, SUPPORTING RESPONDENTS

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Bd. of Curators of the Univ. of Mo. v. Horowitz,
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Trustees of Dartmouth Coll. v. Woodward,
17 U.S. 518 (1819) 3, 25, 26, 27

Statutes

42 U.S.C. § 1981 ..... passim

Civil Rights Act of 1964, Title VI ..... passim

Other Authorities

Jack Greenberg,

Affirmative Action in Higher Education: Confronting the Condition and Theory,

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Thurgood Marshall: The Influence of a Raconteur, 44 Stan. L. Rev. 1217 (1992).....8

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Affirmative Action And The Legislative History Of The Fourteenth Amendment,

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46 UCLA L. Rev. 1583 (1999).....14

William G. Bowen and Derek Bok,

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Service Academies Defend Use of Race in Their Admissions Policies,

N.Y. Times, Jan. 28, 2003, at A17.....8

Albert R. Hunt,

Service Academies: Affirmative Action at Work,

The Wall Street Journal, Jan. 23, 2003, at A15.....8

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Bush Adviser Backs Use of Race in College Admissions,

N.Y. Times, Jan. 18, 2003, at A14.....6

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are 28 private, highly selective residential colleges whose small size and excellence attract students from around the nation and the world.[1] They provide their students with a liberal education in its broadest sense – a rich, deep training in diverse subject matters, in residential settings where education is intended to take place not only in the classroom but throughout four years on campus with classmates from different backgrounds and with different experiences, who arrive with different viewpoints.

Because of their excellence, each of the *amici* colleges is highly regarded and besieged with applications from well-qualified high school seniors. Because of their size, they offer admission to only a small fraction of qualified applicants, whom they select not mechanically by SAT score but taking into account a wide range of factors. Each year, *amici* decide which set of applicants, considered individually and collectively, will take fullest advantage of what the college has to offer, contribute most to the educational process, and use what they have learned for the benefit of the larger society. Each college has, for decades, self-consciously sought to assemble and house on-campus a highly diverse group of students – from different states or different countries, from urban or rural backgrounds, with differing economic circumstances, with different kinds of experience or talent or athletic ability, students who will be the first in their families ever to go to college and legacy students whose parents, grandparents, or even earlier forbears may have attended that same school.

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[1] Three of the *amici*, Colgate, Tufts and Wesleyan, are universities, but their small size, selectivity, and emphasis on a liberal education in a residential setting make their interests identical to those of the *amici* colleges. We refer to *amici* as "colleges" throughout for convenience.

No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae* made a monetary contribution to its preparation or submission. Letters consenting to the filing of *amici curiae* briefs have been lodged by the parties with the Clerk.

Amici have a direct interest in the outcome of these cases because the Court has apparently considered Title VI of the Civil Rights Act of 1964 to be coextensive with the Fourteenth Amendment. Reversal of the judgment in *Grutter* (the undergraduate case is not really comparable), and any ruling that would restrict *amici's* effort to assemble classes that are diverse in multitudinous respects by the means they have thought best, would directly harm *amici,* the education they provide, and their broader mission to benefit the larger society. To alert the Court to the impact that adoption of the arguments advanced by petitioners and the United States would have on their admissions programs – and of the extent to which the "alternatives" touted by petitioners and the United States are impracticable and illusory for smaller selective institutions, requiring a forced abandonment of selectivity if diversity were to be maintained – *amici* submit this brief.

SUMMARY OF ARGUMENT

"The life of the law has not been logic: it has been experience."[2] The Court should examine petitioners' submission in this case with a view to the experience of operating admissions programs at the nation's selective colleges and universities. The Court should consider the experience of admissions before diversity was highly valued and before race conscious approaches were employed, and the progress toward more equal opportunity since that revolution. It should consider the realities of admitting applicants, to serve a highly selective college's mission, in a society in which race still matters in determining a person's available opportunities and life experience, and

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[2] Oliver Wendell Holmes, Jr., *The Common Law, 5* (1881) (Mark D. Howe ed., 1963). President Grover Cleveland expressed the same thought a few years later, calling for a reduction in the tariff notwithstanding prevailing orthodoxy because "[i]t is a condition which confronts us, not a theory." *Third Annual Message to Congress*, Dec. 6, 1887, available at www.polsci.ucsb.edu/projects/presproject/idgrant/sou_pages/cleveland3su.html.

the effects of discrimination and entrenched segregation still linger. If it does so, it will affirm the judgments below.

African-American students were largely absent, or present in very small numbers, from most selective institutions of higher education, including *amici,* until the 1960's. Only when those schools began to aim for racial diversity among the other kinds of diversity long sought for, did those schools begin to enroll more than token numbers of African-American students. Moreover, research and experience suggests that for small, highly selective, largely private colleges like *amici*, carving out race from all the other kinds of diversity that colleges consciously aim for will have a predictable, substantial resegregating effect, probably moving black students from roughly 5-7% of the student body to 2% or so.

The alternatives suggested by the United States and petitioners – admitting a percentage of each high school class, or focusing on class or economic circumstance without looking at racial background – could not work at small, highly selective schools, if the objective is to enroll a class that is both academically excellent and diverse. Moreover, it would deprive *amici* of precisely the diversity that they value for its contribution to the residential, liberal education they provide. Seeking out and obtaining diversity, including racial diversity, does not violate Title VI and 42 U.S.C. §1981, and does not amount to a quota system. The competition between highly selective schools (for the best students, the best faculty, the most places at the most prestigious graduate and professional schools) provides natural constraining factors.

Both the deference due the educational policies of universities and colleges, *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985), and *Trustees of Dartmouth Coll. v. Woodward,* 17 U.S. 518 (1819), and the respect due under *stare decisis* to the holding in *Bakke* reflected in Justice Powell's opinion, strongly support the judgments below.

ARGUMENT

I. PRIVATE, HIGHLY SELECTIVE COLLEGES HAVE A COMPELLING EDUCATIONAL INTEREST IN ENROLLING HIGHLY DIVERSE – INCLUDING RACIALLY DIVERSE – CLASSES, AND CANNOT DO SO WITHOUT TAKING THE DIVERSITY THEY STRIVE FOR INTO ACCOUNT.

During the late 1960's, as American society was coming to grips with the exclusion of African-Americans from many of the institutions and benefits of American life, *amici* took note of how few such students they had enrolled and began to seek out and enroll students from historically disadvantaged groups. The educational benefits that selective colleges have perceived from those efforts, and their assessment that substantial resegregation would likely follow were the Court to preclude any consideration (no matter how nuanced) of racial or ethnic diversity in assembling classes, are accurately reflected in reports submitted below of former Princeton President William G. Bowen and former Harvard President Derek Bok in the district court. Their pathbreaking work, *The Shape of the River*, is the Brandeis brief that *amici* would file (but for page limitations) and to which the Court should attend if it would follow Holmes' dictum to be guided by experience.

Petitioners' arguments, if accepted, would harm the education offered at highly selective institutions, and the nostrums they offer to alleviate those harms are not realistic.

A. Private, Highly Selective Colleges Are Committed To Obtaining The Educational Benefits Of Diversity, Including Racial Diversity.

Petitioners argue that diversity is not a compelling interest that institutions of higher education may pursue. The authorities they rely on, however, are not *educational* authorities, but rather judicial decisions in inapposite, non-educational contexts. In considering petitioners' challenge, the beginning of wisdom is to recognize, as Justice Powell

and a majority of the Court did in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978), that *educators* have set the relevant policies. There are sound *educational* reasons (and others as well) why higher education institutions of all sorts – not only those subject to legislative direction, but also private, highly selective ones – have virtually without exception concluded that *many different kinds of diversity, including racial diversity,* best create the circumstances for the learning required in the 21st century, and that the schools should therefore try to obtain that diversity.

The point is so basic, and the agreement of educators is so broad,[3] that *amici* need not argue it at length. Diversity in all its aspects is one of the factors that make American colleges and universities unique, educationally superior, and the envy of the world. There is a reason why students beat a path to schools where diversity is celebrated and sought out, and why those schools are widely judged to provide excellence beyond the capacities of narrower institutions.

The Amherst Trustees' 1996 Statement on Diversity is representative of the views of *amici* generally:

> We will continue to give special importance to the inclusion within our student body, our faculty and our staff of talented persons from groups that have experienced prejudice and disadvantage. We do so for the simplest, but most urgent, of reasons: because the best and brightest people are found in many places, not few; because our classrooms and residence halls are places of dialogue, not monologue; because teaching and learning at their best are

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[3] *See, e.g.*, Association of American Universities, *AAU Diversity Statement on the Importance of Diversity in University Admissions* (by presidents of its 62 member institutions), Apr. 14, 1997, available at http://www.aau.edu/issues/Diversity4.14.97.html.

> conversations with persons other than ourselves about ideas other than our own.[4]

That understanding is not newly minted; as its president recently observed, Oberlin College, which almost uniquely among *amici* has been steadily attentive to the importance of enrolling black Americans since well before the Civil War, discovered "as early as the 1830s" that "bringing together students with different backgrounds and experiences brought about learning and positive social change."[5]

The proposition that racial diversity, among other kinds of diversity, is important to education in our nation's colleges and universities, or at least that they may reasonably so conclude, is supported by thoughtful, experienced leaders like former Presidents Bowen and Bok and former Stanford Provost Condoleezza Rice,[6] other selective colleges and universities and professional associations (which we understand are also filing briefs), faculty, and Boards of Trustees. Their impressively unanimous judgments, supported by common sense and experience, concerning educational benefits, cannot be displaced by sterile citations to inapposite cases.

Why is an education "characterized by encounters with difference" so vital? Because. as Carleton President Robert A. Oden, Jr. recently said, "we know, with Robert Kagan, that 'the single greatest source of growth and development is the experience of difference, discrepancy, anomaly," and "the free and uncensored play of ideas and opinions and arguments and positions is central to the fabric of a liberal arts education and a college peopled by those representing

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4 www.amherst.edu/fac_serv/aaction/diversity.html.

5 Oberlin Alumni Magazine (Winter, 2002-03), p. 2. As early as 1835, Oberlin began making special efforts to admit and matriculate students of color. The suggestion that upon enactment of the 1866 Civil Rights Statute Oberlin was violating the law – which is what petitioners' case amounts to – is a terrible misreading of history.

6 Neil A. Lewis, *Bush Adviser Backs Use of Race in College Admissions*, N.Y. Times, Jan. 18, 2003, at A14.

and trying out such ideas and opinions and arguments is a finer college for the presence of these people." He also noted that "a pluralistic, widely representative college is a significant factor in the college choice of the world's most talented students."[7]

And as Swarthmore noted recently, "without a reassertion of our commitment to diversity, [we risk] the erosion of the educational, ethical, and social mission" that makes such colleges unique and valuable.

While the relevant judgments are *educational* judgments, made by educators and those responsible for educational institutions, they are not alone; non-educators too have noted the value of diversity in education, and more broadly the extent to which the value of diversity is publicly valued in most institutions of American life.

In connection with this very case, President Bush has stated that he "strongly support[s] diversity of all kinds, *including racial diversity* in higher education."[8] The *amicus* brief filed by the United States agrees that "Measures that *ensure* diversity, accessibility and opportunity are important components of government's responsibility to its citizens."[9] Deliberately seeking out diversity in race-conscious ways, and not merely hoping it magically arrives, has long been the rule in the judicial appointment process in state and federal courts over the past two decades; for political parties (which both seek to enlist candidates who, as a group, are diverse in various ways, including racially

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7 *Inauguration Convocation Address*, Oct. 25, 2002, available at www.carleton.edu/inauguration/speeches.php3?id=1.

8 Neil A. Lewis, *Bush And Affirmative Action: Constitutional Questions; President Faults Race Preferences As Admission Tool*, N.Y. Times, Jan. 16, 2003, at A1.

9 U.S. Brief in *Grutter*, at 10 (emphasis added).

diverse); in federal (and many state) cabinet selections; in the service academies; and in the military's officer ranks.[10]

The practical wisdom underlying these practices rebuts petitioners' assertion that diverse viewpoints and opinions can be sufficiently obtained by obtaining diversity in economic circumstances and disadvantage. Those differences are valuable educationally too, but they do not exhaust or reflect all the diversity that students will need to confront, understand, and be able to relate to and work with.

That educational conversations may be different when we speak with those whose experience is different – deeper, more powerful, with a different moral force – is the point made in Justice O'Connor's memoir of Justice Thurgood Marshall, Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur,* 44 Stan. L. Rev. 1217, 1220 (1992). It needs no better confirmation than the recent oral argument in *Virginia v. Black,* a case that reminds us of the lingering influence of color in American society. When a Justice asked, "Aren't you understating the effects of 100 years of lynching?" and added that cross-burning "is unlike any symbol in our society," the power and educational value of the moment – by all accounts one of the most extraordinary this Term – stemmed in part from the particular experience (including, respectfully, the color) of the speaker. It was important for Presidents Johnson and Bush to give the nation that measure of diversity; it is

[10] Successive presidents since at least 1976 have made plain that appointing more women, blacks, and Hispanic attorneys to the federal bench or the cabinet is a laudable goal, not an equal protection violation. The transformation of state court judiciaries from the virtually all-white membership three decades ago to today's judiciary, which looks much more like the population at large, has been no unplanned for achievement, but the obtaining of diversity deliberately sought out. For the service academies, *see, e.g.,* Adam Clymer, *Service Academies Defend Use of Race in Their Admissions Policies*, N.Y. Times, Jan. 28, 2003, at A17; Albert R. Hunt, *Service Academies: Affirmative Action at Work,* The Wall Street Journal, Jan. 23, 2003, at A15. Both political parties have made a public point of seeking to enlist well-qualified black and Hispanic candidates to run for office.

equally important that *amici* colleges be able to do so as well.

B. Highly Selective Institutions Cannot Obtain The Diversity They Seek Except By Seeking It Directly.

For every aspect of the diversity they seek, *amici* have needed to identify students that can offer it, and consider those potential contributions in the discussion that takes place concerning virtually every serious applicant. To the extent that they seek students with particular backgrounds or talents or interests – international students, legacy students,[11] students interested in as-yet-undersubscribed fields to better occupy recently hired faculty, students interested in newly emerging fields, students with particular musical or artistic or athletic talents, students whose parents have not had the benefits of higher education, students from deprived economic backgrounds or rural areas – the admissions staffs need to, and do, consider those aspects as a small number of admissions personnel read and write comments on each file, and then the larger admission committee *discuss and consider each (or virtually each) student file.*

The overriding task is to assemble the most interesting class of students, ready to learn from one another and from the college's faculty. The factors examined are considered not to allocate benefits according to race, but for how they bear on how committed and successful a student the applicant is likely to be. The primary and secondary educational system in the U.S. is far from a level playing field, and for many, particularly the poor, integration is diminishing, not

[11] *Amici* each seek to enroll legacy students, without quota. Legacy students more often than not outnumber African-American students at most *amici*. Because of the tiny numbers of African-American graduates before about 1970, the effect of considering legacy background a "plus" is to afford that plus to a group of applicants likely to be all (or nearly all) white.

increasing.[12] Because of the unequal education applicants will have received, highly selective colleges need to be especially alert to evidence of special efforts and accomplishments, offering exceptional promise and motivation, on the part of students who have not had many advantages. Just as colleges consider how privileged an applicant's background was to properly assess the achievement reflected, they need to consider all the obstacles, including racial or ethnic background, that a student may have surmounted as well.

At least for smaller schools like *amici* – which happen to be the size of or even larger than most university professional schools or graduate departments – admission decisions are nuanced, multi-factorial, and not quantitative. No numerical points or weights whatever are assigned for any such factors, including racial or ethnic background; numerical quotas are not set or enforced. The same evaluative procedures are used for all applicants regardless of color or ethnic background; for example, different color files are not used. At most of the *amici* colleges, ongoing tallies of various other factors that are kept do not even include race or ethnic background.

In short, the process for each *amici* college is very similar (if not identical) to the Harvard College program described by Justice Powell in *Bakke* (and similar as well to the program at the Michigan Law School) – facially nondiscriminatory, without any quotas, considering racial or ethnic background as a "plus" in a particular applicant's file without insulating that individual "from comparison with all other candidates for the available seats."

At Amherst, for example, offers extended to students of African-American background in recent years (1993 to 2002) have varied widely, without any notable trend,

[12] *See* Erica Frankenberg, Chungmei Lee, and Gary Orfield, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, Harvard University Civil Rights Project, Jan. 16, 2003, available at http://www.civilrightsproject.harvard.edu/research/reseg03/reseg03_full.php.

ranging between 81 and 125 (out of about 950 offers extended altogether, and resulting in between 24 and 49 matriculated students in a class of about 425). Consideration is given to dozens of factors, including, for example, whether the student has a disability, or athletic ability; comes from a rural, or poor urban, community; or has a family with only limited financial resources, or with little or no college background (*e.g.*, neither parent has a 4-year degree). The other *amici* report similarly wide variation in offers extended, the clearest demonstration that consideration of race as a "plus" does not amount to a quota.

The experience of all *amici* is that they cannot be reasonably assured of having the desired range of talent, or international students, or legacy students, or students from underprivileged backgrounds, without noting and considering those factors when it comes time to discuss each file. It is equally impossible to be reasonably assured of obtaining a class with more than token numbers of African-American or Latino students without making special efforts to attract such applications and then considering those factors as well (albeit in a way that ensures that no factor, including race, is "decisive when compared" with any other candidate, as *Bakke* expressly envisioned). This is true at all the *amici* colleges, and particularly true for those schools (*e.g.*, Bowdoin, Bates, Colby and Carleton) which, because of their location far from urban areas or in states with relatively less diversity themselves, would draw fewer applications from African-American or Latino students.

As Bowen and Bok summarize their research, if more than small numbers of black students are to be enrolled, colleges *have to* be sensitive to race in making admissions decisions. That need "stems directly from continuing disparities in pre-collegiate academic achievements of black and white students" as presently measured.[13] The simple truth, ignored by those who glibly suggest that

[13] *The Shape of the River*, 51.

color-blind alternatives could be implemented at the most selective colleges without any sharp reduction in diversity, is that "[r]acial disparities in test scores and high school grades are substantial and show no signs of disappearing in the foreseeable future."[14] *Amici* each use grades and standardized tests as an important part of the admissions process (even though they are nowhere dispositive, and at some schools no longer required). "Racial gaps of all kinds remain" even after attempting to control for the influence of other variables.[15]

It follows – as exhaustive and careful research (by Bowen and Bok) and the experience at a selective university that eliminated consideration of race, Berkeley, both confirm – that enforced elimination of the Harvard College approach at highly selective institutions[16] would have drastic resegregating impact. Black enrollment would likely be reduced "by between 50 and 70 percent"; the probability of black applicants obtaining offers would drop to half that of white students; and the percentage of black students matriculating would drop from roughly 7.1% of the student body to roughly 2.1%. Seriously enforced, a race-neutral policy would "presumably take black enrollments...back to early 1960's levels, before colleges and

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[14] *Id.*

[15] "People will debate long and hard, as they should, whether particular gaps reflect unmeasured differences in preparation and previous opportunity, patterns of continuing discrimination, failures of one kind or another in the educational system itself, aspects of the culture of campuses and universities, individual strengths and weaknesses, and so on. But no one can deny that race continues to matter." *The Shape of the River*, 279 n.2; *see generally id.* at 269-74.

[16] Selectivity (the acceptance rate) at *amici* colleges ranges as high as 19% (one offer for every five applicants), and averages 25% to 33%. Even the women's colleges among *amici*, which receive proportionately fewer applications, have many more applicants than spaces. *No amicus* college admits applicants mechanically on the basis of test scores or grades, and none did so prior to the late 1960's.

universities began to make serious efforts to recruit minority students."[17]

C. The Alternatives Suggested By The United States And Petitioners Cannot Work At Smaller Highly Selective Colleges, And Would Compel Them To Trade Selectivity To Obtain Diversity.

The briefs filed by the United States make much of efforts underway in Florida, Texas, and California to attempt to ameliorate the extraordinarily sharp reductions in offers extended to (and matriculations of) students of African-American or Latino/Hispanic background following decisions in those states that race or ethnic background could not be considered as part of the admissions process. *It is vital for the Court to understand that even assuming arguendo that those measures could work in those states – and the reported experience and logic suggest difficulties and reasons for concern – neither they nor any other alternatives of which we are aware could conceivably work at highly selective schools the size of amici.*

First, given how every *amicus* conducts its admission selection process (virtually every folder read by multiple readers, and then evaluated in meetings without mechanical point systems), there is really no possibility of a *race-blind* admission process: *consciousness* of *all* the diversity each applicant would contribute is unavoidable.[18] There is really

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[17] *The Shape of the River*, 31-34, 39, 50-51, 280. *Amici* have considered the analysis of Bowen and Bok, and their own assessments are the same: elimination of the approach held permissible in Justice Powell's *Bakke* opinion, if enforced, would likely result promptly in sharp reductions in the presence of African-American students.

[18] At a few of the *amici*, a small number of applicants with overwhelmingly superior credentials are admitted without committee discussion, but that small exception does not alter the point that all the remaining qualified applicants are competitively evaluated and discussed, with focus on the whole applicant and the likely contribution to, and success at, the school.

no alternative for these colleges but to accept the reality of this *consciousness* of differences (including racial or ethnic background) and to use it intelligently as part of their complex weighing of multiple factors that leads to judgments as to whom to admit.

The alternatives usually suggested to obtain diversity without attending to it – mechanical formulas looking to grades, tests scores, or graduation rank – would radically change the profile of each *amici* college. No small, highly selective college could use the "percentage of each high school class" method adopted by Texas and Florida, or Florida's guarantee of placement to all students who successfully complete a two year degree at a community college.[19] California's efforts to restore at least some of the diversity lost since adoption of its race-neutral admissions policy has led to some restoration of diversity at the less selective institutions, but to sharp drops of African-American and Hispanic students at the more selective institutions – *i.e.*, the ones most comparable to *amici*.[20]

Similarly, it is unrealistic to believe that highly selective schools could retain diversity, while not taking it directly into account, by improving search techniques, or focusing more than they presently do on low socioeconomic rank. "[C]lass-based preferences cannot be substituted

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[19] As has been repeatedly noticed, although not by the United States, the Texas program depends for its very effectiveness on the existence of a huge number of segregated-in-fact schools. If public schools mirrored the community at large, the Texas plan would result in no diversity whatever. Moreover, the plan would seem to discriminate against brighter minority students in better integrated schools, and lead to students with lower SAT/ACT scores and less likely to do well, because it guarantees admission to top 10% students at all a state's worst schools, while effectively shutting out minority students just below 10% at the best schools in the state, even if those students seem better candidates by the assessment of educators. *See The Shape of the River*, 274 (using grades rather than test scores would likely "diminish[] the pool of students who can compete effectively for positions of leadership").

[20] Stephen Thernstrom and Abigail Thernstrom, *Reflections on The Shape of the River*, 46 UCLA L. Rev. 1583, 1625 (1999).

for race-based policies if the objective is to enroll a class that is both academically excellent and diverse."[21] Search techniques (including obtaining printouts of every minority student at a specified SAT level) are already extraordinarily comprehensive; and it is precisely the "middle class" students from minority backgrounds who, research and experience shows, are most likely to succeed.[22] Substitution "of a class-based system would drastically reduce the quality of the eligible pool of black and Hispanic applicants, seriously impeding the goal of preparing the ablest minority leaders for society and the professions."[23]

Oberlin has given careful consideration to African-Americans from virtually all-black inner city high schools who challenged themselves by taking the most demanding courses available to them (often at local community colleges, as their schools had few demanding courses), even though their SATs were so low as to be likely disqualifying unless they were viewed through the understanding of race-based test gaps. In doing so, with great success, it has found that the SATs, which it generally uses to predict attrition, consistently and substantially over-predict attrition for its African-American students. There is no way to apply its experience that "SATs are not good measures of African-American freshman academic performance" without being race conscious. Oberlin is looking for academic achievement and sees it in these students (and has been proven correct), but could not do so without consideration of the applicant's whole record and background.

Another difficulty with leaving race to chance in achieving diversity is that a "critical mass" of students is important in attracting individual students (just as it is hard to attract a violinist to a school that has no orchestra). This does not mean quotas, but it does mean that it is difficult to

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[21] *The Shape of the River*, 46-50.

[22] *The Shape of the River*, 46-51.

[23] *The Shape of the River*, 51.

attract a student of color to Middlebury or any other rural campus without a critical mass of fellow students.

D. Selecting A Diverse Student Body Does Not Classify Students By Race Or Violate Title VI or §1981, And Without More Imposes No Quota, And Built-In Structural And Competitive Factors Afford Substantial Guarantees Against Abuse.

1. One of the central insights underlying the sharp distinction Justice Powell drew in *Bakke* between the dual-track admissions process operated by the UC-Davis Medical School and the Harvard College approach was that the former could fairly be said to deny the equal protection of law, while the latter could not. A "facial intent to discriminate is evident," and a public university denies equal protection, when it operates two separate processes, for two lines of racially-reserved admission slots. By contrast, "[n]o such facial infirmity exists in an admissions program where race or ethnic background is simply one element – to be weighed fairly against other elements – in the selection process." 438 U.S. at 318.

Even less can the extraordinarily selective, non-quantitative, eclectic, nuanced admissions processes at private selective colleges like *amici* be said to violate Title VI. Private colleges that carefully and individually consider all aspects of an applicant's background, *including* (but hardly limited to) racial or ethnic background, economic circumstances, family educational background, and the like, do not thereby deny unadmitted students the benefits of participation "on grounds of race, color, or national origin." When colleges and universities decide that the advantages of diversity warrant the admission of some international students, or (for example) look to ensure some presence of students from Japan, Korea, and China, they are not thereby violating their obligations under Title VI, and unadmitted applicants who live in the United States have no private right of action under Title VI by reason of any "exclusion"

by reason of national origin. By exactly that same reasoning, the kind of consideration expressly permitted by *Bakke* of all aspects of a candidate's background, including but not limited to racial or ethnic background, in the service of "attaining the goal of a heterogeneous student body," 438 U.S. at 314, does not reflect any "racial intent to discriminate," and violates no rights under either 42 U.S.C. §1981 or Title VI.

2. Petitioners are trying to eliminate any room for consideration of racial background along with myriad other factors by labeling it a "quota" and hoping the label sticks. But the consideration of race at neither Michigan's Law School (whose admissions procedures are similar in many respects to *amici*'s), nor at its undergraduate college (which because of its huge size is not comparable), amounts to a quota as understood in *Bakke* or in any meaningful sense.

In any event, *amici*'s own consciousness of race as one of the many factors to be included within the student body does not amount to a quota system, and it is important that the court not be deceived by petitioners' use of the term. A quota is a preset number (or narrow range) reserved for some applicants or limiting offers to another. Results that are fairly reached without such an allocation process, goals that are aimed for but often not met, and the widely varying numbers of offers to African-American and Latino applicants which depend on competitive consideration of applicants who may each present talents, backgrounds, or achievements that the schools are hoping to include, reflect no "quota."[24] It makes no sense to say that our electoral process has a "quota" for Republicans (or Democrats) because their vote tallies have varied narrowly in the last few elections between 48% and 52%.

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[24] At each *amicus* college, the percentage of African-American students admitted and matriculated is significantly less than the percentage of such students in the general high school population, which also demonstrates the absence of any quota or "entitlement."

3. In a variety of contexts, some justices of this Court have expressed concern that racial preferences may be self-perpetuating, or become fixed (or even expanding) entitlements. Whatever may be the case when government (with its natural monopoly and lack of competitiveness) adopts quotas, no such tendency has been seen or is likely in the case of highly selective colleges.

The extraordinary competition among private colleges and universities – for the best applicants, the best matriculants, the best faculty, the most foundation support, the most important fellowships for its graduates, the most and largest government grants – operates as a constant check on any abuse. Every institution has a powerful incentive to improve the intellectual capacity of its student body, class by class. The natural constraining power of this competitive quest for excellence virtually guarantees that affirmative action, as practiced at *amici* and sister institutions, has the genuine purpose of finding that sector of the best and the brightest whom present testing methods are not properly identifying, not filling (or trying to expand) any quota.

Nor will these efforts become entrenched. Over the past twenty years, the sharply increasing numbers of Asian-American applicants, the convergence of their test scores, and their interest in particular schools, have enabled some highly selective schools to matriculate Asian Americans in sizeable numbers without any focus on doing so. As the black middle class expands and the educational opportunities available to black students improve, there is reason to expect a narrowing of the test score gaps that have created the need to consider race among other diversity factors. Between 1976 and 1989, average SAT scores of black matriculants at selective schools went up 68 points, "a larger gain than that of white matriculants."[25]

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[25] *The Shape of the River*, 289.

II. THE COMMITMENT TO BROADLY INCLUDE STUDENTS FROM GROUPS WHICH HAD BEEN SYSTEMATICALLY DISADVANTAGED AND EFFECTIVELY EXCLUDED HAS BROUGHT MYRIAD BENEFITS WHICH THE COURT SHOULD RESPECT AND SAFEGUARD.

A. The Recognition That Classes Were Not Racially Or Ethnically Diverse, And The Commitment To Efforts To Obtain A Broader Diversity By Attending To Students Who Had Been Systematically Excluded.

The interest in educating students from all reaches of American society, and the understanding that doing so can be vital to the educational mission of colleges or other institutions of higher education, has deep roots, and cannot be dismissed as late-twentieth century social engineering.

Hamilton was established as Hamilton Oneida College in 1793 as "an institution for the education of American *and Indian youth.*" Dartmouth's charter created a college "for the education and instruction of youth of the Indian tribes, and also of English youth and others." Oberlin resolved in 1835 that "the education of people of color is a matter of great interest and should be encouraged and sustained in this institution."[26] Bates was founded by abolitionists in 1855 who resolved immediately to admit students without regard to race, religion, national origin, or sex.[27] Middlebury graduated a black student in 1823, and Amherst and Bowdoin followed in 1826 and 1833.[28] In short, even while most African-Americans were still

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[26] By 1900, Oberlin had graduated 128 African-Americans, nearly half of *all* black college graduates in the United States. Surely Oberlin's race-conscious efforts would not properly have been held to violate the 1866 Civil Rights Act upon its enactment.

[27] An early beneficiary of Bates' efforts, Rev. Benjamin E. Mays, a child of freed slaves, graduated from Bates in 1920, went on to become president of Morehouse College, and was described by Martin Luther King Jr. as "my spiritual mentor and my intellectual father."

[28] Harold Wade, Jr., *Black Men of Amherst*, p. 5.

enslaved, some New England colleges announced or reflected a very longstanding interest in recruiting a diverse student body in the service of their educational missions.

However, at all the *amici* (and throughout America as well), the simple fact is that African-American young men and women were, until the mid-1960's, absent or rare at every one of the *amici* colleges to a degree inexplicable except as a consequence of the underlying discrimination rampant throughout American society and systematic denial of equal opportunity.[29] Even today, with their outreach efforts and consideration of color and ethnic background in the admissions process, *none* of the *amici* colleges enrolls African-American students in anything like their proportion of the high school population.

For the colleges as much as for the rest of American society, the Civil Rights Movement in the 1960's was a watershed, an occasion for taking stock, making commitments, and pursuing them. The trustees and faculty at each college examined the education mission they were charged with serving and considered whether the continued effective absence (or great paucity) of students of color was consistent with education broadly conceived and the public service each college aims to serve. They all concluded that special efforts to attract, enroll, and graduate students from groups historically excluded was an educational, social, and

[29] No African-American student graduated from Haverford until 1951. No blacks graduated from Amherst from 1939 to 1947, even though under different leadership Amherst had, from 1915 to 1926, enrolled a number of African-American students, including four from the M Street (Dunbar) High School in Washington, D.C who are among its most illustrious and successful graduates by any standard – William Hastie (who after arguing a series of civil rights cases in the Supreme Court became the first African-American federal judge, and later served on the United States Court of Appeals for the Third Circuit), Charles Houston (Dean of the Howard Law School and NAACP Special Counsel who planned the legal strategy that led to *Brown v. Bd. of Educ.)*, Charles Drew (who perfected the storage of blood plasma in time to save thousands of lives in World War II), and Mercer Cook (twice a United States Ambassador). Harold Wade, Jr., *Black Men of Amherst*, chs. IV-V.

moral imperative. Not only did the faculty think that including students from African-American backgrounds was an educational imperative; students who were choosing among colleges reached the same judgment, identifying campus diversity as a significant factor motivating their decisions.

In the years since the King assassination sparked reflection and action across American campuses, *amici* have graduated more African-American students than in the previous 175 years. They have done so through the use of race-conscious admissions efforts permitted by *Bakke* – indispensable efforts that Petitioners would foreclose.

B. Thirty-Five Years Later, The Colleges' Experience Demonstrates That Affirmative Action Has Had Educational Benefits – And Benefits For American Society.

Nearly thirty-five years after *amici* college recognized that they were each more insular and less diverse than was educationally wise or socially defensible – and more than they and the students they sought to attract wanted them to be – they have found that their resultant efforts have paid off in numerous respects. The careful, thoughtful, well-considered efforts to attract more students of color to apply to and matriculate at the colleges have enabled the colleges to better accomplish the missions they set for themselves, which include among other things, educating students who, individually and collectively, will contribute most to the educational process, and be most successful in using what they have learned for the benefit of the larger society.

1. Much important data is summarized by Bowen and Bok, who conclude that efforts to expand diversity have paid off handsome educational dividends.[30] Significantly more students (of all races) reported by 1989 (as compared to 1976) that college contributed a great deal to their ability to work effectively and get along well with people from

[30] *The Shape of the River*, chs. 3-4.

different races and cultures; for white students, the number nearly doubled.[31]

2. *Amici* colleges contribute very substantially to the ranks of graduate students at the nation's leading graduate and professional schools, and their efforts at inclusion have meant more graduate degrees (at more prestigious institutions) for African-American students generally.

Twenty of *amici*, for whom we have data, report that from 1992 through 2001, 179 of their African-American graduates subsequently earned Ph.D.s in science and engineering fields.[32]

A Haverford graduate who benefited from its Minority Scholars Program – which supports the academic achievement of students of color, and has helped create a graduation rate for minority students that closely matches (and sometimes exceeds) the college's overall graduation rate – went on to graduate study in Molecular Biology at Princeton and will return to Haverford next fall as an Assistant Professor of Neurobiology.

3. Two of the most frequently heard criticisms of admissions programs that take race into account, like *amici's* (and like that at the Michigan Law School and the one at Harvard as described by Justice Powell), are simple canards that are easily demolished.

Graduation rates for "affirmative action" students are not lower than the average, so it cannot fairly be charged that valuable resources are being underused. At Amherst, Colgate, and Vassar – as at Harvard and Princeton – the black student graduation rate is over 90%, and higher than the rate for white students.[33] (By contrast, graduation rates

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[31] *The Shape of the River*, 225-40.

[32] The survey was undertaken by the National Science Foundation, and published by the Co-Operative Institutional Research Program at UCLA.

[33] The Journal of Blacks in Higher Education, *The Wide Disparity in Black Student Graduation Rates at the Nation's Most Selective Colleges and Universities*, Autumn 2002, p. 90.

at even the best of the historically black colleges are substantially lower.)

The consideration of race does not mean that some students of lesser merit are admitted over more "meritorious" students. At *amici* and other highly selective colleges, merit has never been defined purely by test scores. By any measure, the students who have been admitted under the diversity-seeking, race-conscious process that *amici* have employed in reliance on *Bakke* have met the colleges' highest expectations.

Consider, for example, Ted Shaw (Wesleyan '72) and Hugh Price (Amherst '63). Mr. Shaw, one of the counsel for intervenors in *Gratz,* benefited from Cardinal Cooke's early affirmative action efforts to develop leadership skills in young blacks in Catholic schools in New York City, and attended Wesleyan shortly after its post-King assassination commitment to make the student body more racially diverse. He has made exactly the kind of contribution (service in the Department of Justice Civil Rights Division, teaching at the University of Michigan Law School, and practicing civil rights law in this and other courts) that Wesleyan hopes its students will make. He now serves as a Wesleyan trustee.[34]

Similar contributions have been made by Mr. Price. After graduating from Yale Law School, he served as the first executive director of the Black Coalition of New Haven; was for six years as senior vice president of WNET/Thirteen in New York, the nation's largest public television station; was vice president of the Rockefeller Foundation; and has been president of the National Urban League since 1994.[35]

Peter J. Gomes, Bates '65, is University Minister and Plummer Professor of Christian Morals, Harvard University, a Bates Trustee, and a prolific author on topics

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[34] *Ted Shaw '76: Winning the Fight for Social Justice?*, Wesleyan, Winter 1996, pp. 1-4.

[35] Amherst, Summer 1994, p. 6.

of Biblical and Christian Ethics.[36] Notwithstanding its commitment and efforts, Bates "has had very limited success in attracting black students," and only 1.9% of its students are African-American.[37] Are those efforts now to be held unlawful, and the contributions of Bates to the education of leaders like Rev. Gomes forbidden, because Bates considers race along with all the other aspects of a candidate's background?

Beverly Daniel Tatum, Wesleyan '75, formerly acting President of Mount Holyoke, is President of Spelman College. She has written *Why Are All The Black Kids Sitting Together in the Cafeteria?: And Other Conversations About Race* (1997), and *Assimilation Blues: Black Families in a White Community* (1987).[38] Her achievements make plain the educational benefits of looking for and including students like these at *amici*, and explain why the colleges believe so passionately that their missions demand – and the law should not prohibit – efforts to educate and send back into the world those who might not, but for consideration of their whole background, be noticed, or sought out, or admitted.

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[36] Referring to the admission staff who reviewed his application, Rev. Gomes observed: "They invested in the raw stuff of human flesh and, in many cases, my own included, they should have said, 'If we go strictly by the numbers, and strictly by the record, and strictly by the achievements posted, this is a man who would be much happier in Orono than in Lewiston.'", Bates College, *Taking a Chance on Our Future*, Oct. 26, 2002, available at http://www.bates.edu/homecoming-gomes-address.xml.

[37] *The Journal of Blacks in Higher Education*, available at http://www.jbhe.com/features/38_leading_colleges.html.

[38] *Talking about Race with Beverly Daniel Tatum '75*, Wesleyan, Summer 1998, pp. 5-9.

III. BARRING INSTITUTIONS OF HIGHER EDUCATION FROM MAINTAINING THEIR OWN ADMISSION CRITERIA WOULD VIOLATE VITAL PRINCIPLES OF ACADEMIC FREEDOM AND INSTITUTIONAL AUTONOMY, AS WELL AS STARE DECISIS.

Petitioners' quest to displace the educational judgments of the University of Michigan – and, make no mistake about it, the educational judgments of *amici* and private colleges and universities generally – is at war with two fundamental principles of constitutional law: the rule that "Considerations of profound importance counsel restrained judicial review of the substance of academic decisions," *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985), and the rule of *stare decisis*.

1. The rule of judicial restraint that underlies *Ewing*, which provides a substantial barrier to petitioners' campaign here, rests in part on the First Amendment. The *Ewing* Court noted its "reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, "a special concern of the First Amendment." *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967). Academic freedom includes the "discretion to determine, on academic grounds, who may be admitted to study," "one of 'the four essential freedoms' of a university. *Bakke*, 438 U.S. at 312 (opinion of Powell, J.)." *Ewing*, 474 U.S. at 226 n.12 (citations omitted).

But the judicial restraint commanded by *Ewing* has even older and deeper roots, reaching back to *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819), and the Court's recognition there that a free society requires public and private spheres, and limitations on governmental intrusion and control so as to preserve those key distinctions. "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students . . . but also . . . on autonomous decisionmaking by the academy itself . . . ." *Ewing*, 474 U.S. at 226 n.12

(citations omitted). Only a "hands off" policy leaves schools free to reform, experiment, refine, and thereby offer to the whole society the improvements that result from a free market in ideas and practices.

The framers wisely placed the nation's colleges and universities, and particularly private institutions generally apart from judicial or even legislative interference. *Trustees of Dartmouth Coll.*, *supra* a.

Accordingly, "When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms . . . ." *Ewing*, 474 U.S. at 225; *see also id.* at 228 (courts may displace such judgments, if at all, only if they were found to be such a substantial departure from accepted academic norms or "aberrant"); *cf. Bakke*, 438 U.S. at 318 (Powell, J.) ("in an admissions program where race or ethnic background is simply one element – to be weighed fairly against other elements – in the selection process," good faith "would be presumed").[39]

Private selective colleges and universities have made, individually but with impressive unanimity, a collective judgment that obtaining diversity in their classes, including racial diversity, is a matter of profound educational importance and social importance, and that the way to obtain that diversity is by seeking it, in a process in which the reality of race is considered competitively along with dozens of other factors. Deference to the colleges' educational

[39] *See also Ewing*, 474 U.S. at 227-28 (asking whether the challenged decision by educators was "beyond the pale of reasoned academic decision-making"). *Cf. Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 89-90 (1978) (courts are not equipped or authorized to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions - decisions that require "an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking").

judgments that diversity is a core component of the education they are seeking to provide is plainly called for. Petitioners and their allies seeking to eliminate racial background from the list of dozens of other factors looked to in assembling a class have not met, and could not conceivably meet, the *Ewing* standard.

Displacement of a college or university's core prerogatives – including the power to decide which set of applicants, considered individually and collectively, will take fullest advantage of what the college has to offer, contribute most to the educational process in college, and be most successful in using what they have learned for the benefit of the larger society[40] – would be an extraordinary departure from the deference that courts have long shown to institutions of higher education generally, and particularly private institutions.

2. *Stare decisis* independently leads to the same judicial restraint required by *Dartmouth College*, *Sweezy*, and *Ewing*. The standards for reversal of *Bakke*'s constitutional holding, as set forth in *Dickerson v. United States*, 530 U.S. 428 (2000), and *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992), are not nearly met.

After *Bakke*, each of the *amici* (and undoubtedly other selective colleges and universities as well) reviewed their admissions procedures in light of Justice Powell's opinion sketching out a permissible approach (which five justices plainly supported), and set sail accordingly. Enormous reliance interests have built up accordingly. In dozens of ways, the schools where diversity is a significant reality have changed, and invested in change.

The peopling of the college communities with a more diverse group of students has made the colleges different (and better) than they were. Reliance on *Bakke* has had huge impact on the world in which aspiring families and their high school students, and college students, live. *Bakke* has left its mark on recruiting efforts, on relationships with

[40] *The Shape of the River*, 277.

secondary public and private schools and high school counselors, on support services and programs, on housing choices, and on the curricula, which have broadened and developed to meet the needs and expectations of a more diverse student body. Current students and those matriculated for next year have expectations about being in a diverse community, and not being isolated.

Not only have the colleges invested in reliance on *Bakke;* so too have African-American students and their parents. Thousands of such students have been aiming for admission to the *amici* colleges, or their highly selective university counterparts. Reversal of *Bakke*, and any reversal of judgment in favor of the Michigan Law School, would as a practical matter turn realistic opportunities into lottery chances. Without the ability to take race into account – and even more, with a post-*Grutter* likelihood that differential admission rates in SAT bands would be attacked as *prima facie* evidence of unlawful discrimination – African-American presence on America's most selective campus would plummet, as it did in California.

In short, upending the world that *Bakke* created would interfere substantially with reasonable expectations and long-settled social patterns. That dislocation should weigh heavily against dispatching Justice Powell's opinion and the broadened opportunity it allowed for African-Americans at the nation's most selective colleges.

Extraordinary progress in opening up previously closed educational institutions has occurred since conscious efforts to include black Americans within the circle of those admitted to highly selective educational institutions in the United States began in the 1960's, and were held permissible in *Bakke.*[41] Many thousands of black Americans have graduated, and taken their place in

[41] Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. Rev. 521, 569-71 (2002); *The Journal of Blacks in Higher Education*, available at http://www.jbhe.com/features/38_leading_colleges.html.

American society, and have benefited the society at large by their accomplishments and civic contributions. For the Court to deem their very degrees illegitimate, the basis for their achievements and contributions the product of violations of constitutional or statutory law, would be an extraordinary step, permissible, if at all, only if the constitutional or statutory text or history left no doubt whatever that *Bakke* reached the wrong result.

The Fourteenth Amendment's text does not preclude universities and colleges from considering racial background, *among other factors* and without quotas, in the service of diversifying their student bodies to include students from historically excluded groups (particularly when students from those groups would continue to be excluded if SAT or comparable quantitative tests were relied on as the sole or prime measure of selection). Given the repeated enactment of race-conscious legislation by the Congress that adopted the Fourteenth Amendment in order to close the social gap between blacks and whites, the Court could not fairly conclude that the "original understanding" of the Fourteenth Amendment prohibits what *Bakke* permits.[42] In view of that telling original understanding, it is plainly not possible to say that the holding in *Bakke* – that race may be considered competitively, along with other factors, so long as separate racial tracks are not set up – was plainly wrong.

* * * *

The judicial deference owed to colleges and universities, joined to the wise policy of *stare decisis*, counsels against any resolution of these cases that would interfere with the powers of colleges and universities generally – and particularly private institutions – to experiment and pursue

[42] Eric Schnapper, *Affirmative Action And The Legislative History Of The Fourteenth Amendment*, 71 Va. L. Rev. 753, 784-85 (1985); Jed Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427, 429-32 (1997); Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. Rev. 521, 577 & n. 322 (2002).

their own judgments as to how to best use their resources for educational and charitable purposes, even when doing so entails some consideration of racial background as one factor, among many, to be considered and weighed competitively with many others.

CONCLUSION

Academic freedom and the deference due educational judgments leave colleges and universities free to select those students who, in their judgment and as *Bakke* contemplated, will, individually and collectively, take fullest advantage of what the college has to offer, contribute most to the educational process, and use what they have learned for the benefit of the larger society. The Fourteenth Amendment, Title VI, and 42 U.S.C. §1981 do not prohibit colleges and universities from taking into account race or ethnic background as factors to be competitively evaluated and considered in admission decisions, without quotas. The judgments below should be affirmed.

Respectfully submitted,

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Nos. 02-241 & 02-516

IN THE

Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

—v.—

LEE BOLLINGER, *et al.*,

Respondents.

JENNIFER GRATZ and PATRICK HAMACHER,

Petitioners,

—v.—

LEE BOLLINGER, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN JEWISH COMMITTEE; CENTRAL CONFERENCE OF AMERICAN RABBIS; HADASSAH; NATIONAL CONFERENCE FOR COMMUNITY AND JUSTICE; NATIONAL COUNCIL OF JEWISH WOMEN; PROGRESSIVE JEWISH ALLIANCE; UNION OF AMERICAN HEBREW CONGREGATIONS; AND WOMEN OF REFORM JUDAISM, THE FEDERATION OF TEMPLE SISTERHOODS IN SUPPORT OF RESPONDENTS

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Adarand Constructors, Inc. v. Pena,
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Brown v. Board of Education,
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Gratz v. Bollinger,
122 F. Supp. 2d 811 (E.D. Mich. 2000) 6, 14, 21, 28

Grutter v. Bollinger,
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Keyishian v. Board of Regents,
385 U.S. 589 (1967) 20

Local Union No. 35 of the Internat'l Brotherhood of Electrical Workers v. Hartford,
625 F.2d 416 (2d Cir. 1980) 9-10

Metro Broadcasting, Inc. v. FCC,
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Regents of the University of California v. Bakke,
438 U.S. 265 (1978) ..... *passim*

Sweatt v. Painter,
339 U.S. 629 (1950) 20

United States v. Brown University,
5 F.3d 658 (3rd Cir. 1993) 18

Wygant v. Jackson Bd. of Educ.,
476 U.S. 267 (1986) 21

Zelman v. Simmons-Harris,
536 U.S. 639, 122 S. Ct. 2460 (2002) 15

Other Authorities

Babylonian Talmud, Tractate Sanhedrin..... 5

Barnes, R., *Politics and Passion: Theoretically a Dangerous Liaison*, 101 Yale L.J. 1631 (1992)..... 20

The Blessings of Liberty and Education: An Address Delivered in Manassas, Virginia, on 3 September 1894, in 5 *The Frederick Douglass Papers* 623 (J. Blassingame & J. McKivigan eds. 1992)..... 15

Bowen, W. & Bok, D., *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (Princeton University Press 1998)..... 18, 24

CensusScope: Census 2000, (Social Science Data Analysis Network 2000) 19

Chilling Admissions: The Affirmative Action Crisis and the Search for Alternatives (Gary Orfield & Edward Miller, eds., Harvard Education Publishing Group 1998)..... 18, 26

Clark, K.B., *Effect of Prejudice and Discrimination on Personality Development* (Midcentury White House Conference on Children and Youth, 1950)..... 1

Emerson, R., "Culture," *The Conduct of Life* (1860, rev. 1876) 17

Feingold, H., *Lest Memory Cease: Finding Meaning in the American Jewish Past* (Syracuse University Press 1997)..... 10

Freedman, J., *Liberal Education & The Public Interest* (University of Iowa Press 2003)..... 16, 26

Goldman, A., *Justice and Reverse Discrimination* (Princeton University Press 1979) 12

Gottesman, M., *Twelve Topics to Consider Before Opting for Racial Quotas*, 79 Geo. L.J. 1737 (1991) 11

Greenberg, J., *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 3 B.C. L. REV. 521 (2002) 17

Gurin, P., *Reports submitted on behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education*, 5 Mich. J. Race & Law 363 (1999)..... 17

Harris, C., *Critical Race Studies: An Introduction*, 49 UCLA L. Rev. 1215 (2002) 24-25

Honan, W., *Dartmouth Reveals Anti-Semitic Past*, N.Y. Times, Nov. 11, 1997..... 10

Horn, C. & Flores, S., *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* (The Civil Rights Project, Harvard University, Feb. 2003) 25

Investing in People: Developing All of America's Talent on Campus and in the Workplace (Business-Higher Education Forum 2002) 17-19

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King, M. L., Jr., *Response to Award of American Liberties Medallion at the American Jewish Committee 58th Annual Meeting* (May 20, 1965) 27

Meacham, J., *The New Face of Race*, NEWSWEEK (Sep. 18, 2000) 19

Nelson, W., *The Changing Meaning of Equality in Twentieth-Century Constitutional Law*, 52 Wash. & Lee L. Rev. 3 (1995) 11

Oren, D., *Joining the Club: A History of Jews and Yale* (Yale University Press 1985) 11

Raines, K., *The Diversity and Remedial Interests in University Admissions Programs*, 91 Ky. L.J. 255 (2002) 17

Synnott, M., *The Half-Opened Door: Discrimination at Harvard, Yale, and Princeton, 1900-1970* (Greenwood Press 1970) 10

United States Commission on Civil Rights, Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education (2002) 25-26

Wightman, L., *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 N.Y.U. L. Rev. 1 (1997) 25

INTERESTS OF *AMICI*[1]

The **American Jewish Committee** ("AJC") is a national, not-for-profit, human relations organization, founded in 1906 for the purpose of protecting the civil and religious rights of Jews. It maintains 33 regional offices in major cities nationwide and has more than 150,000 members and supporters. In furtherance of its goal to strengthen the basic principles of pluralism around the world and at home as the best defense against anti-Semitism and other forms of bigotry, AJC has advocated for the removal of the historical barriers faced by many in our society, particularly those of color. For example, AJC sponsored the study demonstrating the psychological impact of prejudice and discrimination upon children cited by this Court in its landmark *Brown v. Board of Education* decision.[2]

At the same time, AJC has recognized the harmful effects of making inflexible predeterminations about the correct composition of student bodies in the context of higher education. For this reason, AJC has staunchly opposed, and continues to oppose, the types of quotas used to restrict Jewish admission to universities in the earlier part of the Twentieth Century. Such quotas were born of bigotry and precluded the assessment of applicants as individuals.

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1 Blanket consent letters indicating the parties' approval of the filing of *amicus* briefs have been filed with the Clerk of the Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their counsel, or their members made a monetary contribution to the preparation or submission of this brief.

2 *Brown v. Board of* Education, 347 U.S. 483, 495 n.11 (1954) (citing K.B. Clark, *Effect of Prejudice and Discrimination on Personality Development* (Mid-century White House Conference on Children and Youth, 1950)).

The two cases currently before the Court require the synthesizing of these two principles, *i.e.*, the importance of removing historical barriers without making inflexible predeterminations. While recognizing that the removal of historical barriers to advancement is critical to eradicating our nation's legacy of discrimination, there is another compelling value at stake – diversity in higher education. Diversity not only provides all students with a richer educational experience, but also prepares them for participation in our pluralistic democracy. AJC believes the compelling interest of diversity can best be served through carefully tailored admissions programs, such as the programs in place at the University of Michigan and its Law School.

The **Central Conference of American Rabbis** ("CCAR"), founded in 1889, is the rabbinic arm of the Reform Jewish Movement. It represents some 1,800 rabbis across North America. Our nation's history has been marred by centuries of racial and ethnic prejudices and wrongdoings. As Jews, who have often been the victims of such prejudices, we value the importance of equality. It is noted in Genesis that all of God's children are "created in the image of God." History continues to teach the importance of equality and that "all people benefit when the barriers to true equality are removed." (CCAR Resolution on Affirmative Action, 1978). In that spirit, and in recognition of the value of a diverse campus community, CCAR supports the carefully crafted programs at issue here.

Hadassah, the Women's Zionist Organization of America, founded in 1912, is the largest women's and Jewish membership organization in the United States, with over 300,000 members nationwide. In addition to Hadassah's mission of maintaining health care institutions in Israel, Hadassah has a proud history of protecting the rights of women and the Jewish community in the United States. Hadassah supports affirmative action as an essential tool to

achieve a "level-playing field" of opportunity for historically excluded Americans and to ensure diversity in education from which all participants and society benefit. While Hadassah rejects the use of quotas to achieve diversity, Hadassah supports the use of goals and timetables. Hadassah believes that race is one factor that may be taken into account, among many other factors, in making educational admissions decisions.

The **National Conference for Community and Justice** ("NCCJ"), founded in 1927 as The National Conference of Christians and Jews by such leaders as U.S. Supreme Court Justices Charles Evans Hughes and Benjamin Cardozo, is a human relations organization dedicated to fighting bias, bigotry, and racism. NCCJ promotes understanding and respect among all races, religions and cultures through advocacy, conflict resolution and education through its national office and 58 regional offices. NCCJ supports realistic goals and timetables in affirmative action plans, and opposes the use of quotas except in rare instances in court-ordered, short-term situations to remedy egregious discrimination in education, healthcare, jobs and economic opportunity.

Affirmative action policies must be maintained to advance the creation of educational settings and workplaces that promote diversity and inclusion and are free of bias, bigotry, and racism. Largely because of affirmative action programs, our nation has made significant strides toward providing access and opportunity that have resulted in people of color and women assuming new roles of leadership. Affirmative action has created examples of success, inspired the young and shown the benefits a diverse workforce brings to corporate America. Yet, it is much too soon to declare victory over racial and gender bias, as it is indisputable that a majority of the U.S. population – people of color and women – are still facing discrimination in education, healthcare, jobs

and other economic opportunities. One of the most important values of achieving higher education is that it is a gateway to opportunity for the next generation of leaders and citizens. As such, NCCJ supports the admissions programs currently in place at the University of Michigan and its Law School.

The **National Council of Jewish Women** ("NCJW") is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, NCJW has 90,000 members in over 500 communities nationwide. Given NCJW's *National Principle*, which states that "A democratic society and its people must value diversity and foster mutual understanding and respect for all," as well as NCJW's *National Resolution* supporting "equal opportunity for all in the public and private sectors through programs such as affirmative action," NCJW joins this brief.

The **Progressive Jewish Alliance** ("PJA") is a national membership organization dedicated to the Jewish traditions of ensuring social and economic justice, promoting equality and diversity and pursuing peace. Under the rubric of "Tikkun Olam, Tikkun Ha Ir" ("Repair of the World, Repair of the City"), PJA works in alliance with other organizations and individuals similarly dedicated to achieving these goals in Southern California and beyond.

The issues raised in this case are of profound concern to PJA. The American Jewish community is acutely aware of the need for all Americans to have access to excellent higher education. Jewish tradition recognizes the importance of higher education as a value in and of itself, and also as a gateway to full participation in society. This is especially the case with regard to law school. Jewish legal tradition recognizes that every judge's unique personal perception

impacts his or her administration of the law. *Babylonian Talmud*, Tractate Sanhedrin, 6b. Thus, the more varied the pool of judges and attorneys produced by our legal education system, the more robust and just our legal system will be. PJA believes that carefully tailored admissions policies, such as those in place at the University of Michigan and its Law School, currently offer the best formula for achieving diverse and highly qualified student communities.

The **Union of American Hebrew Congregations** ("UAHC") is the central body of the Reform Movement in North America. UAHC is the largest Jewish movement in North America, composed of 900 Reform congregations and 1.5 million Reform Jews. The Jewish tradition has always been sensitive to the plight of the stranger. A long, dark history of injustice and prejudice has made African Americans, Latinos, women and other groups strangers in society's mainstream. As Jews deeply committed to the prophetic imperatives of our tradition, the Reform Movement "is dedicated to those deeds that will create justice for all people." (UAHC Resolution on Affirmative Action, 1977). UAHC supports the programs at issue as important tools for addressing the effects of discrimination and for fostering diversity on campus.

Women of Reform Judaism, The Federation of Temple Sisterhoods, comprised of 100,000 women in 600 local groups nationwide, deeply committed to the social justice teachings of the prophets, is constitutionally mandated to serve humanitarian causes. Its resolutions, adopted through democratic processes, enable Women of Reform Judaism to implement this mandated principle. Over the years, Women of Reform Judaism has adopted numerous resolutions calling for: quality public education to prepare all students for effective participation in employment and community; affirmative action and equity programs; and greater understanding of America's increasing diversity.

Women of Reform Judaism joins this brief in furtherance of its resolutions.

STATEMENT OF THE CASES

Both cases before the Court involve the consideration of race as a factor in the admission to public universities:

1. Pursuant to an admissions policy that was drafted to comply with this Court's decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the University of Michigan Law School considers race as one factor among many that are weighed to determine which law school applicants receive offers of admission. The policy states that the Law School "seek[s] a mix of students with varying backgrounds and experiences who will respect and learn from each other." *Grutter v. Bollinger*, 288 F.3d 732, 736 (6th Cir. 2002).

2. The admissions program for the College of Literature, Science and Arts at the University of Michigan, which also was implemented in response to this Court's decision in *Bakke*, is based upon a "selection index" points system. Under that program, an applicant's race is a factor that is considered. Applicants are awarded points for a variety of factors, including their membership in an "under-represented" racial or ethnic minority group. *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 827-28 (E.D. Mich. 2000).

SUMMARY OF ARGUMENT

I. The historic Jewish opposition to quotas does not mandate rejection of carefully tailored goals. The Jewish community knows first hand the harm imposed by the utilization of quota systems in higher education because quotas were used by premier American universities in the early decades of the Twentieth Century to limit the number of Jewish students. As a result, many in the Jewish

community welcomed this Court's decision in *Bakke*, which struck down a special admissions program at a state medical school where 16 of 100 slots for entering students were set aside for minority students and, as part of that program, a separate admissions committee considered the applications of the minority students. However, flexible goals aimed at increasing the numbers of minority students at a given university are not the same as unconstitutional quotas.

The admissions programs utilized by the University of Michigan, at both the Law School and the College of Literature, Science and Arts, do not constitute quotas and are constitutional. Under these admissions systems, race is only one of many factors considered. There are no fixed numbers or percentages of persons from a given race who will be admitted. Rather, each student's academic strengths, personal achievements and life experiences are given consideration, and the most overwhelming criteria used in making admissions decisions are academic qualifications.

II. Considering race as a factor in university admissions furthers the compelling governmental interest of achieving diversity in higher education in the United States. Diversity is an important component of a well-rounded education, especially in such a pluralistic country as our own. Exposure in universities to those of diverse backgrounds and experiences will better equip those graduates who go on to become the leaders of our future. Only if diversity is permitted to continue and flourish in our universities will our children receive the rich and rewarding education that they deserve.

III. The means used by the University of Michigan to meet the compelling interest in obtaining diversity in higher education do not run afoul of the Equal Protection Clause. Rather, they are narrowly tailored to meet that interest. Disallowing the consideration of race as one factor among many in university admissions would have the

effect of eliminating meaningful diversity on American campuses. The University of Michigan should be free to choose among properly crafted programs one that is best suited for achieving a diverse student body.

ARGUMENT

I. HISTORIC JEWISH OPPOSITION TO QUOTAS DOES NOT MANDATE REJECTION OF NARROWLY TAILORED ADMISSIONS PROGRAMS LIKE THOSE IN PLACE AT THE UNIVERSITY OF MICHIGAN AND ITS LAW SCHOOL.

Our country was founded upon certain bedrock principles, chief among them being freedom and equality. However, freedom and equality have not always been available to all of our citizens. Many of them (notably Native Americans, African Americans, other minority populations and women) have historically been treated as second-class citizens. For many years, Jews were treated similarly in many parts of this country. Legislation has been passed, cases have been decided, and programs have been implemented as societal values and mores have evolved in an effort to achieve for all the freedom and equality to which our country strives. The important issues that arise out of the two cases before the Court are by-products of our past. This Court by no means is writing on a clean slate.

Of course, the precedent most relevant to the issues here is this Court's decision in *Bakke*. In *Bakke*, the Medical School of the University of California at Davis had established a "special admissions" program under which 16 of the 100 positions in the class were set aside for "disadvantaged" minority students. 438 U.S. at 272-75. In addition, the "special admissions program operated with a separate committee, a majority of which were members of minority groups." *Id.* at 274.

This quota system was found to be unconstitutional. "It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats." *Id.* at 319 (Powell, J.). Accordingly, the "two-track" program was found to be in violation of the Equal Protection Clause. *Id.* at 289-90. However, in striking down the medical school's admissions program, Justice Powell distinguished between unconstitutional quota systems and the constitutionally legitimate consideration of race as a factor in university admissions. *See id.* at 320 and discussion *infra* at pp. 13, 22-24. Particularly because of its unique experience with exclusionary quotas, many in the Jewish community vigorously opposed the admissions program challenged in *Bakke*, and therefore applauded this Court's decision in that case.

A. The Jewish Experience With Quotas.

During the early decades of the Twentieth Century, quotas were used to limit the number of Jews admitted to colleges and universities.[3] Among the elite private

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[3] The use of quotas against Jews was not a new phenomenon. *Numerus clausus* laws enacted in several European countries limited Jewish participation in schools and occupations to certain numbers or percentages, usually in relation to the total population. For example, Hungary enacted a law that provided that the student bodies in the universities should be proportioned by race to reflect the racial percentages of the total population. *Local Union No. 35 of the Internat'l Brotherhood of Elec. Workers v. Hartford*, 625 F.2d 416, 426 (2d Cir. 1980) (Van Graafeiland, dissenting). In addition, Bulgaria limited the number of Jews in both schools and occupations by its Law for the Defense of the Nation. *Id.* In fact, the law restricted the number of Jewish doctors to twenty-one, the number of Jewish lawyers to twenty,

institutions, Harvard, Yale, Princeton, Columbia and Dartmouth have well-documented histories of using quotas to restrict the admission of Jewish candidates. In the 1920s, Harvard, Yale and Princeton used various means to limit the number of Jewish students, including "photographs attached to admissions forms, specific questions regarding the applicant's race and religion, personal interviews, and restriction of scholarship aid." M. Synnott, *The Half-Opened Door: Discrimination at Harvard, Yale, and Princeton, 1900-1970*, pp. 19-20 (Greenwood Press 1970). Harvard's President, Abbott Lawrence Lowell, sought to justify Harvard's use of quotas limiting the number of Jews as reducing anti-Semitism within the student body: "'If their number should become 40 percent of the student body,' he explained in a letter to Alfred Benesch, a prominent Jewish alumnus from Cleveland, 'the race feeling would become intense. When on the other hand, the number of Jews was small, the race antagonism was also small.'" H. Feingold, *Lest Memory Cease: Finding Meaning in the American Jewish Past*, p. 95 (Syracuse University Press 1997) (citation omitted).

In the summer of 1934, Dartmouth alumnus Ford H. Whelden wrote to Robert C. Strong, the director of admissions, stating: "[T]he campus seems more Jewish each time I arrive in Hanover. And unfortunately many of them . . . seem to be the 'kike' type." W. Honan, *Dartmouth Reveals Anti-Semitic Past*, N.Y. Times, Nov. 11, 1997, at A16. In response, Strong stated: "I am glad to have your comments on the Jewish problem, and I shall appreciate your help along this line in the future. If we go beyond the 5 percent or 6 percent in the Class of 1938, I shall be grieved beyond words." *Id.*

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and the number of Jewish dentists to a mere seven. *Id.* at 427. Similarly, in 1887, Russia passed a law limiting the number of Jews in middle and higher schools to between two and fifteen percent. *Id.* at 426.

In his 1944-45 annual report as the Chairman of the Board of Admissions at Yale during the 1940s, Edward Noyes wrote, "the Jewish problem . . . continues to call for the utmost care and tact. . . .[T]he proportion of Jews among the candidates who are both scholastically qualified for admission and young enough to matriculate has somewhat increased and remains *too large for comfort*." *D.* Oren, *Joining the Club: A History of Jews and Yale*, p. 177 (Yale University Press 1985) (emphasis supplied) (citation omitted).

In the 1940s, "[e]veryone knew . . . that Columbia like most other colleges and universities did discriminate, especially against Jews . . .." W. Nelson, *The Changing Meaning of Equality in Twentieth-Century Constitutional Law*, 52 Wash. & Lee L. Rev. 3, 35 (1995). Nicholas Murray Butler, President of Columbia, "had earlier imposed quotas that had the effect of reducing Jews from forty to twenty percent of the student body." *Id.* (citation omitted).

The quotas used against Jews arose out of blatant anti-Semitism and were abhorrent. Jews were excluded from educational opportunities strictly because they were Jews, notwithstanding their qualifications. Although these types of quotas no longer appear to exist, it is important that they be kept firmly in mind in analyzing higher education admissions programs, lest we forget the lessons of our past.

B. Differences Between Quotas And Goals.

There are constitutionally significant differences between rigid, racial quotas and targeted goals. A quota is an inflexible template that is often based upon population percentages. Quotas mandate admissions based solely upon group membership and there are often sanctions imposed if they are not met. *See* M. Gottesman, *Twelve Topics to Consider Before Opting for Racial Quotas*, 79 Geo. L.J. 1737, 1748-49 (1991). By contrast, goals are flexible and are

based on the relevant, available, qualified applicant pool. They can be adjusted, as needed, and no sanctions are imposed if they are not met. While quotas used to limit the number of Jews in higher education were motivated by the discriminatory intent to restrict a particular group, goals have the intent of increasing the number of qualified minority members at the institution. *See* A. Goldman, *Justice and Reverse Discrimination,* p. 210 (Princeton University Press 1979) (quoting B. Sandler, 53 Commentary 14-16 (1972)).

The use of quotas in university admissions, like the ones discussed in Section I.A. above, is inappropriate and unlawful. Accepting or rejecting students for admission to public universities solely on the basis of their racial or ethnic background to achieve a predetermined numerical quota is harmful to both those students excluded and those admitted. Quotas simply have no place in American society.

In contrast to quotas, goals in the context of university admissions serve the compelling governmental interest of diversity and are supported by *amici.* (*See* discussion in Section II, *infra*.) These goals are not unlike aspirational business plans established by for-profit organizations. Sometimes the business plan targets are met, and sometimes they are not, but the shareholders are benefited because of the focus and the planning that is directed towards an important interest of the organization. For example, a company could set goals for profits that it hopes to achieve. Alternatively, a company could set goals as to the number of women and/or minorities that it would like to employ. Both these scenarios are indistinguishable from the University of Michigan's efforts to strive for a student body that reflects this nation's pluralistic character at its University and Law School.

C. The Admissions Programs Of The University Of Michigan And Its Law School Do Not Establish Quotas And Are Constitutional.

The admissions programs of the University of Michigan and its Law School are not quota systems. Unlike the admissions program in *Bakke* that was found unconstitutional where there were 16 of 100 seats set aside, there are no fixed numbers or percentages of persons from a given race who will be admitted. Rather, the race of an applicant merely is a factor that is considered during the admissions process. This is precisely what was envisioned by Justice Powell when he sanctioned the Harvard College admissions program in *Bakke*. 438 U.S. at 317 (Powell, J.) ("In such an admissions program, race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats."). (*See* discussion in Section III, *infra*.)

Every application is reviewed individually, in the context of the whole person. Each student's academic strengths, personal achievements and life experiences are given due consideration, among many other factors. The most overwhelming criteria used in making admissions decisions are academic qualifications (*e.g.,* grades, test scores and strength of curriculum). *See* JA 223-40. The University only accepts students who are academically qualified to do the work. *See* Pet. App. 111a.

These are not programs where students are admitted solely on the basis of their race. Such programs would be in violation of the Equal Protection Clause. The programs at issue here are different. Under the admissions programs of the University of Michigan and its Law School, there are multiple factors that are considered in the admissions process, both academic and non-academic. Although some

special consideration is given to the race of the candidate, race is not a dispositive factor. *See Gratz,* 122 F. Supp. at 828 (in College of Literature, Science and Arts admissions "points" system, twenty points awarded to under-represented minority applicants and "six points awarded for geographic factors, four points awarded for alumni relationship, three points awarded for an outstanding essay, five points awarded for leadership and service skills, twenty points awarded for socioeconomic status, [and] twenty points awarded for athletes"); *Grutter,* 288 F.3d at 747 ("the Law School's admissions policy states that '[t]here are many possible bases for diversity admissions' and that in evaluating 'soft' variables, it considers a range of factors such as leadership, work experience, unique talents or interests and the enthusiasm of an applicant's letters of recommendation.").

Criticisms have been leveled against the Law School admissions program because of its inclusion of a "critical mass" component. While the Law School does not strive to admit a particular percentage of under-represented minority students, it does seek to enroll a meaningful number or "critical mass" of such students, which it has defined as "sufficient numbers to ensure under-represented minority students do not feel isolated or like spokespersons for their race, and do not feel uncomfortable discussing issues freely based on their personal experiences." *Grutter*, 288 F.3d at 737.

Amici believe that the "critical mass" component of the Law School's admissions program does not render the admissions program unconstitutional. In contrast to quota systems, the Law School program does not "have a portion of the class that is set aside for a critical mass of under-represented minority students." *Grutter*, 288 F.3d at 737 (citing testimony of Dean Jeffrey Lehman). Of course, care must be taken in the implementation of this component to assure that it does not become a slippery slope to an unacceptable quota system. But such care was taken by the

University of Michigan Law School. In fact, from 1987 to 1998, under-represented minority enrollment at the Law School fluctuated between 12.3% and 20.1%. *Id.* at 748.[4] Looking at the Law School's admissions program over time, it becomes clear that a quota is not in place.

II. CONSIDERATION OF RACE TO ACHIEVE DIVERSITY IN PUBLIC UNIVERSITY ADMISSIONS FURTHERS A COMPELLING GOVERNMENTAL INTEREST.

A. The Value of Racial and Ethnic Diversity in Higher Education.

The value of a rich educational experience simply cannot be overstated. "Education . . . means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free." *The Blessings of Liberty and Education: An Address Delivered in Manassas, Virginia, on 3 September 1894*, in 5 *The Frederick Douglass Papers* 623 (J. Blassingame & J. McKivigan eds. 1992). What was stated by this Court in 1954 remains true to this very day:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education

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[4] Judge Boggs' dissent in *Grutter*, in disapproving of the "critical mass" component of the Law School's admissions program, focused on the 1995 to 1998 time period to conclude that "the Law School really seeks to enroll a critical *number* of minority students," *i.e.*, 13.5% to 13.7%. 288 F.3d at 801. However, it is important to look at the Law School's admissions program over a period of time to obtain an accurate picture of how it works. As this Court recently instructed, a "snapshot" of an educational program may not be sufficient for purposes of constitutional analysis. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 122 S. Ct. 2460, 2471 (2002).

> both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Brown v. Board of Education, 347 U.S. 483, 493 (1954).

Education is a vital interest not only for those in public elementary, middle and high schools, but also for those in our states' colleges and universities. College education prepares our citizens for fulfilling lives and rewarding careers. In addition to its "redemptive potential to heighten the glories and exhilarations of life" for the individual, J. Freedman, *Liberal Education & The Public Interest*, p. 70 (University of Iowa Press 2003), education provides important benefits to our society. "Liberal education urges upon us a reflectiveness, a tentativeness, a humility, a hospitality to other points of view, a carefulness to be open to correction and new insight, that can mitigate [social] tendencies toward polarity, rigidity, and intolerance." *Id.* at 57.

It is widely recognized that diversity plays a crucial role in enhancing the quality of higher education. "Diversity improves education. The study of history, art, literature, sociology, psychology, politics, philosophy, law, medicine,

and many other subjects thrives on discussion, in and out of class. Without schoolmates of diverse experience and viewpoints, including African-Americans, students would miss an essential part of their education. For that reason, '[v]irtually all selective colleges and professional schools have continued to consider race in admitting students.'"[5] J. Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 572 (2002) (citation omitted); *see also* P. Gurin, *Reports submitted on behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education*, 5 Mich. J. Race & L., 363, 364 (1999) ("A racially and ethnically diverse university student body has far-ranging and significant benefits for all students, non-minorities and minorities alike. Students learn better in a diverse educational environment, and they are better prepared to become active participants in our pluralistic, democratic society once they leave such a setting."); K. Raines, *The Diversity and Remedial Interests in University Admissions Programs*, 91 Ky. L.J. 255, 284 (2002) ("A diverse student body . . . allow[s] students to experience different cultures through firsthand interactions with other students."). Moreover, students who receive higher education in a diverse setting will be better suited to compete in the global economy due to an improved ability "to understand issues from different points of view" and "to collaborate harmoniously with co-workers from a wide range of cultural backgrounds." *Investing in People: Developing All of America's Talent on Campus and in the Workplace*, p. 32 (Business-Higher Education Forum 2002) <http://www.acenet.edu/bookstore

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[5] As Ralph Waldo Emerson wrote, "You send your child to the schoolmaster, but 'tis the schoolboys who educate him." R. Emerson, "Culture," *The Conduct of Life* (1860, rev. 1876).

/pdf/investing_in_people.pdf> (last visited Feb. 12, 2003) (hereinafter, "*Investing in People*").[6]

In addition to the educational benefit to individual students, diversity in higher education serves important communal interests. *See United States v. Brown University,* 5 F.3d 658, 683 (3rd Cir. 1993) ("As the district court conceded, the nation profits in immeasurable ways 'when our many great institutions of higher education open their doors to those who for too long were denied the privilege of attending college.'"). *See also Chilling Admissions: The Affirmative Action Crisis and the Search for Alternatives, p. 13* (Gary Orfield & Edward Miller, eds., Harvard Education Publishing Group 1998) (hereinafter, "*Chilling Admissions*") ("Universities must foster the creation of knowledge and the training of leadership for the community and its professions. Because of these critical functions of universities, admissions processes reflect considerations important to the fulfillment of community as well as individual goals. This is precisely what the Supreme Court recognized in the *Bakke* case.").

Diversity's importance in the context of higher education is a function of our nation's pluralistic character. Not only has racial and ethnic diversity been "a

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6 Because of the recognized educational benefits of diversity, it is not surprising that the American public, including university graduates, believes it to be of legitimate concern to university admissions decisions. In a recent study, 88% of those surveyed believed that having students of different races, cultures and backgrounds in higher education is important. And more than three quarters of them agreed that the universities "should be allowed to take action to ensure diversity in their student bodies." *Investing in People,* p. 32. *See also* W. Bowen & D. Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions*, p. 255 (Princeton University Press 1998) (hereinafter, "*The Shape of the River*") ("Of the many thousands of former matriculants who responded to our survey, the vast majority believe that going to college with a diverse body of fellow students made a valuable contribution to their education and personal development.").

distinguishing characteristic of the United States since it became a nation," *Investing in People,* p. 29, but evidence shows that our society is becoming more diverse in population everyday. In 2000, African Americans, Native Americans, Asian Americans and Hispanics made up twenty-nine percent of the population of the United States. *See CensusScope: Census 2000* (Social Science Data Analysis Network 2000)<http://www.censusscope.org/us/chart_race.html> (last visited Feb. 12, 2003). According to one estimate, these groups will constitute forty-seven percent of the United States' population by the year 2050. J. Meacham, *The New Face of Race*, Newsweek, p. 40 (Sep. 18, 2000).

Against this background, it would indeed be ironic if, with all the factors that universities take into account to assure diversity or otherwise serve the university's pedagogical and institutional interests – including geography, sports capability, socioeconomic or legacy status – that the only factors that may not be taken into account are those associated with populations that have been historically underrepresented on our campuses. Moreover, taken to its logical conclusion, the principle of absolute color-blindness might arguably lead to the conclusion that, under traditional civil rights analysis, even the types of preferences noted above are unconstitutional because of their adverse, disparate impact on minority groups. The preference for legacies, for instance, unquestionably favors white applicants at most universities. But the Constitution should not be read to compel reliance on numbers-driven, grades-based admissions standards alone, neither in those cases nor in the cases now before the Court.[7]

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7 As Justice Blackmun noted in his concurring opinion in *Bakke*: "It is somewhat ironic to have us so deeply disturbed over a program where race is an element of consciousness, and yet to be aware of the fact, as we are, that institutions of higher learning, albeit more on the undergraduate than the graduate level, have given conceded preferences up to a point to

The University of Michigan Law School's goal of maintaining a diverse student body is particularly compelling because "the proving ground for legal learning and practice cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and exchange of views with which the law is concerned." *Sweatt v. Painter*, 339 U.S. 629, 634 (1950). The admission of a diverse student body into our nation's law schools ineluctably has led – and will continue to lead – to the invaluable diversity that exists in our state and federal courts. "[I]t is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Bakke*, 438 U.S. at 313 (opinion of Powell, J.) (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)); *see also* R. Barnes, *Politics and Passion: Theoretically a Dangerous Liaison*, 101 Yale L.J. 1631, 1652 (1992) (The "diversity movement" "urges that the previously excluded be brought into positions of power not simply to remedy discrimination, but also to provide those institutions the benefit of the participation of all segments of society.").

B. This Court Has Recognized the Compelling Nature of Racial and Ethnic Diversity in Higher Education.

Considering race as a factor in order to achieve diversity in public university admissions furthers a compelling governmental interest. As was found by Justice Powell in *Bakke*, "the attainment of a diverse student body

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those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largesse on the institutions, and to those having connections with celebrities, the famous, and the powerful." *Bakke*, 438 U.S. at 404 (Blackmun, J., concurring).

. . . clearly is a constitutionally permissible goal for an institution of higher education." 438 U.S. at 311-12.[8]

Significantly, decisions by this Court after *Bakke* have never disavowed Justice Powell's discussion of diversity in higher education as a compelling governmental interest. Indeed, members of this Court have reaffirmed *Bakke's* continuing validity in that regard. In her concurring opinion in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), Justice O'Connor stated: "[A]lthough its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." *Id.* at 286 (citation omitted). In *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), *overruled on other grounds by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), Justice Brennan, in an opinion joined by Justices White, Blackmun, Marshall and Stevens, quoted *Bakke* for the proposition that "a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated." *Metro Broadcasting*, 497 U.S. at 568 (quoting *Bakke*, 438 U.S. at 311-13 (Powell, J.)).

For the last quarter of a century, colleges and universities across the country, including the University of Michigan, have relied upon this Court's pronouncements

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8 Petitioners in *Gratz v. Bollinger* argue in their Brief (at page 47) that "there is no workable way to employ Justice Powell's framework for the consideration of race and ethnicity in educational admissions," and that it results in "subjective interpretations" of what is permissible. What Petitioners ignore, however, is the fact that admissions decisions include elements that are inherently subjective, and often are based on subtle judgments. The critical component of Justice Powell's sound framework is that race may be considered as part of an analysis that includes these subjective elements.

post-*Bakke*. In doing so, they have established admissions programs that not only are aimed at, but in fact have achieved significant progress in diversifying their student bodies. To accept petitioners' arguments and end this noble endeavor would result in a major retrenchment by institutions of higher learning from their efforts to offer their students meaningful opportunities to interact with and learn from others of differing background and experience.

III. THE ADMISSIONS SYSTEMS AT THE UNIVERSITY OF MICHIGAN AND ITS LAW SCHOOL ARE NARROWLY TAILORED TO MEET THE COMPELLING GOVERNMENTAL INTEREST OF ACHIEVING DIVERSITY AND DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

Admissions systems at institutions of higher education that are narrowly tailored to achieve diversity of their student bodies, like those at the University of Michigan, pass constitutional muster. Five Justices in *Bakke* joined in the Court's holding that a public university could, where appropriate, constitutionally consider race under a "properly devised admissions program" involving "competitive consideration of race and ethnic origin." 438 U.S. at 320 (Powell, J.); *id.* at 379 (Brennan, White, Marshall, Blackmun, JJ.). Justice Powell cited with approval to the Harvard College admissions program, "which take[s] race into account in achieving the educational diversity valued by the First Amendment." *Id.* at 316. Justice Powell described the Harvard program as follows:

> In such an admissions program, race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be

> examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a particular quality may vary from year to year depending upon the "mix" both of the student body and the applicants for the incoming class.
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> This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed

> fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

Id. at 317-18 (footnotes omitted). In concurring with Justice Powell that race could be considered as a factor in university admissions, Justices Brennan, White, Marshall and Blackmun found that a state educational institution should be permitted to adopt a race-conscious program, like the Harvard plan, even without a finding on its part of past discrimination. *See id.* at 369.

In the cases before the Court, the University of Michigan and its Law School have carefully crafted their admissions programs to comply with the Court's decision in *Bakke*. Indeed, they have many of the same attributes of the Harvard plan that is discussed with approval in *Bakke*. Most significantly, all candidates in the admissions programs at the University of Michigan and its Law School are considered as individuals and are on equal footing in competing against one another. These programs are different from the admissions program at issue in *Bakke*, where disadvantaged minority students were assessed through a special admissions program and did not compete against the other applicants.

Importantly, disallowing the consideration of race as one factor among many in university admissions would have the effect of eliminating meaningful diversity on American campuses. William Bowen, the former President of Princeton University, and Derek Bok, the former President of Harvard University, estimated that, if a race-neutral admissions policy had been utilized at a sample of five selective colleges and universities, the number of African American students matriculating in 1989 would have fallen from 7.1% to 2.1%. *The Shape of the River*, p. 34. Similar results have been found in connection with law school admissions. *See* C. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. Rev. 1215, 1223-24 (2002)

(enactment of Proposition 209 (barring preferential treatment on the basis of race) and "heavy reliance" on LSAT scores resulted in serious declines in minority enrollments at UCLA Law School: "Compared to the averages between 1990-1996, the class of 2000 (admitted in 1997) represented a 73 percent decline in African American enrollment, a 27 percent decline in Latina/o enrollment, and an 80 percent decrease in American Indian enrollment."); L. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 N.Y.U. L. Rev. 1, 28 (1997) (without race-conscious admissions decisions, number of African American students accepted at accredited law schools annually would drop from 6.8% to 1.6%).

Much has been written about so-called "percentage plans" in place in Texas, California and Florida.[9] These plans are deficient because they largely deprive universities of the ability to assess applicants as individuals. In addition, these plans have "failed to significantly increase enrollment for all minority groups, particularly at the most prestigious state institutions." *USCCR Report*, Chap. 4. *See also* C. Horn & S. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences*, p. 58 (The Civil Rights Project, Harvard University, Feb. 2003)

---

9 Texas instituted an admissions "percentage plan" in 1998 that "guarantees high school graduates in the top 10 percent of their classes admission to a Texas public college or university of their choice." United States Commission on Civil Rights, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education*, Executive Summary (2002) <http://www.usccr.gov/pubs/percent2.htm> (last visited Feb. 12, 2003) (hereinafter, "*USCCR Report*"). Under a state-imposed "Master Plan," the University of California must admit the top 12.5 percent of high school graduates. *Id.* In 1999, Florida "instituted the Talented 20 Program (T20 Program), which guarantees admission to one of Florida's 11 public institutions for students graduating in the top 20 percent of their high school class and completing a prescribed 19-unit academic high school curriculum." *Id.*

<http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf> (last visited Feb. 12, 2003) ("the percent plans seem to have the least impact on the most competitive campuses, which have persisting losses in spite of many levels of efforts to make up for affirmative action"). Moreover, the viability of these plans depends upon the continued segregation of the nation's public schools, which *amici* find repugnant.

It is important to note that diversity cannot be achieved strictly by considering the socioeconomic status of applicants. "Most poor people in the United States are neither black nor Latino, and many of the minority students admitted to college through race-conscious affirmative action are not poor. A ranking of students below the poverty line by their test scores would result in a pool of favored applicants that was mostly Asian and white – many of them from temporarily poor families who managed to send their children to competitive schools that prepared them for college entrance exams." *Chilling Admissions*, p. 9.

Public universities, like the University of Michigan, are to be commended for reaching out to disparate groups in our society for inclusion in their student bodies. They are to be commended for carefully crafting admissions programs in order to comply with this Court's decision in *Bakke* and to achieve the diversity that they have found to be essential to higher education. "Indeed, except for the military and professional athletics, universities have done more than any other institution to bring minorities into full membership in American life .... These efforts have served to unite our shared destinies and burnish the legitimacy of democratic ideals." J. Freedman, *Liberal Education & The Public Interest*, p. 50 (University of Iowa Press 2003). *Amici* urge that the State of Michigan be permitted to choose which admissions programs to employ, so long as the programs used – like the ones at issue in the cases before the Court –

are narrowly tailored to achieve the compelling interest of achieving diversity.

* * *

The Rev. Martin Luther King, Jr., who was presented with the prestigious American Liberties Medallion in recognition of his "exceptional advancement of the principles of human liberty" at the American Jewish Committee's 58th Annual Meeting in 1965, closed his acceptance speech as follows: "So I close by quoting the words of an old Negro preacher who did not quite have his grammar right but who uttered the words of great symbolic profundity, in the form of a prayer: 'Lord, we ain't what we want to be; we ain't what we ought to be; we ain't what we gonna be, but, thank God, we ain't what we was.'" Martin Luther King, Jr., *Response to Award of American Liberties Medallion at the American Jewish Committee 58th Annual Meeting* (May 20, 1965) <http://www.ajc.org/InTheMedia/Publications.asp?did=403&pid=930> (last visited Feb. 12, 2003). This country should strive for the day when we are what we ought to be – diverse and equal. Until that time, race really does matter, and public universities should be permitted to consider race as one of a number of factors taken into account in their admissions programs in order to achieve the compelling state interest of diversity in higher education.

CONCLUSION

The decision of the Sixth Circuit in *Grutter v. Bollinger* should be affirmed and the judgment of the U.S. District Court for the Eastern District of Michigan in *Gratz v. Bollinger* holding that the undergraduate admissions program is constitutional should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

BARBARA GRUTTER,
Petitioner,

v.

LEE BOLLINGER, *et al.*,
Respondents.

JENNIFER GRATZ, *et al.*,
Petitioners,

v.

LEE BOLLINGER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, ASIAN LAW CAUCUS, ASIAN PACIFIC AMERICAN LEGAL CENTER, *ET AL.*, IN SUPPORT OF RESPONDENTS

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Asian Law Alliance

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Asian Pacific Islander Legal Outreach
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Association of Asian Indian Women in Ohio

Association of Asian Pacific Community Health Organizations

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Organization of Chinese Americans

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Federal Cases

Adarand Contractors, Inc. v. Pena, 515 U.S. 200 (1995)..... 22
Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000) 4, 10, 12
Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001) 12
Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002) (*en banc*)..... 3, 4, 6, 7, 9, 10, 12
Korematsu v. United States, 323 U.S. 214 (1944) 22
Marks v. United States, 430 U.S. 188 (1977) 9
Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992)..... 9
Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 9

Federal Statutes and Rules

Pub. L. 100-383, § 2(a), 102 Stat. 903-904 22
Supreme Court Rule 37.3(a) 1

Federal Regulations

Proposed Reforms to Affirmative Action in Federal Procurement, *Appendix - The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey*, 61 Fed. Reg. 26042, 26050-63 (May 23, 1996) 21

Books, Reports And Periodicals

Asian Americans and Pacific Islanders Joint Task Force, *AAPI Federal Employment and Glass Ceiling Issues* (2001) 20

"Asian Pacific American Agenda: Asian Americans on the Issues," *Asian Week* (August 23, 1996) 16

Brest, Paul et al., *Affirmative Action for Whom?*, 47 Stan. L. Rev. 855 (1995) 19

Chang, Mitchell, "The Positive Educational Effects of Racial Diversity on Campus," in *Diversity Challenged: Evidence on the Impact of Affirmative Action* (Gary Orfield and Michael Kurlaender eds., 2001) 7

Chen, Terri Yuh-lin, *Hate Violence as Border Patrol: An Asian American Theory of Hate Violence*, 7 Asian L.J. 69 (2000) 2, 23

Chew, Pat K., *Asian Americans in the Legal Academy: An Empirical and Narrative Profile*, 3 Asian L.J. 7 (1996) 20

Committee of 100, *American Attitudes Toward Chinese Americans and Asians* (2001) 21, 22

Census 2000 Fact Sheet: Residential Segregation in United States Metropolitan Areas (April 27, 2001) 14

"Eyes on Michigan: the California Case," *Daily Bruin*, (Feb. 7, 2003) 15

Equal Employment Opportunity Commission, *Job Patterns for Minorities and Women in Private Industry* (1998), *available at* http://www.eeoc.gov/stats/jobpat/1998/tables-1.html 19

Kang, Jerry, *Racial Violence Against Asian Americans*, 106 Harv. L. Rev. 1926 (1993) 22, 23

Kidder, William C., *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts About Thernstrom's Rhetorical Acts*, 7 Asian L.J. 29 (2000) 15

Kidder, William C., *Affirmative Action in Higher Education: Recent Developments in Litigation, Admissions and Diversity Research*, 12 Berkeley La Raza L.J. 173 (2001) 16

Korn/Ferry International, *Executive Profile: A Decade of Change in Corporate Leadership* (1990) 20

Kurlaender, Michael & John T. Yun, "Is Diversity a Compelling Educational Interest? Evidence from Louisville," in *Diversity Challenged: Evidence on the Impact of Affirmative Action* (Gary Orfield and Michael Kurlaender eds., 2001) 7, 8

LEAP Asian Pacific American Public Policy Inst. & UCLA Asian American Studies Ctr., *The State of Asian Pacific America* (1993) 19

Lee, Cynthia Kwei Yung, *Beyond Black and White: Racializing Asian Americans in a Society Obsessed with O.J.*, 6 Hastings Women's L.J. 165 (1995) 22

Lien, Pei-te et al., *A Summary Report of the Pilot Study of the National Asian American Political Survey* (2001) 16

National Asian Pacific American Legal Consortium, *Audit of Violence Against Asian Pacific Americans* (2000) 23

National Science Foundation, *Women, Minorities, and Persons with Disabilities in Science and Engineering* (1998), *available at* http://www.nsf.gov/sbe/srs/nsf99338/pdfstart.html 20

Orfield, Gary & Dean Whitla, "Diversity and Legal Education: Student Experiences in Leading Law Schools," in *Diversity Challenged: Evidence on the Impact of Affirmative Action*, (Gary Orfield and

Michael Kurlaender eds., 2001) 7
Thernstrom, Stephan, *Farewell to Preferences?*, 130 Pub. Interest 34 (1998) 17
Thernstrom, Stephan and Abigail Thernstrom, *Reflections on the Shape of the River*, 46 UCLA L. Rev. 1583 (1999) 14
Tienda, Marta et al., *Closing the Gap? Admissions and Enrollments at the Texas Public Flagships Before and After Affirmative Action* (2003) 13, 15
Turnbull, Spencer K., *Wen Ho Lee and the Consequences of Enduring Asian American Stereotypes*, 7 Asian Pac. Am. L.J. 72 (2001) 22
University of Michigan Law School, Report and Recommendations of the Admissions Committee (1992) 8, 11-12, 14
Wang, Theodore Hsien, *Swallowing Bitterness: The Impact of the California Civil Rights Initiative on Asian Pacific Americans*, Ann. Survey Am. L. 463 (1995) 21
White House Initiative on Asian Americans and Pacific Islanders, *A People Looking Forward, Action for Access and Partnership in the 21st Century* (2001) 20
Woo, Deborah, *Glass Ceilings and Asian Americans: The New Face of Workplace Barriers* (2000) ...18, 19, 20
Wu, Diana Ting Liu, *Asian Pacific Americans in the Workplace* (1997) 18, 19
Wu, Frank, *Yellow: Race in America Beyond Black and White* (2001) 17, 18, 23

Miscellaneous

"Q&A re University of Michigan Admissions Policies", *available at* http://www.umich.edu/~urel/admissions/faqs/q&a.html 8, 11, 14
"Description of University of Michigan Undergraduate Admissions Policy," *available at* http://www.umich.edu/~urel/admissions/faqs/uapolicy.html 11
Press Release, Asian Pacific Legal Center of Southern California, Asian Pacific American Voters in Southern California Vote Overwhelmingly For President Clinton and Against Prop. 209 (Nov. 6, 1996) 16
Proof Brief of Defendants-Appellants, *Grutter v. Bollinger*, No. 01-1447 (6th Cir. May 24, 2001) 12-13
Chen, Edward M., "Speech Presented at the California Law Review Dinner" (April 11, 2002).....20

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The National Asian Pacific American Legal Consortium ("NAPALC") is a national, nonprofit, nonpartisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. NAPALC is committed to supporting affirmative action as a way of ensuring equal opportunities for women and minorities. Joining NAPALC as *amici curiae* in this brief are 27 public interest legal and civil rights organizations listed in the Appendix to this brief that also are dedicated to advancing the interests and protecting the rights of Asian Pacific Americans (collectively, "*Amici*"). *Amici* include Japanese, Chinese, Filipino, Korean, Hmong, South Asian, Pacific Islander, Cambodian, Laotian, and Vietnamese American public-interest groups. *Amici* also include some of the largest and oldest Asian Pacific American organizations in this country that are involved in challenging racial discrimination, safeguarding civil rights, and advocating for affirmative action programs. *Amici* thus have an important and substantial interest in this case, which addresses the constitutionality of the use by the University of Michigan ("Michigan") of race-conscious admission procedures to offer students better educational opportunities by providing a diverse academic community.

---

[1] In accordance with Supreme Court Rule 37.3(a), *Amici Curiae* have filed with the Clerk of the Court letters from Petitioners and Respondents consenting to the filing of this brief. No person or entity other than *Amici Curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief, and no counsel for Petitioners or Respondents had any role in authoring this brief.

SUMMARY OF ARGUMENT

Asian Pacific Americans bring a unique perspective to this case. Unlike African Americans, Hispanics, and Native Americans, Asian Pacific Americans are not specifically identified as under-represented minorities in Michigan's race-conscious admission procedures. Nonetheless, *Amici* and their Asian Pacific American constituencies support Michigan's race-conscious approach. *Amici* do so in spite of the contention of Petitioners and their supporters that Michigan's affirmative action programs victimize Asian Pacific Americans. *Amici* submit this brief to rebut Petitioners' contention.

First, contrary to Petitioners' contention, Asian Pacific American students, like all students, benefit significantly from Michigan's race-conscious admission procedures. Ample studies have shown that exposure to students from a wide range of backgrounds enhances the educational experiences of all students, whether Caucasian American or minority. Thus, Asian Pacific American students, and all other students, benefit from racial and ethnic diversity at Michigan. Achieving such diversity constitutes a compelling governmental interest.

Second, again contrary to Petitioners' claim, Michigan's admission procedures are not rigid quotas, but rather are flexible processes that allow consideration not simply of whether an applicant is African American, Hispanic, or Native American, but also of a variety of factors that reflect a unique background or distinctive personal circumstances. For example, the admission policy of the University of Michigan Law School ("Law School") expressly identifies a broad array of factors that may warrant preferential consideration on the basis of diversity, including "'an Olympic gold medal, a Ph. D. in physics, the attainment of

age 50 in a class that otherwise lacked anyone over 30, or the experience of having been a Vietnamese boat person.'" *Grutter v. Bollinger*, 288 F.3d 732, 747 (6th Cir. 2002) (*en banc*) (quoting Law School Admissions Policy). This flexibility allows Michigan's affirmative action programs to account for the circumstances facing Asian Pacific American applicants and all other applicants. Consequently, Asian Pacific Americans are not harmed by Michigan's race-conscious admission procedures. This flexibility also demonstrates that Michigan's race-conscious admission procedures are narrowly tailored to achieve the compelling governmental interest in maintaining racial diversity in public education.

Third, empirical evidence refutes the suggestion of Petitioners and their supporters that Asian Pacific Americans would gain substantially from affirmative action's demise. For example, following the abolition of affirmative action programs in California during the 1990s, Asian Pacific American enrollment in state law schools did not increase significantly, as one would have expected if Asian Pacific Americans actually had been victimized by these programs. Instead, it remained virtually unchanged.

Thus, despite the claims of Petitioners and their supporters, Asian Pacific Americans are not harmed by Michigan's use of race-conscious admission procedures, even though Asian Pacific Americans are not specifically identified as under-represented minorities by those procedures. *Amici* emphasize, however, that at other schools and in other contexts, such as employment and public contracting, Asian Pacific Americans should be included in the category of under-represented minorities in affirmative action programs. The arguments of certain opponents of affirmative action that Asian Pacific Americans do not need such programs should be rejected because these arguments

rest on the myth that Asian Pacific Americans no longer suffer from racial discrimination in American society and that Asian Pacific Americans have been able to succeed despite past racism and prejudice. This "model minority" myth is empirically false. Moreover, it stems from stereotyping and ignores current discrimination against Asian Pacific Americans. Consequently, this myth provides no support to those who contend that affirmative action is no longer necessary to promote acceptance of and positive interaction with Asian Pacific Americans (or other minority groups).

For all of these reasons, *Amici* support Michigan's affirmative action programs. Accordingly, *Amici* respectfully request that this Court affirm the judgment of the Sixth Circuit in *Grutter v. Bollinger* and reverse the District Court's decision in *Gratz v. Bollinger.*

ARGUMENT

I. ASIAN PACIFIC AMERICANS ARE NOT HARMED BY MICHIGAN'S RACE-CONSCIOUS ADMISSION PROCEDURES

Petitioners and their supporters claim that Michigan's race-conscious admission procedures use unconstitutional quotas for African Americans, Hispanics, and Native Americans. Petitioners and their supporters further assert that these procedures discriminate against other racial and ethnic groups – including "especially Asian Americans." Brief for the Petitioner, *Grutter v. Bollinger* ("Pet. Brief *Grutter"),* at 39 ("disadvantage on the basis of race works not only against Caucasian Americans, but also against other groups, including minority groups historically discriminated against, especially Asian Americans"); *see id.* at 10 ("the odds favoring students from African American, Mexican

American, Native American, and Puerto Rican groups are always 'enormously' large relative to Caucasian Americans, and other groups such as Asian Americans") (citations omitted); Brief of the Asian American Legal Foundation as *Amicus Curiae* in Support of Petitioners ("AALF Brief"), at 2 ("diversity-based admission schemes are almost always used to exclude Asian Americans from educational institutions"); *id.* ("By granting preferences to applicants from certain ethnic groups, the admissions programs of the University of Michigan college and law school . . . place racial barriers before Chinese Americans and other 'non-preferred' individuals that are unjustified by any remedial purpose."); Brief for the United States as *Amicus Curiae* Supporting Petitioner, *Grutter v. Bollinger,* at 35 ("As Judge Boggs pointed out in his dissent, '[i]t is clear from the Law School's statistics that under-represented minority students are nearly automatically admitted in zones where white or Asian students with the same credentials are nearly automatically rejected.'").[2]

This attempted portrayal of Asian Pacific Americans as victims of Michigan's race-conscious admission processes is wrong for three reasons. First, Asian Pacific American students (and, indeed, students of all racial and ethnic groups) benefit from a diverse student body. Second, Michigan's program is sufficiently flexible to take into

[2] *See also* Brief for the United States as *Amicus Curiae* Supporting Petitioner, *Grutter v. Bollinger,* at 31 ("By admitting racial minorities that are given weight by respondents in attaining their critical mass, respondents discriminate against other racial minorities that are deemed not to contribute to the critical mass."); Brief for the Petitioners, *Gratz v. Bollinger* ("Pet. Brief *Gratz*"), at 22-23 ("Like the formal quota in Bakke, the dual standard employed by the University [of Michigan College of Literature, Science and Arts] insulates members of the preferred racial and ethnic groups from competition from members of the disfavored racial groups.").

account the circumstances facing Asian Pacific American applicants. Under Michigan's flexible approach, Asian Pacific Americans are not harmed. Third, Petitioners' suggestion that Asian Pacific Americans would benefit substantially from the overturning of Michigan's affirmative action programs is empirically incorrect. We discuss each of these reasons in turn.

A. Asian Pacific American Students, Like All Students, Benefit from a Diverse Student Body

Although Asian Pacific Americans are not specifically identified as members of an under-represented group in Michigan's affirmative action programs, Asian Pacific American students, like all students, receive significant benefits from the diversity that results from Michigan's programs. *See Grutter,* 288 F.3d at 760 (Clay, J., concurring) (discussing Michigan's evidence regarding benefits of diversity). Indeed, as discussed in *Grutter,* Michigan's expert Professor Patricia Gurin concluded,

> "Students learn better in a diverse educational environment, and they are better prepared to become active participants in our pluralistic, democratic society once they leave such a setting. In fact, patterns of racial segregation and separation historically rooted in our national life can be broken by diversity experiences in higher education. . . .
>
> Racial diversity in a college or university student body provides the very features that research has determined are central to producing the conscious mode of thought

> educators demand from their students. This is particularly true at the University of Michigan, because most of the University's students come to Ann Arbor from segregated backgrounds."

Id. (quoting Professor Gurin's report).

Professor Gurin's conclusions are well supported by the findings of other researchers. Law students surveyed at Michigan and Harvard University report that racial and ethnic diversity broadens their intellectual perspective both in and outside the classroom and improves their ability to work and socialize with people of other races and ethnicities. *See* Gary Orfield and Dean Whitla, "Diversity and Legal Education: Student Experiences in Leading Law Schools," in *Diversity Challenged: Evidence on the Impact of Affirmative Action ("Diversity Challenged")* (Orfield and Kurlaender, eds., 2001) (copy of relevant pages lodged with Clerk of the Court). Similarly, racial diversity on university campuses has been shown to enhance students' educational experiences and to increase the likelihood that students will socialize across racial lines and discuss racial matters. *See* Mitchell Chang, "The Positive Educational Effects of Racial Diversity on Campus," in *Diversity Challenged* (copy of relevant pages lodged with Clerk of the Court). This in turn has a positive impact on student retention, overall college satisfaction, and intellectual and social self-confidence among students. *See id.*

In addition, racial diversity at all levels of education has been shown to have positive educational effects. For example, high school students receive substantial benefits, including greater willingness to live and work in diverse environments as well as improved critical thinking skills. *See, e.g.,* Michal Kurlaender and John T. Yun, "Is Diversity

a Compelling Educational Interest? Evidence from Louisville," in *Diversity Challenged* (copy of relevant pages lodged with Clerk of the Court). Racial diversity also helps high school students to sharpen their focus on future educational goals and deepens their understanding of civic principles. *See id.*

Michigan admission officials recognize these substantial benefits of providing students with a racially and ethnically diverse educational environment, and these officials depend on their admission procedures to produce this environment. *See* "Q&A re University of Michigan Admissions Policies," at http://www.umich.edu/~urel/admissions/faqs/q&a.html ("Michigan Admission Q&A") (visited on December 11, 2002); University of Michigan Law School, Report and Recommendations of the Admissions Committee 9-10 (1992) ("Law School Admission Policy") ("diversity . . . has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts. In particular we seek to admit students with distinctive perspectives and experiences as well as students who are particularly likely to assume . . . leadership roles in the bar and make . . . contributions to society"); *id.* at 12 (describing Michigan's "commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers").

In sum, diversity does not benefit only African Americans, Hispanics, and Native Americans at Michigan.

Instead, it benefits students of all races, including Asian Pacific Americans.[3]

B. Because Michigan's Race-Conscious Admission Procedures Are Flexible, and Consider a Variety of Factors, These Procedures Do Not Harm Asian Pacific Americans or Other Applicants

In addition to the benefits of diversity, there is a second reason that Asian Pacific Americans are not victimized by Michigan's race-conscious admission procedures. Far from being the rigid quotas portrayed by Petitioners, the procedures are flexible and thus allow Michigan to consider

[3] To uphold Michigan's efforts to promote diversity would be entirely consistent with *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), in which Justice Powell concluded that diversity is a compelling governmental interest. *See id.* at 314 (Opinion of Powell, J.) (stating that "the interest of diversity is compelling in the context of a university's admissions program"). Under *Marks v. United States*, 430 U.S. 188 (1977), Justice Powell's opinion "constitutes *Bakke's* holding and provides the governing standard here." *Grutter*, 288 F.3d at 741. Accordingly, upholding the constitutionality of Michigan's race-conscious admission procedures would follow a precedent that is a quarter of a century old and which has been relied upon by educators and courts alike. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 856 (1992) (Opinion of O'Connor, Kennedy, and Souter, JJ.) (upholding *Roe v. Wade* because, among other things, "for two decades of economic and social developments," people have relied on the availability of legal abortion and because of "the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case"). Thus, upholding *Bakke* would not, as the Asian American Legal Foundation ("AALF") contends, create new precedent. Brief of the Asian American Legal Foundation as *Amicus Curiae* in Support of Petitioners ("AALF Brief"), at 3, 22-23. Nor, as the AALF also argues (*id.* at 3), would a ruling for Respondents lead to the establishment of racial quotas, which *Bakke* forbade as unconstitutional. *See* 438 U.S. at 319-20.

the circumstances facing Asian Pacific American applicants, as well as the circumstances facing students from other backgrounds.

Petitioners claim that Michigan maintains a "two track" system, with one track for "under-represented minorities" and the other for Caucasian Americans, Asian Pacific Americans, and other purportedly disfavored groups. *See* Pet. Brief *Gratz*, at 21; Pet. Brief *Grutter*, at 17. Petitioners' claim is incorrect. There is no "two track" system at Michigan in which certain minority applicants are considered separately from all other applicants. *See Gratz v. Bollinger*, 122 F. Supp. 2d 811, 829 (E.D. Mich. 2000) (stating that no separate review process exists for under-represented minority applications in the undergraduate college); *Grutter*, 288 F.3d at 746 (stating that under-represented minority Law School applicants are not insulated from competition with other applicants).[4]

[4] Petitioners argue at length that Michigan's efforts to obtain "meaningful numbers" or a "critical mass" of under-represented minorities function as the equivalent of a quota. *See, e.g.*, Pet. Brief *Grutter*, at 40-41. As the Sixth Circuit stated, however, "the Law School's 'critical mass' is not the equivalent of a quota, because unlike Davis's reservation of sixteen spots for minority candidates, the Law School has no fixed goal or target. . . . Because *Bakke* allows institutions of higher education to pay some attention to the numbers and distribution of under-represented minority students, over time reliance on *Bakke* will always produce some percentage range of minority enrollment. . . . These results are the logical consequence of reliance on *Bakke*. . . . As such they cannot serve as the basis for a charge that the Law School's admissions policy is unconstitutional." *Grutter*, 288 F.3d at 747-48.

Moreover, the Law School's efforts to achieve "meaningful numbers" of minority students are necessary to avoid precisely the sort of stereotyping that Petitioners decry. If there are only a handful of students from under-represented minorities, other students inevitably will assume that all minorities think and act like that handful. It is only when "meaningful numbers" of minority students are present that other

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Michigan's admission officials consider each applicant according to many academic and non-academic criteria. When evaluating all applicants at both the undergraduate college and the Law School, admission officials place greatest weight upon applicants' grades and test scores. *See* "Description of University of Michigan Undergraduate Admissions Policy," at http://www.umich.edu/~urel/admissions/faqs/uapolicy.html ("Undergraduate Admission Policy") (visited on February 7, 2003); Law School Admission Policy, at 4. Nonetheless, in a variety of circumstances, Michigan admits certain applicants with grades or test scores lower than those of other applicants whom Michigan rejects.[5] In doing so, admission officials consider many other factors. These factors include not only race but also the quality of the application essay, the difficulty of the courses taken by the applicant, the state and geographic region where the applicant resides, a socioeconomically disadvantaged background, leadership, and personal achievement in music, athletics, or other fields of endeavor. *See* Undergraduate Admission Policy; Michigan Admission Q&A; Law School Admission Policy,

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students can learn of the broad variety of opinions and viewpoints minority students hold. As the Sixth Circuit observed, "The Law School's pursuit of a 'critical mass' of under-represented minority students also tracks the Harvard plan's pursuit of a class with meaningful numbers of minority students. Explaining its attention to the numbers and distribution of minority students, Harvard emphasized that '10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States.'" *Id.* at 747 (citation omitted).

[5] For example, in 1997 (the year Petitioner Grutter applied to the Law School), over 450 Caucasian American applicants who were admitted had lower grades or test scores than Petitioner. *See Grutter* Trial Ex. 137 (Larntz Supp. Rpt. at 38).

at 5-6, 10-13; *see also Grutter*, 288 F.3d at 736-37, 746-47 (stating that law school admission officials examine each application individually and consider many academic and non-academic factors); *Gratz*, 122 F. Supp. 2d at 828-29 (stating that undergraduate college considers applicants according to numerous factors). In evaluating these factors, Michigan seeks to enroll a diverse student body, but diversity is by no means limited to under-represented minorities.

For instance, the Law School's admission policy expressly provides a broad range of factors that can serve as a basis for diversity admission, including "an Olympic gold medal, a Ph. D. in physics, the attainment of age 50 in a class that otherwise lacked anyone over 30, or the experience of having been a Vietnamese boat person." *Grutter*, 288 F.3d at 747 (quoting Law School Admission Policy). Thus, Michigan's programs provide sufficient flexibility to take into account, among other things, the circumstances faced by Asian Pacific Americans.

Moreover, in this case, Michigan's decision to treat Asian Pacific Americans differently from under-represented minorities is justified by the fact that Michigan already admits Asian Pacific Americans in significant numbers. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 835 n.15 (E.D. Mich. 2001) (citing testimony that Law School Admission Policy did not mention Asian Pacific Americans because the Law School was admitting significant numbers of them).

If Law School officials believe that they are having difficulty enrolling Asian Pacific Americans (or any other racial or ethnic group) without special attention to their race or ethnicity, the admission procedures allow the officials to pay special attention to that factor. *See* Proof Brief of Defendants-Appellants, *Grutter v. Bollinger*, No. 01-1447, at

50 n.33 (6th Cir. May 24, 2001) (citing testimony of Dean Jeffrey Lehman). This flexibility demonstrates that Michigan's race-conscious admission procedures do not victimize Asian Pacific Americans (or any other racial or ethnic group) and are narrowly tailored to achieve the compelling governmental interest in maintaining racial diversity in public education.[6]

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[6] This flexibility also rebuts Petitioner's claim (Pet. Brief *Grutter*, at 43) that Michigan illogically categorizes Asian Pacific Americans as an "undifferentiated mass[]" although "one could easily identify dozens of separate racial or ethnic groups contained" in that category. Likewise, this flexibility, which permits consideration of the circumstances each applicant faces, rebuts the contention of the Asian American Legal Foundation (AALF Brief, at 20) that Asian Pacific Americans and people of all races are "oppress[ed]" by race-conscious affirmative action that "emphasizes the group over the individual."

Moreover, the flexibility of Michigan's admission procedures attests to their superiority over plans used in Texas and Florida that the United States advocates as race-neutral alternatives to Michigan's program. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioner, *Grutter v. Bollinger*, at 16-27. Because these plans oblige officials to admit students based on a numerical system (*e.g.*, the top 10 percent of all high school students in the state), they do not provide students with as good an opportunity to learn in a diverse environment as Michigan's flexible, multi-factor procedures. *See, e.g.*, Tienda et al., *Closing the Gap? Admissions and Enrollments at the Texas Public Flagships Before and After Affirmative Action* (2003) ("*Closing the Gap?*") (emphasizing that Texas's plan, which guarantees college admission to the top 10 percent of high school graduates in the state based on their grades, is not an alternative to race-conscious admission procedures for educational institutions striving to diversify their student bodies) (copy lodged with the Clerk of the Court). To the extent such plans produce racial diversity, they do so through reliance on continued residential and school segregation throughout the state in which the system applies. In other words, because schools tend to be segregated by race or ethnicity, a plan that admits the top 10 percent of the students from each school will mean that, at some schools the top 10 percent will be overwhelmingly Caucasian American, whereas at other schools it will be heavily African American. Asian Pacific Americans, however, are less segregated than other historically disadvantaged racial and ethnic groups and thus less

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Thus, race is but one factor among many that Michigan admission officials take into account in their effort to provide a diverse academic community. Admission officials' consideration of applicants according to many criteria affords these officials the latitude they need to make informed judgments about how best to advance Michigan's educational goals given the nature of American society and applicants' backgrounds. *See* Michigan Admission Q&A; Law School Admission Policy, at 11-12. Under this flexible, multi-factor approach, Asian Pacific Americans and other applicants are not victimized.

C. Empirical Evidence Refutes Petitioners' Suggestion That Asian Pacific Americans Would Significantly Benefit from the Elimination of Michigan's Race-Conscious Admission Procedures

By emphasizing the detriment Asian Pacific Americans allegedly suffer as the result of affirmative action, Petitioners and their supporters imply that Asian Pacific Americans will gain substantially if race-conscious admission procedures are eliminated. Indeed, some prominent affirmative action critics assert that Asian Pacific Americans stand to gain the most from affirmative action's demise. *See* Stephan Thernstrom and Abigail Thernstrom, *Reflections on the Shape of the River*, 46 UCLA L. Rev. 1583, 1629 (1999) (asserting that Asian Pacific Americans derive the greatest

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likely to be aided by such plans. (*See Census 2000 Fact Sheet: Residential Segregation in United States Metropolitan Areas* 1 (April 27, 2001) ("The segregation of Asian/Pacific Islanders is lower than [African Americans or Hispanic Americans] and declined in most [Metropolitan Statistical Areas].").

benefit when race-conscious admission policies are eliminated).

The empirical evidence, however, rebuts these suggestions. During the late 1990s, after California (home to the largest Asian Pacific American population of any U.S. state) banned affirmative action, enrollment of African Americans, Hispanics, and Native Americans at three state law schools decreased 13 percent (from 23 percent of first-year classes to 10 percent). *See* William C. Kidder, *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts About Thernstrom's Rhetorical Acts*, 7 Asian L.J. 29, 45 (2000). *See also Daily Bruin*, "Eyes on Michigan: the California Case" (Feb. 7, 2003) (noting that only two African Americans graduated from UCLA's law school in 2002, a steep decrease from the period preceding the ban). Enrollment of Asian Pacific Americans in these state law schools, however, did not increase accordingly; to the contrary, it rose only one percent, and the enrollment of Filipino Americans plummeted. *See* Kidder, 7 Asian L.J. at 39 (Asian Pacific Americans "constituted 18.3 percent of UC Law School classes in 1997-99, compared to 17.4 percent for 1994-96"). By contrast, Caucasian Americans saw their enrollment figures increase by approximately 12 percent. Caucasian Americans accounted for 59.8 percent of enrollment in the state law schools during the three years before the ban, but 71.7 percent after the ban. *Id.* at 44.[7]

[7] Further, mixed evidence has emerged about the effect on Asian Pacific Americans after affirmative action was banned in Texas in the mid-1990s. After the ban, fewer Asian Pacific Americans enrolled as undergraduates at one of Texas's two flagship public universities, while more Asian Pacific Americans enrolled at the other. *See Closing the Gap?*, at 17. At the University of Texas Law School, Asian Pacific American enrollments were virtually unaffected, with an average of 30

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In sum, Petitioners and their supporters are wrong to contend that Michigan's race-conscious admission procedures harm Asian Pacific Americans. Rather than being victimized by Michigan's affirmative action programs, Asian Pacific American students, like all students, receive significant benefits from Michigan's diverse educational environment. Further, Michigan's race-conscious admission procedures are not rigid quotas, but instead are flexible procedures that take into account many facts about each applicant, including the circumstances faced by Asian Pacific Americans. Lastly, empirical evidence refutes the suggestion of Petitioners and their supporters that Asian Pacific American students will gain substantially from affirmative action's demise.[8]

(... Continued)
Asian Pacific Americans enrolling before the ban and 31 after the ban. *See* William C. Kidder, *Affirmative Action in Higher Education: Recent Developments in Litigation, Admissions and Diversity Research,* 12 Berkeley La Raza L.J. 173, 215 (2001).

[8] Notably, Asian Pacific Americans themselves have expressed their clear support for affirmative action. In the 2001 Pilot Study of the National Asian Political Survey, 72 percent of Asian Pacific American respondents favored affirmative action. *See* Pei-te Lien et al., *A Summary Report of the Pilot Study of the National Asian American Political Survey* 10 (2001) (copy lodged with the Clerk of the Court). Other polls also reveal Asian Pacific Americans' support for affirmative action. *See, e.g.,* November 6, 1996 press release of Asian Pacific Legal Center of Southern California (discussing exit poll revealing that 76 percent of Asian Pacific American voters had voted against Proposition 209, which banned affirmative action) (copy lodged with the Clerk of the Court); "Asian Pacific American Agenda: Asian Americans on the Issues," *Asian Week* 14-17 (23-29 August 1996) (discussing how 57 percent of respondents favored affirmative action and 55 percent favored consideration of race in college admission) (copy lodged with Clerk of the Court).

II. NOTWITHSTANDING THE CLAIMS OF OPPONENTS OF AFFIRMATIVE ACTION THAT ASIAN PACIFIC AMERICANS NO LONGER SUFFER FROM DISCRIMINATION, IN APPROPRIATE CIRCUMSTANCES ASIAN PACIFIC AMERICANS SHOULD BE INCLUDED IN AFFIRMATIVE ACTION PLANS AS UNDER-REPRESENTED MINORITIES

As shown above, Asian Pacific Americans are not harmed by Michigan's flexible race-conscious admission procedures. The absence of harm in the present case, however, should not be allowed to obscure the fact that, at other schools, or in contexts other than education, it is entirely appropriate (and, in fact, necessary) to include Asian Pacific Americans in affirmative action programs as under-represented minorities. For example, Asian Pacific Americans frequently need such programs to ensure diversity in areas such as employment and public contracting. This is so despite the claims of certain opponents of affirmative action who assert that Asian Pacific Americans no longer suffer from racism in American society. *See, e.g.,* Stephan Thernstrom, *Farewell to Preferences?*, 130 Pub. Interest 34, 47-49 (1998) (referring to the claim that Asian Americans "face enormous problems in contemporary America because of their race" as a "fiction" and as a "silly notion"). Affirmative action opponents use this assertion to suggest that affirmative action is unnecessary for Asian Pacific Americans because they already have succeeded in American society. *See id.* at 41. Proponents of this myth imply that other minorities also would succeed if they acted more like Asian Pacific Americans. *See* Frank Wu, *Yellow: Race in America Beyond Black and White* 49, 59-67 (2001) ("*Yellow*") (criticizing myth that Asian Pacific Americans are a "model"

for other minority groups) (copy of relevant pages lodged with Clerk of the Court).

A substantial body of scholarly literature has debunked this "model minority" myth. *See, e.g.,* Wu, *Yellow,* at 39-59 (discussing the empirical and other flaws in this myth); Deborah Woo, *Glass Ceilings and Asian Americans: The New Face of Workplace Barriers* 34-38 (2000) (*"Glass Ceilings"*) (same) (copy of relevant pages lodged with Clerk of the Court). This myth is empirically false and ignores current discrimination and racism against Asian Pacific Americans. Moreover, this myth rests on stereotypes of Asian Pacific Americans as being more racially and culturally inclined to be hard-working and industrious than other minorities. *See* Wu, *Yellow,* at 45-47, 49, 62-63, 74-77 (discussing how the myth emerged with a 1966 article contrasting Japanese Americans and African Americans based on cultural differences, and criticizing the "model minority" myth as a form of stereotyping); Woo, *Glass Ceilings,* at 24, 33-38 (criticizing explanations of socioeconomic disparities between Asian Pacific Americans and other races based on cultural differences such as Confucianism).

First, the empirical evidence refutes the "model minority" myth. Contrary to the claims of the proponents of the myth, Asian Pacific Americans' socioeconomic status reflects the lingering effects of a long history of racial discrimination. Indeed, a higher percentage of Asian Pacific Americans than Caucasian Americans lives in poverty. *See* Diana Ting Liu Wu, *Asian Pacific Americans in the Workplace* 60 (1997) (copy of relevant pages lodged with Clerk of the Court). Asian Pacific Americans also have been unable to achieve income levels commensurate with their academic training and credentials. Asian Pacific Americans' median individual income is lower than that of Caucasian Americans and the

population as a whole for both high school and college graduates. *Id.* at 59-60. Further, discriminatory employment barriers resulting from the stereotype of Asian Pacific Americans as unassertive "grinds" who lack leadership skills have hindered Asian Pacific Americans' ability to advance to management positions. *See* Woo, *Glass Ceilings*, at 120 (discussing cultural stereotypes about Asian Pacific Americans' leadership ability); Paul Brest and Miranda Oshige, *Affirmative Action for Whom?*, 47 Stan. L. Rev. 855, 894 (1995) (noting negative stereotype that Asian Pacific Americans have poor leadership and interpersonal skills).[9] Asian Pacific Americans experience such "glass ceiling" barriers in many occupational contexts, including the

[9] Indeed, according to one study of all racial groups, Asian Pacific Americans "face the worst chance of being advanced into management positions." *See* LEAP Asian Pacific American Pub. Policy Inst. & UCLA Asian American Studies Ctr., *The State of Asian Pacific America* 215-216 (1993) (copy lodged with the Clerk of the Court). According to the Equal Employment Opportunity Commission ("EEOC"), a disparity exists for Asian Pacific Americans between the extent to which they occupy professional positions that require a college degree and the extent to which they hold management positions with responsibilities of supervision and policy setting. *See* EEOC, *Job Patterns for Minorities and Women in Private Industry* (1998), http://www.eeoc.gov/stats/jobpat/1998/tables-1.html) (visited Feb. 4, 2003). EEOC data shows that 29 percent of Asian Pacific American employees are professionals, but only 7.4 percent fill management positions. *See id.*

corporate sector,[10] the federal government,[11] science and engineering,[12] academia,[13] and the federal judiciary.[14] Asian Pacific Americans also suffer significant discrimination in the area of government contracting.[15]

Second, the "model minority" myth ignores the continuing existence of racism against Asian Pacific Americans in contemporary American society. In 2001, a comprehensive survey revealed that 71 percent of respondents held either decisively negative or partially negative attitudes toward Asian Americans. *See* Committee of 100, *American Attitudes Toward Chinese Americans and Asians* 56 (2001) ("*American Attitudes*") (copy lodged with Clerk of the Court).[16] Racial representations and stereotyping of Asian Pacific Americans, particularly in well-publicized instances where public figures or the mass

[10] Asian Pacific Americans comprised less than 0.3 percent of senior executives in the United States in 1990. *See* Korn/Ferry International *Executive Profile: A Decade of Change in Corporate Leadership* 23 (1990) (copy lodged with the Clerk of the Court). Today, Asian Pacific Americans comprise less than one percent of the board directorships of Fortune 500 companies. *See* White House Initiative on Asian Americans and Pacific Islanders, *A People Looking Forward, Action for Access and Partnership in the 21st Century* 60-61 (2001) ("*A People Looking Forward*"), http://www.aapi.gov/resources.htm.

[11] According to EEOC data, Asian Pacific Americans are under-represented in supervisory positions in 23 out of 25 federal departments or agencies (of those departments or agencies reporting this information) and constitute just 1.6 percent of the federal workforce's top managers and highest salaried employees. *See A People Looking Forward*, at 104-05; Asian Americans and Pacific Islanders Joint Task Force, *AAPI Federal Employment and Glass Ceiling Issues* 11 (2001) (copy lodged with the Clerk of the Court).

[12] Asian Pacific Americans are less likely than other minority groups to be in management positions in science and engineering fields. *See* National Science Foundation, *Women, Minorities, and Persons with Disabilities in Science and Engineering* (1998), at www.nsf.gov/sbe/srs/nsf99338/pdfstart.htm (visited on February 5, 2003).

[13] Among minorities, Asian Pacific Americans occupy the smallest number (under one percent) of top administrative positions at two- and four-year academic institutions combined. *See* Woo, *Glass Ceilings*, at 118-19. Asian Pacific Americans also have been under-represented in professional school faculties. For example, as of 1993, over 70 percent of American law schools had never hired an Asian Pacific American faculty member. *See* Pat K. Chew, *Asian Americans in the Legal Academy: An Empirical and Narrative Profile*, 3 Asian L.J. 7, 33 (1996).

[14] Of almost 1,600 active judges in the federal judiciary, only 0.9 percent are Asian Pacific American. *See* Edward M. Chen, "Speech Presented at the California Law Review Dinner," April 11, 2002 (unpublished) (copy lodged with the Clerk of the Court).

[15] *See* Notice: Proposed Reforms to Affirmative Action in Federal Procurement, *Appendix – The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey*, 61 Fed. Reg. 26042, 26050-63 (May 23, 1996) (citing congressional hearings since 1980 regarding discrimination against minority-owned business enterprises, and stating that Congress found that "11 percent of Asian business owners had experienced known instances of discrimination in the form of higher quotes from suppliers" (*id.* at 26061) and that Asian Pacific American-owned businesses receive, on average, only 60 cents of each dollar "of state and local expenditures that those firms would be expected to receive, based on their availability" (*id.* at 26061-62)); Theodore Hsien Wang, *Swallowing Bitterness: The Impact of the California Civil Rights Initiative on Asian Pacific Americans*, Ann. Surv. Am. L. 463, 469 (1995) (stating that numerous studies conducted by local governments in California concluded that Asian Pacific American businesses face significant discrimination in competition for government contracts).

[16] The study further found that, of those respondents holding decisively negative views, 34 percent said they would be upset if a significant number of Asian Americans moved into their neighborhood and 57 percent believed that increased Asian American population is bad for America. *See American Attitudes*, at 46, 50. Twenty three percent of respondents said that they would be "uncomfortable" if an Asian American were elected president. *Id.* at 40.

media express such attitudes,[17] reflect and reinforce an image of Asian Pacific Americans as "different," "foreign," and the "enemy," thus stigmatizing Asian Pacific Americans, heightening racial tension, and instigating discrimination.[18] *See* Cynthia Kwei Yung Lee, *Beyond Black and White: Racializing Asian Americans in a Society Obsessed with O.J.*, 6 Hastings Women's L.J. 165, 181 (1995) ("*Beyond Black and White*"); Spencer K. Turnbull, *Wen Ho Lee and the Consequences of Enduring Asian American Stereotypes*, 7 Asian Pac. Am. L.J. 72, 74-75 (2001); Terri Yuh-lin Chen, *Hate Violence as Border Patrol: An Asian American Theory of Hate Violence*, 7 Asian L.J. 69, 72, 74-75 (2000) (*"Hate Violence"*); Jerry Kang, *Racial Violence Against Asian Americans*, 106 Harv. L. Rev. 1926, 1930-1932 (1993).

[17] For example, during the trial of O.J. Simpson in the mid-1990s, Senator Alfonse D'Amato, using a crudely exaggerated Japanese accent on a radio talk show, mocked the handling of the case by Judge Lance Ito, a third generation Japanese American who speaks English without an accent. *See* Cynthia Kwei Yung Lee, *Beyond Black and White: Racializing Asian Americans in a Society Obsessed with O.J.*, 6 Hastings Women's L.J. 165, 175 (1995). Other incidents of such stereotyping in connection with the Simpson trial included racist epithets that appeared on national radio programs. *See id.* at 176.

[18] *See American Attitudes*, at 8. In the survey discussed above, 32 percent of the respondents said they believed that Chinese Americans are more loyal to China than to the United States, and 46 percent of those surveyed said they believed that "Chinese Americans passing on information to the Chinese government is a problem." *See American Attitudes*, at 18, 26. Such racial attitudes toward Japanese Americans underlay the federal government's internment of approximately 120,000 of these citizens during World War II. *See Korematsu v. United States*, 323 U.S. 214 (1944); *see also Adarand Contractors, Inc. v. Pena*, 515 U.S. 200, 236 (1995) (recognizing that the internment of Japanese Americans upheld in *Korematsu* was "illegitimate" and citing Congressional finding that this internment was "carried out without adequate security reasons . . . and [was] motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership" (quoting Pub. L. 100-383, § 2(a), 102 Stat. 903-904)).

Such negative racial representation and stereotyping also can incite violence directed against Asian Pacific Americans. *See* Chen, *Hate Violence*, 7 Asian L.J. at 74-76. Thousands of incidents of anti-Asian Pacific American violence have been documented over the last decade, including physical harassment, assault, attempted murder, and murder. *See* National Asian Pacific American Legal Consortium *2000 Audit of Violence Against Asian Pacific Americans* 9 (2001) (copy lodged with the Clerk of the Court).[19]

In sum, ample evidence exists to show the falsity of the notion that Asian Pacific Americans uniformly are a socioeconomic success story and that Asian Pacific Americans do not suffer from racism. The reality is that Asian Pacific Americans continue to suffer from racial discrimination in many aspects of life. In certain contexts, such as employment or public contracting, the effects of such discrimination are sufficiently egregious that Asian Pacific Americans should be specifically included in affirmative action programs to ensure diversity. In other contexts, such

[19] Moreover, the myth that Asian Pacific Americans uniformly are economically prosperous encourages criminals to target Asian Pacific Americans. *See* Jerry Kang, *Racial Violence Against Asian Americans*, 106 Harv. L. Rev. 1926, 1929-30 (1993). The implied inferiority of other minority races that is inherent in the myth's depiction of Asian Pacific Americans as a success story also creates or intensifies resentment and scapegoating impulses, especially in competitive circumstances (*e.g.*, school) or in times of economic downturn. *See id.* at 1934-36 (explaining that publicity about supposed successes of Asian Pacific Americans implies to other minority groups "that, but for their incompetence or indolence, they too would be succeeding in America," thus fueling resentment against Asian Pacific Americans); Frank Wu, *Yellow: Race in America Beyond Black and White* 70-73 (2001) (explaining how myth of Asian Pacific American prosperity instigated racial tension in Detroit during the recession in 1982 and in Los Angeles during the 1992 riots following acquittal of the defendants accused of beating Rodney King).

as the present case, Asian Pacific Americans will receive fair treatment even if not expressly included in affirmative action programs because the flexibility of programs such as Michigan's takes into account the unique backgrounds and distinctive experiences of Asian Pacific American applicants. In either case, the Court should reject the efforts of those who rely on the "model minority" myth to suggest that Asian Pacific Americans (and other minority groups) do not need or are disadvantaged by affirmative action.

CONCLUSION

For all of these reasons, *Amici* support Michigan's affirmative action programs. Accordingly, *Amici* respectfully request that this Court affirm the judgment of the Sixth Circuit in *Grutter v. Bollinger* and reverse the District Court's decision in *Gratz v. Bollinger*.

Dated: February 14, 2003 Respectfully submitted,

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APPENDIX

List of *Amici Curiae*

The National Asian Pacific American Legal Consortium (NAPALC)
NAPALC is a national, nonprofit, nonpartisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. NAPALC is committed to supporting affirmative action as a way of ensuring equal opportunities for women and minorities. NAPALC focuses on educating policymakers, corporations, institutions, and the general public on the facts and importance of affirmative action to the Asian Pacific community, and works with other civil rights organizations and policymakers to ensure that affirmative action programs are appropriate and effective and that they address Asian Pacific American concerns.

The Asian Law Caucus (ALC)
ALC is a nonprofit, public interest legal organization whose mission is to promote, advance, and represent the civil rights of Asian Pacific Islander communities. Founded in 1972, the ALC is the nation's oldest Asian Pacific Islander civil rights legal organization. The ALC has provided legal services and community education on affirmative action and discrimination, represented individuals in discrimination suits, and conducted local and regional policy advocacy on affirmative action. ALC is affiliated with the National Asian Pacific American Legal Consortium.

The Asian Pacific American Legal Center of Southern California (APALC)
APALC is the largest provider of direct legal services, civil rights advocacy, community education, and impact litigation for low-income Asian Pacific Americans in the country.

Since 1982, APALC has represented Asian Pacific Americans in a number of areas, including anti-discrimination, workers' rights, family law, immigration, and hate crimes. APALC is also a leader in bringing diverse communities together to improve race relations. APALC was co-counsel in a federal lawsuit to increase minority representation in the Los Angeles Police Department and has litigated numerous employment cases to defend the rights of working people. APALC is affiliated with the National Asian Pacific American Legal Consortium.

The Asian American Business Roundtable (AABR)
AABR was established in 1989 to help Asian Pacific and other minority-owned companies expand their market with the Federal government as well as the commercial sector by providing information that is accurate and timely to enable them to make informed decisions beneficial to their companies.

The Asian American Legal Center Inc. (AALC)
AALC is a nonprofit civil rights organization dedicated to advancing the civil and legal rights of Asian Americans and educating Asian Americans regarding those rights.

The Asian American Legal Defense and Education Fund (AALDEF)
AALDEF, founded in 1974, is a nonprofit organization based in New York City. AALDEF defends the civil rights of Asian Americans nationwide through litigation, legal advocacy, and dissemination of public information. Throughout its long history, AALDEF has supported affirmative action programs in higher education.

The Asian Law Alliance (ALA)
ALA, founded in 1977, is a nonprofit, public interest legal organization with the mission of providing equal access to

the justice system to the Asian and Pacific Islander communities in Santa Clara County, California. ALA has provided community education and legal services on affirmative action and discrimination issues.

The Asian Pacific American Labor Alliance (APALA)
APALA was founded in 1992 with the strong support of the AFL-CIO and is the first and only organization of Asian American and Pacific Islander trade unionists. Since its inception, APALA has been committed to organizing the unorganized, mobilizing the Asian American and Pacific Islander community for political action and mobilization, advocating for workers' rights, civil rights, and immigrant rights, and building alliances between labor and community. APALA has always been a strong supporter of programs that benefit the Asian American and Pacific Islander communities beyond labor issues.

The Asian Pacific Islander Legal Outreach (APILO)
Formerly Nihonmachi Legal Outreach, APILO is a 28-year-old nonprofit, social justice law firm serving the Asian American and Pacific Islander communities of the Greater Bay Area. With offices in San Francisco and Oakland, APILO's multilingual staff of 26 provides legal services to several thousand Asian Americans and Pacific Islanders each year in more than a dozen dialects and languages. Attorneys with APILO have previously participated in several federal impact and class action cases, including the defense of diversity in cases such as *Rios v. Regents of the University of California*.

The Association of Asian Indian Women in Ohio (AAIWO)
AAIWO is a nonprofit organization representing Asian Indian Women. Founded in 1989, AAIWO fosters and supports Asian Indian women to assume leadership roles

through networking and volunteering opportunities, and by encouraging new immigrants to mainstream into American society. AAIWO emphasizes education and provides scholarships to displaced homemakers and youth. AAIWO presents multicultural events to promote diversity and mutual understanding between different cultures. The AAIWO Helpline is staffed by professionals to help women and youth in crises. Membership and all services are free.

The Association of Asian Pacific Community Health Organizations (AAPCHO)
AAPCHO is a national association representing community health organizations dedicated to promoting advocacy, collaboration, and leadership that improves the health status and access of Asian Americans, Native Hawaiians, and Pacific Islanders within the United States, its territories, and freely associated states, primarily through our member community health clinics. Formed in 1987, AAPCHO advocates for policies and programs that will improve the provision of health care services that are community driven, financially affordable, linguistically accessible, and culturally appropriate. As a unified voice of its membership, AAPCHO shares its collective knowledge and experiences with policy makers at the national, state, and local levels.

Chinese for Affirmative Action (CAA)
CAA is a 33-year-old, membership-based, nonprofit organization whose mission is to defend and promote the civil rights of Asian Americans within the context of advancing a multiracial democracy in the United States. Throughout its history, CAA has engaged in policy advocacy to develop affirmative action programs in employment, education, and contracting in the San Francisco Bay Area.

D.C. Asians for Peace and Justice (DCAPJ)
DCAPJ is an Organization of Asian Americans in the greater Washington, D.C., area. DCAPJ is dedicated to civil rights, peace, and human rights for all. DCAPJ members are descended from all regions of the wide-ranging Asian diaspora, including South Asia, the Philippines, Korea, China, Japan, Okinawa, and Southeast Asia, and have direct experience with discrimination in the United States. DCAPJ therefore stands committed to affirmative action and equality in education

The Filipino Civil Rights Advocates (FilCRA)
FilCRA advocates for civil rights legislation that ensures equal opportunities and protection of all individuals regardless of race, national origin, ethnicity, gender, sexual orientation, age, and religion in employment, education, housing, and health, and supports legal causes that seek to protect and expand civil rights.

Filipinos for Affirmative Action (FAA)
FAA's mission is to build the Filipino community by addressing the needs of the most vulnerable through direct service and volunteerism, and by strengthening the Filipino community's capacity to participate as equals in the larger society.

Hmong National Development, Inc. (HND)
HND is a national, nonprofit organization developing capacity to ensure the full participation of Hmong in society. HND works with local and national organizations, public and private entities, and individuals to promote educational opportunities, to increase community capacity, and to develop resources for the well-being, growth, and full participation of Hmong in society.

The Japanese American Citizens League (JACL)
JACL, founded in 1929, is one of the oldest and largest Asian American nonprofit, nonpartisan organizations committed to securing and upholding the human and civil rights of Americans of Japanese ancestry and others. During World War II, Japanese Americans were denied constitutional rights and were incarcerated by the United States for no reason other than their ethnicity. Through JACL and other groups, those who were wrongfully forced into internment camps obtained redress, but discrimination against Japanese Americans remains an issue. Knowing the harm caused by discrimination and the importance of programs that counter the effects of discrimination, JACL has worked hard to educate people on the need for affirmative action programs.

Leadership Education for Asian Pacifics, Inc. (LEAP)
LEAP is a national, nonprofit, nonpartisan organization. Since 1982, LEAP has worked to achieve full participation and equality of Asian Pacific Americans through innovative leadership education programs, community outreach, and public policy initiatives designed to develop people, inform society, and empower communities.

The National Association for the Education and Advancement of Cambodian, Laotian, and Vietnamese Americans (NAFEA)
NAFEA is a nonprofit organization serving professionals who are Southeast Asian Americans and those who work with the Southeast Asian immigrant/American community in fields of education, social services, and community development. NAFEA seeks to provide and promote quality education for Southeast Asian immigrant/American students, improvement in the quality of life for Southeast Asian families, better understanding and appreciation for the diverse Southeast Asian backgrounds/languages and

cultures, and exchange of information among professionals and community members. NAFEA also seeks to provide the linkage between Southeast Asian American professionals and others working with the Southeast Asian community.

The National Asian Pacific American Bar Association (NAPABA)
NAPABA is the national professional association of Asian Pacific American attorneys, judges, law professors, and law students. NAPABA was incorporated in 1989 to represent and advocate on a national level for the interests of Asian Pacific American attorneys and their communities. To advance its goals, NAPABA monitors legislative developments and judicial appointments, and advocates on issues of importance to Asian Pacific American lawyers and the community.

The National Asian Pacific American Women's Forum (NAPAWF)
NAPAWF is a grassroots organization dedicated to forging a progressive movement for social and economic justice and the political empowerment of Asian and Pacific American women and girls. NAPAWF believes that affirmative action programs are necessary to address the myriad educational and economic obstacles facing APA women and girls.

The National Coalition for Asian Pacific American Community Development, Inc. (National CAPACD)
CAPACD is the first national advocacy organization dedicated to addressing the housing, economic, and community development needs of Asian Americans and Pacific Islanders. Our mission is to be a powerful voice for the unique community development needs of Asian American and Pacific Islander communities and to strengthen the capacity of community-based organizations to create neighborhoods of hope and opportunity. National

CAPACD is built on the principle that equal access in education and employment is essential to progress in all communities.

National Council of Asian American Business Associations (NCAABA)
The mission of NCAABA is to bring together the leaders of the Asian Pacific American Chambers of Commerce and business associations across the country to unite and develop the formation of a coalition that will address issues in the area of economic development, public contracting and private procurement policies, public policy, and fiscal impacts that affect APA business owners.

National Federation of Filipino American Associations (NaFFAA)
NaFFAA is a nonprofit, nonpartisan civil rights organization dedicated to promoting the interests and betterment of Filipinos and Filipino Americans in the United States. Founded in 1997, NaFFAA represents over 300 Filipino American community organizations and institutions. NaFFAA works in coalition with other civil rights organizations to ensure that Asian Pacific Americans enjoy equal opportunities in education, employment, and industry.

National Korean American Service & Education Consortium (NAKASEC)
NAKASEC seeks to empower and improve the lives of Korean Americans through advocating for their civil rights and full equality. By facilitating grassroots organizing and political/civic participation of Korean Americans, NAKASEC works toward building coalitions with other communities across the nation. NAKASEC also promotes the Korean American cultural heritage as part of diversity in multi-ethnic America. Founded by four local Korean American organizations with similar missions in 1994,

NAKASEC has been an active participant in immigrant and civil rights activism.

Organization of Chinese Americans, Inc. (OCA)
OCA is a nonprofit, nonpartisan civil rights organization dedicated to ensuring the equality of Chinese Americans, Asian Americans, and all Americans in the United States. Founded in 1973, OCA currently represents over 10,000 members in 50 chapters and 30 college affiliates. OCA has worked to ensure the Asian Pacific Americans are treated fairly and are accorded the rights guaranteed to them under the Constitution, federal, state, and local law.

South Asian Bar Association of Southern California (SABA-SC)
SABA-SC is a voluntary bar association of over 300 South Asian attorneys throughout Southern California.

Southeast Asia Resource Action Center (SEARAC)
SEARAC was founded in 1979 to facilitate the relocation of Southeast Asian refugees into American society as well as the development of nonprofit organizations led by and for Southeast Asians. SEARAC's principal mission is to advance the interests of Southeast Asian Americans by promoting community empowerment and leadership development, as well as advocating for and representing the diverse Southeast Asian American community on issues and concerns such as education, health care, safety, economic development, and civil rights.

FEB 14

No. 02-0516

IN THE

Supreme Court of the United States

JENNIFER GRATZ AND PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, ET AL.,

Respondents.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMICUS CURIAE BRIEF OF NORTHEASTERN UNIVERSITY SUPPORTING THE RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

"Preparing students to welcome – and excel in – a world characterized by diversity is among our most critical missions and one of our strongest commitments."

Richard M. Freeland, Northeastern University Annual Report, 1999-2000.

Northeastern University is a private university with its main campus in Boston, Massachusetts.[1] Northeastern has approximately 16,200 full-time and 6,300 part-time students participating in a comprehensive range of undergraduate and graduate degree programs.

The centerpiece of Northeastern's programs is the cooperative education system, in which a student's academic studies are interspersed with periods of employment related to the student's chosen field. Northeastern is a world leader in cooperative education, also referred to as practice-oriented education.

A racially and ethnically diverse student body is essential to Northeastern University's educational mission of practice-oriented education. Employers in the urban community

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[1] The parties have filed letters with the Clerk, pursuant to Supreme Court Rule 37.3, which consent to the filing of *amicus* briefs in support of either party. This brief was not authored in whole or in part by counsel for any party, and no person or entity other than the *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

and elsewhere, both public and private, demand an educated, diverse workforce reflective of society as a whole. They also need to hire workers who have the skills to thrive in an environment that is diverse in both the workplace in which they perform and in the marketplace that they are employed to serve. Northeastern's practice-oriented educational programs meet both aspects of this need. Northeastern produces qualified minority candidates for the professions and other occupations, and it equips its minority and non-minority students alike with the leadership skills and other attributes that flow from learning in a diverse educational community.

Northeastern University, as a leader in professional education, cannot meet the needs of employers, nor can it appropriately prepare its students to thrive in the workplace, if it is forced to forfeit its ability to admit, retain, educate and graduate a diverse student body. The resolution of the central question pending before the Court – whether the appropriately tailored use of racial and ethnic preferences in student admissions is lawful – thus is of vital interest to Northeastern; to the thousands of Northeastern students who currently benefit from the diversity of its student body; and to the thousands of employers in the greater Boston area and elsewhere who look to Northeastern to provide diverse graduates who are well-prepared to assimilate in and meet the demands of a diverse marketplace.

SUMMARY OF ARGUMENT

Preparing students to serve the needs of the professions and other occupations has been a core mission for Northeastern University since its inception. As a practice-oriented university, Northeastern is particularly attuned to the needs of the many different occupations that its students pursue, not only upon graduation, but also during the cooperative employment internships in which many Northeastern students participate before graduation. Northeastern hears loud and clear the call of employers in the public and private sectors for employees who are diverse in race and ethnicity, equipped to thrive in a diverse workforce and able to serve a diverse community of customers.

One example of an employer that looks to Northeastern University to help provide it with qualified minority candidates, as well as candidates who have benefitted from being educated within a diverse student body, is the City of Boston Police Department. The Department needs racial diversity within its ranks for several compelling reasons. The Police Department must reflect the community at large in order to maximize the effectiveness of its community policing strategy. It also has needed to increase minority hiring in order to remedy the effects of past discrimination by the Department. Northeastern's College of Criminal Justice, which has its origins in the training needs of the Boston Police Department, has played a central role in supplying the Department with qualified minority candidates.

The Boston Police Department is just one illustration of an employer that needs to increase minority hiring not only to reap the functional benefits of a diverse workforce, but also to comply with existing court orders – and to avoid new ones – resulting from the employer's past discrimination. Employers like the Boston Police Department have a compelling need for qualified minority applicants – a need that cannot be filled unless universities first admit, retain, prepare, and graduate minority students who are ready to become those qualified applicants.

Racial and ethnic diversity is a compelling interest for Northeastern University not only because it is essential to meeting the needs of employers, but also because diversity is essential to the educational experience that it is Northeastern's mission to provide. A diverse student body is paramount to the vibrant exchange of information, ideas and viewpoints that is the very essence of higher education. For these reasons, diversity at Northeastern must be understood as imperative to the Northeastern educational experience itself.

This Court long has recognized the vital role of education in a free society, and the constitutional importance of academic freedom in the university. For these principles to have meaning, the individual university must be free to define its own mission and determine how to achieve that mission. Northeastern has defined its mission as a world leader in practice-oriented education, and has determined that diversity is essential to that mission. Northeastern must not

lose the ability to select its student body bearing in mind this educational mission.

ARGUMENT

I. NORTHEASTERN UNIVERSITY CANNOT FULFILL ITS EDUCATIONAL MISSION WITHOUT A DIVERSE STUDENT BODY.

Attaining diversity in higher education is a compelling interest, which is permissible under the Constitution and Title VI of the Civil Rights Act of 1964. *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 311-14 (1978). *See also Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 568 (1990)("a 'diverse student body' ... is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated")(quoting *Bakke*, 438 U.S. at 311-12 (Powell, J.)), *overruled on other grounds*, *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986)(O'Connor, J., concurring)("a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest")(citing *Bakke*, 438 U.S. at 311-15 (Powell, J.)).

Justice Powell, in his controlling opinion in *Bakke*, identified two primary reasons why achieving racial diversity in higher education is a compelling interest: (1) diversity promotes better learning, 438 U.S. at 312 ("[t]he atmosphere of 'speculation, experiment and creation' – so essential to the quality of higher education – is

widely believed to be promoted by a diverse student body")(quoting William Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Weekly 7, 9 (Sept. 26, 1977)); and (2) it fosters the values and skills that will make students better leaders after they leave the academic environment, *id.* at 313 ("the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples")(quoting *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967)).

Achieving diversity is a compelling interest for Northeastern University because a diverse student body is essential to the practice-oriented education that it is Northeastern's mission to provide.

A. Diversity Is Essential to Northeastern University's Mission of Practice-Oriented Education.

Derek Bok, the former president of Harvard University and former dean of Harvard's law school, correctly observes that one reason many universities consider race in their admissions policies is the universities' "established tradition of trying to serve the needs of important professions and occupations in the society." Derek Bok, *The Uncertain Future of Race-Sensitive Admissions* (Revised draft, Jan. 20, 2003), http://www.nacua.org/documents/Uncertain_Future_of_Race_Sensitive_Admissions_Revised.pdf, at 3 (hereafter, "Bok"). For Northeastern University, preparing students to serve the needs of the professions and other occupations is not

merely an "established tradition." It is has been a core mission for Northeastern from the start.

1. Northeastern University Fulfills its Educational Mission by Preparing its Students for Success in the Workplace.

Northeastern University was founded in Boston at the end of the 19th century, when more than half of the city's population consisted of either immigrants or first-generation Americans. Foremost among the city's institutions committed to helping these new Americans succeed was the Young Men's Christian Association (YMCA), the first American branch of which was established in Boston in 1851. The Boston YMCA began providing classes for its members in literature, history, music and numerous other subjects, which immediately drew large numbers of young men seeking to improve themselves. The Boston YMCA's academic programs grew and expanded,[2] leading to the incorporation in 1916 of Northeastern College of the Young Men's Christian Association, which ultimately became

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[2] Building on its early success, the YMCA began offering evening classes, which by 1898 included classes in its newly created Department of Law. In the early years of the twentieth century, the YMCA opened an Automobile School, a School of Law with the authority to award LLB degrees, and a School of Commerce and Finance for those interested in careers in business. The Evening Polytechnic School offered courses in art, architecture, navigation, surveying, mathematics and other subjects.

Northeastern University – fully separate from the YMCA – in 1935.[3]

Throughout its history, Northeastern has adhered to the approach laid out by its founder and first president, Frank Palmer Speare, who recognized in the constituency of the Boston YMCA "a vast market of working-class, sometimes older, often second-generation men and boys who hankered to take advantage of the American dream – the dream of moving ahead in an increasingly urban industrial society – but who were excluded by reason of birth and economics from the traditional education system." Antoinette Frederick, *Northeastern University, Coming of Age: The Ryder Years,* at 2 (1995)(hereafter "Frederick"). "Where traditional educational institutions tried to shape their markets by passing on traditional classical education, Speare looked instead at what was needed and tried to fulfill the needs of a market that increasingly demanded people with pragmatic, professional skills." *Id.* The result was Northeastern's "well-organized, systematic degree-granting professional programs, available

[3] Northeastern continued to expand throughout the twentieth century, adding a College of Liberal Arts in 1935 and, in subsequent decades, Colleges of Education, Pharmacy, Nursing, Criminal Justice and Computer Science, among many other new programs, as well as additional campuses in several Boston suburbs.

at minimum cost and easily accessible by public transportation in after-work hours." *Id.*[4]

Significantly, Speare and the other directors of the Boston YMCA

> were animated by more than Christian concern for the well-being of young men from rural and immigrant backgrounds. Through their ties to Boston's business community, they understood that the region faced a shortage of trained workers and [that the] new arrivals were needed to maintain economic expansion. The dual impulse to provide opportunities for students with few resources while working with industry to produce competent manpower was built into the foundations of Northeastern and became a defining characteristic of the school.

Richard M. Freeland [current President of Northeastern University], *Academia's Golden Age:*

[4] Speare's ideals have endured at Northeastern throughout its transformation to a modern research university: "What lies at the heart of the University is a commitment to devote our abilities and our resources to the tens of thousands of students – young and old, rich and poor, black and white, well-prepared academically or simply eager and ambitious to learn – who come to Northeastern in the hope and expectation of bettering themselves and their place in society through education." Northeastern University Annual Report, 1989-90, at 8.

Universities in Massachusetts, 1945-1970, at 33 (1992)(hereafter, "Freeland").

While Northeastern today is a major research university, its core mission continues to be to provide opportunities for diverse students, including those of modest means, to achieve professional success through practice-oriented education. This mission is reflected especially in Northeastern's focus on "cooperative" education – referring to the cooperation between university and employer – in which both undergraduate and graduate students alternate periods of classroom and laboratory work with periods of employment in positions related to their area of study. Indeed, what gives Northeastern a "special competence to provide professional education for [its] students" is "the University's unflagging adherence to the cooperative method." *Id.* at 165, 173 (quoting Kenneth G. Ryder, *The Uses of Knowledge, in A Decade of Progress, A Future of Promise, 1975-1985*, Northeastern University Tenth Anniversary Report 1985, at 4). Today, Northeastern annually places some 8,000 undergraduate and graduate students with upwards of 3,000 cooperating employers.

Northeastern's success in the field of practice-oriented education depends upon its ability – which means the ability of its students – to meet the needs of public and private employers. Those needs include the need for a diverse workforce.

2. Employers Require an Educated, Diverse Workforce.

As Professor Bok has observed, "every major profession in the United States has made known a desire for more diversity within its ranks." Bok, *supra*, at 4. The demand for greater diversity exists not only in the traditional professions, but across a broad spectrum of vocations, from bar associations and medical societies to automotive manufacturers, network newsrooms, and the sphere of presidential appointees in the federal government. *Id.* at 4-10.

The reasons the professions and other occupations demand diversity include, as just a few examples:

- the American Bar Association's conclusion that diversity on the bench and in the bar "will help make the legal profession more responsive to the needs of all segments" of society and will help to overcome the "widespread perception that the judicial system harbors an abiding racial bias";[5]

- the American Medical Association's conclusion that "a predominantly white (and increasingly Asian) profession cannot fully meet the health needs of a population

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[5] *Bok, supra*, at 5 (quoting Brief of the American Bar Association as *Amicus Curiae* at 11, *University of California* v. *Bakke*, 438 U.S. 265 (1978); Brief of the American Bar Association as *Amicus Curiae* at 16, *Grutter* v. *Bollinger*, 288 F.3d 732 (6th Cir. 2002)).

that is already almost one-quarter black and Hispanic," because "proper care requires not only technical skill but qualities of empathy and cultural awareness," including an understanding about "how different cultures perceive diseases";[6] and

- the conclusion of General Motors and numerous other large corporations that a diverse workforce, which includes diversity through the highest levels of management, is necessary for "American business [to] continue to create the world's most innovative products, manage the world's most productive workforces, and expand their operations across the globe."[7]

Northeastern University, as a practice-oriented university, is particularly attuned to the needs of the many different occupations that its students pursue. It has heard the demand of both public and private employers to develop a workforce that is itself diverse and that has the skills to deal with diversity in the workplace, and with a diverse consumer population.

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[6] *Id.* at 6-8 (citing, *inter alia*, *Diversity in Medical Education*, 15 Am. Med. Ass'n Bd. of Trustees Rep. at 2, 4 (1999); Gerard N. Burrow, *Medical Student Diversity – Elective or Required*, 73 Acad. Med. at 1052 (1998)).

[7] *Id.* at 9-10 (quoting Brief of General Motors Corporation as *Amicus Curiae* at 2, *Gratz* v. *Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000), and citing Brief of 3M, Abbott Laboratories, American Airlines, *et al.*, as *Amici Curiae* at 10-11, in *Grutter* v. *Bollinger*, 288 F.3d 732 (6th Cir. 2002)).

Northeastern regularly receives entreaties from employers such as

- PricewaterhouseCoopers, the international accounting and consulting firm, which told Northeastern, "For us, diversity is a business imperative that will help us sustain our position as the leading global professional services firm";[8]

- Liberty Mutual, a Fortune 200 insurance company, which identified Northeastern as a "target school" for helping the company achieve its "mission ... to cultivate and encourage a career-long work environment that develops, retains and promotes a diverse work force";[9]

- the United States Department of Justice, Immigration and Naturalization Service, which requested the opportunity to come to Northeastern "to talk to minority students there and let them know about the different positions in the Immigration Service as well

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[8] Letter from Nancy Hennessey, Accounting Group, Northeastern University, to Patricia Venter, Minority Liaison for Co-op Education, Northeastern University (2003)(on file with recipient).

[9] E-mail from Christopher Duffy, Claims Manager at Liberty Mutual, to Patricia Venter, Minority Liaison for Co-op Education, Northeastern University (Oct. 23, 2001, 13:01 EST)(on file with recipient).

as let them know about the co-op program in Immigration";[10]

- the Commonwealth of Massachusetts Department of Environmental Protection, which contacted Northeastern to express its "concern[] with enhancing the diversity of [its] staff to include more persons of color, women, and the physically challenged";[11]

- The Nature Conservancy, which approached Northeastern about its "commit[ment] to diversity in the work place, with particular emphasis on areas in which minorities have been historically under-represented in the environmental professions";[12] and

- the Bedford, Massachusetts, Public Schools, which informed Northeastern it was "seeking to increase the diversity of its

[10] Letter from Rose Moses, Manager of Special Emphasis Program, United States Department of Justice, Immigration and Naturalization Service, to Patricia Venter, Minority Liaison for Co-op Education, Northeastern University (April 28, 1992)(on file with recipient).

[11] Letter from Arnold Sapenter, Director of Program Monitoring, Commonwealth of Massachusetts Department of Environmental Protection, to Patricia Venter, Minority Liaison for Co-op Education, Northeastern University (Jan. 13, 1997)(on file with recipient).

[12] Letter from Patti Reilly, Communications Associate, The Nature Conservancy, to Patricia Venter, Minority Liaison for Co-op Education, Northeastern University (Mar. 4, 1996)(on file with recipient).

faculties," and asked Northeastern to "encourag[e] minority graduates ... to consider a teaching career with the Bedford Public Schools".[13]

These are but a few examples of the numerous employers that actively recruit minority students at Northeastern.

3. Northeastern University Is Meeting Employers' Needs for an Educated, Diverse Workforce.

Perhaps the best example of a profession that requires a diverse workforce, and that looks to Northeastern to help produce qualified candidates for that workforce, is urban policing. Northeastern University has a preeminent College of Criminal Justice, which was established in the 1960s to prepare students for careers in law enforcement, corrections, legal studies, private security, and a host of related areas at all levels of the criminal justice system. Frederick, *supra*, at 151. One important employer for graduates of the College of Criminal Justice, indeed an employer whose hiring needs contributed directly to the creation of the College,[14] is the City of

[13] Letter from Joseph Buckley, Jr., Superintendent of Schools, Bedford Public Schools, to Patricia Venter, Minority Liaison for Co-op Education, Northeastern University (Jan. 21, 1997)(on file with recipient).

[14] Northeastern had conducted continuing-education courses for the Boston Police Department since the late 1950s. By the mid-1960s, the Department was lobbying for the creation of a

(continued...)

Boston Police Department, which actively seeks qualified minority applicants for a number of reasons.

Foremost among these reasons is the Department's conclusion that a meaningful minority presence in the Department is essential to its nationally renowned community policing strategy, which involves active collaboration among law enforcement, neighborhood residents, clergy, business leaders and other members of the local community. *Cotter* v. *City of Boston*, 193 F. Supp. 2d 323, 340-41 (D. Mass. 2002). In response to an upsurge in youth violence in Boston in the early 1990s, "community leaders and public officials in Boston began to implement a number of innovative reforms that together came to be known as the 'Boston Model' or 'Boston Strategy,'" the underlying philosophy of which was community oriented policing. Jack McDevitt, *A Survey of the Role of Racial and Ethnic Diversity in Leadership of the Boston Police Department*, 8-9 (July 12, 2001) (hereafter, "McDevitt") (cited in *Cotter v. City of Boston*, *supra*).

> [T]he Boston Strategy stressed the importance of partnerships between the

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(continued...)

comprehensive facility for criminal justice education. Northeastern assembled a plan for such a college and was able to open its new College of Criminal Justice in 1967. Freeland, *supra*, at 262.

> police, community groups, private organizations and other public agencies. ... Essentially, the model necessitates that the police and community work with one another in solving not only crime problems but also other quality of life concerns.

Id. at 13.

The Boston Police Department "insists that the success of community policing depends on the ability of the Department to garner the trust of the citizens it serves," and that a "critical component" of developing that trust "is ensuring diversity among the ranks of the Department." *Cotter* v. *City of Boston*, 193 F. Supp. 2d at 341 (quoting the Declaration of Boston Police Commissioner Paul Evans, Docket No. 96, at 5). Boston is hardly alone in this view. A survey of police chiefs in the 50 largest cities in the United States, conducted by the Center for Criminal Justice Policy Research at Northeastern's College of Criminal Justice, revealed that

- 96% of the respondents identified "partnerships between community organizations and the police" as being "extremely important";

- 98% indicated "that it was important to the success of Community Policing to have racial and ethnic diversity among those at each level of a police department, [including] line officers, supervisors, managers, and command staff"; and

- fully 100% "indicated that racial and/or ethnic diversity among members of the police force" was among the "important elements of a successful Community Policing effort ...."

McDevitt, *supra*, at 17, 22.

The results of the Boston Strategy, by any measure, "have been phenomenal." *Cotter v. City of Boston*, 193 F. Supp. 2d at 341. Not only have crime rates in the City of Boston declined dramatically, but the City also has appreciated a marked decrease in community complaints about the police, and a corresponding increase in the level of trust in the criminal justice system. McDevitt, *supra*, at 15, 19.

The "phenomenal" success of community policing is but one example of the "compelling public safety concerns" that courts have found sufficient to justify the appropriately tailored consideration of race in the field of criminal justice. *Reynolds* v. *City of Chicago*, 296 F.3d 524, 530 (7th Cir. 2002)(citing *Wittmer* v. *Peters*, 87 F.3d 916, 920-21 (7th Cir. 1996); *Barhold* v. *Rodriquez*, 863 F.2d 233, 238 (2d Cir. 1988); *Talbert* v. *City of Richmond*, 648 F.2d 925, 928-32 (4th Cir. 1981); *Detroit Police Officers' Ass'n* v. *Young*, 608 F.2d 671, 695-96 (6th Cir. 1979)). The court in *Reynolds*, for example held that the City of Chicago's promotion of twenty black, Hispanic and female sergeants and lieutenants to the ranks of lieutenant and captain pursuant to an affirmative action plan did not violate the equal protection clause because the City demonstrated, *inter alia*, that "[e]ffective police

work, including the detection and apprehension of criminals, requires that the police have the trust of the community and they are more likely to have it if they have 'ambassadors' to the community of the same ethnicity".[15]

The Boston Police Department also must hire qualified minority applicants in order to remedy the effects of past discrimination by the Department. The court in *Cotter* v. *City of Boston*, *supra*, recently upheld the Department's use of racial preferences to promote three black candidates to sergeant on this basis. 193 F. Supp. 2d at 346 (noting "the many opinions of the First Circuit documenting the discrimination perpetrated in the past by the Boston Police Department against minorities") (collecting cases).[16]

Northeastern has played a direct role in helping the Department remedy that past discrimination. "In 1985, when the Boston Police Department decided under court order that it must expand its roster of minority officers, the

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[15] *See also Patrolmen's Benevolent Ass'n of the City of New York, Inc.* v. *City of New York*, 310 F.3d 43, 54 (2d Cir. 2002)("There may indeed be occasions where the race-conscious transfer of police officers is a constitutionally permissible means of improving law enforcement, whether as a long-term strategy to create a diverse police force ..., or as an immediate response to an emergency situation.").

[16] The court held that a second compelling interest that justified the use of racial preferences was the Department's interest in avoiding meritorious litigation by the minority candidates if it failed to make the promotions. *Cotter*, 193 F. Supp. 2d at 351.

College of Criminal Justice began to provide examination training to minorities through the [George Lewis] Ruffin Society," "an organization of minority criminal justice professionals dedicated to increasing minority leadership in the profession," for which the College was a host institution. Frederick, *supra*, at 154. Largely as a result of this training, "the number of minority officers on Boston's force jumped from two to sixty within a period of a few years." *Id.* at 155. Northeastern, "[q]uite literally" had helped "change[] the complexion of the force." *Id.* (quoting College of Criminal Justice Dean Norman Rosenblatt).

This is but one example of the unique role that higher education can play in remedying the effects of past discrimination. The university has a compelling interest in diversity not to correct its own past discrimination, but based upon past discrimination by employers whose needs it is Northeastern's mission, in part, to serve.[17] Simply put, employers like the Boston Police Department that need to increase minority hiring,

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[17] Another example of Northeastern's role in remedying the effects of past discrimination outside the University concerns the court-ordered desegregation of the Boston public schools in the 1970s. During Phase II of the court-ordered desegregation, U.S. District Judge W. Arthur Garrity, Jr., ordered twenty-one Boston-area colleges and universities to be paired with certain Boston public schools as part of the effort to improve the educational quality of those schools. Northeastern's leadership role in that pairing program supplemented Northeastern's pre-existing experience with the Boston public schools and led to a wide range of other new programs and initiatives for students in those schools. Frederick, *supra*, at 185, 186-89, 192-95.

either in response to a court order or to avoid one, have a compelling need for qualified applicants – a need that cannot be filled unless universities first admit, retain, prepare and graduate minority students who are ready to become those qualified applicants.

B. The Benefits of Diversity Are Essential to the Educational Experience that Northeastern University Provides.

Northeastern University does not champion diversity only in order to produce qualified minority candidates for the employers it serves. A racially and ethnically diverse student body also is essential to the educational experience that it is Northeastern's mission to provide. Northeastern's graduates of every race and color are better leaders and workers because they have received their education in an environment of diversity.

The conclusion that diversity in higher education produces dramatic educational benefits has ample empirical proof, as the respondents demonstrated below. *Gratz* v. *Bollinger*, 122 F. Supp. 2d 811, 822 (E.D. Mich. 2000)("The University Defendants have presented this Court with solid evidence regarding the educational benefits that flow from a racially and ethnically diverse student body."). It also is a conclusion that the petitioners and their *amici* effectively concede. *Id.* at 823 ("Plaintiffs have presented no argument or evidence rebutting the University Defendants' assertion that a racially and ethnically diverse student body gives rise to educational benefits for both minority and non-

minority students. In fact, during oral argument, counsel for Plaintiffs indicated his willingness to assume, for purposes of these motions, that diversity in institutions of higher education is "good, important and valuable."); *see also* Petitioners' Brief at 40 ("It certainly can be assumed that remedying the lingering effects of societal discrimination would produce benefits both in the educational system and throughout society generally."); Brief of United States as *Amicus Curiae* at 13-14 (describing the goal of diversity in education as "important and laudable").

For Northeastern University, the educational benefits of diversity are so compelling that diversity must be regarded not simply as a means of enhancing the education that the University provides, but as essential to the educational experience itself.[18] Because of the benefits that flow directly from diversity in the classroom, the consideration of race or ethnicity

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[18] Of all the noble ideals that a university can teach, none are more vital to our democracy than those of tolerance, inclusion and the free exchange of ideas. ... [The university] must bring to its campus students and faculty as diverse as the world from which they are drawn. It must promote civil discussion of differences and provide opportunities for the practice of cooperation and tolerance. It must demonstrate through its course offerings an unwavering respect for the world's multitude of cultures.

Inauguration Speech of Northeastern University President John A. Curry (December 1, 1989)(*quoted in* Karen Feldscher, *Northeastern University, 1989-1996: The Curry Years: Smaller but Better,* 151-52 (2000)).

in admissions is not for the purpose of determining who should have access to the educational opportunity at Northeastern. Rather, it is for the purpose of creating the educational opportunity that Northeastern wishes to provide in the first place. *See* State of the University Address of Northeastern President Richard M. Freeland, September 30, 1996, *available at* http://www.president.neu.edu/speeches/university960930.html (describing diversity "as a central element of [Northeastern's] institutional character").

As Justice Powell recognized in *Bakke*, the very essence of higher education is the vibrant exchange of information, ideas and viewpoints among faculty and students, and – as importantly – among the students themselves.

> "[A] great deal of learning [in higher education] occurs informally. It occurs through interactions among students of both sexes; of different races, religions and backgrounds ...who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. ...
>
> "... For many, ... the unplanned, casual encounters with roommates, fellow sufferers in organic chemistry class, student workers in the library, teammates on the basketball squad, or

> other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth."

Bakke, 438 U.S. at 312-13 n.48 (Powell, J.)(quoting William Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Weekly 7, 9 (Sept. 26, 1977)). In short, what students ultimately learn in higher education cannot be divorced from the question of who is present when the learning takes place.

Based on its own experience, including its interactions with employers from the professions and all occupations, Northeastern knows that students who learn in an environment that is racially and ethnically diverse are more comfortable with the free exchange of ideas than those who learn in an environment of homogeneity; that students educated in a diverse environment absorb the values of tolerance and inclusion; and that these values translate directly into character attributes that foster success in the workplace, which is itself a collection of diverse co-workers, supervisors, customers, vendors, competitors, and consumers.

> We expand our understanding of excellence when we can more thoughtfully identify those skills, values and attributes that are needed to do the work that [the professions] are hiring people to do. Though it is easier to rely on traditional criteria such as class rank ...: and the ranking of the institutions students attend[, w]e

> have to admit that these are merely surrogates for the real outcomes we are seeking.

David Hall [Professor, Northeastern University School of Law, former Senior Vice President for Academic Affairs and Provost and former Dean of the School of Law at Northeastern University], Diversity in Excellence: Expanding our Understanding of Excellence (speech to The Boston Lawyers Group, Hiring and Education Committee Spring Forum, May 15, 2002).

Northeastern thus does not seek diversity in a compromise with individual qualifications, but rather as integral to the overall qualifications of each incoming class. Northeastern does not seek diversity at the expense of academic excellence, but promotes diversity in order to attain excellence. Without a diverse student body, Northeastern cannot achieve the educational excellence that it strives to attain, and cannot provide its students – *any* of them – with the practice-oriented education that is its mission to provide.

II. NORTHEASTERN UNIVERSITY MUST NOT FORFEIT ITS ABILITY TO DEFINE AND TO PURSUE ITS OWN EDUCATIONAL MISSION.

This Court long has recognized the vital role of education in a free society, and the "constitutional importance of academic freedom." *Board of Regents of the Univ. of Wisconsin System* v. *Southworth*, 529 U.S. 217, 238 n.3

(2000)(Souter, J., concurring)(collecting authorities).

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.

Sweezy v. *New Hampshire*, 354 U.S. 234, 250 (1957). Thus, it is essential that the university be able "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Id.* at 263 (Frankfurter, J., concurring). *See also Bakke*, 438 U.S. at 312 (Powell, J.)(reaffirming that "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment," and that a university's "freedom ... to make its own judgments as to education includes the selection of its student body") (citing *Sweezy*, 354 U.S. at 263).

For these principles to have meaning, the individual university must not lose the ability "to define its own mission." *Board of Regents of the Univ. of Wisconsin System* v. *Southworth*, 529 U.S. at 238 (Souter, J., concurring). Northeastern University has defined its mission, and diversity is essential to it. Northeastern must be able to ensure the racial and ethnic diversity of its student body in order to provide each of its

students with the benefits of an education informed by a diverse environment, and in order to provide future employers with a pool of talented workers and leaders instilled with the breadth of character required for success.

CONCLUSION

Northeastern University, like other institutions of higher education, prepares students to flourish in the society of the future. In America, that society must be one that ever more completely fulfills our national promise of equal opportunity for all. This goal can only be achieved if our workforce, across the full range of professions, is diverse and inclusive. Northeastern's historic focus upon preparing students for the professions through its flagship program of cooperative education implies, therefore, a particular need to enroll, educate and graduate a diverse student body. Affirmative action policies that consider race among a number of criteria in the admissions process are essential to the achievement of that mission.

Accordingly, the Court should affirm the judgment of the district court, and affirm that the appropriately tailored use of racial or ethnic preferences in student admissions does not violate the Equal Protection Clause of the 14th Amendment, Title VI of the Civil Rights Act of 1964, or 42 U.S.C. § 1981.

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Supreme Court of the United States

JENNIFER GRATZ AND PATRICK HAMACHER,
Petitioners,

v.

LEE BOLLINGER, et al.,
Respondents.

On Writ Of Certiorari Before Judgment To The
United States Court of Appeals For The Sixth Circuit

BRIEF OF THE AMERICAN EDUCATIONAL RESEARCH ASSOCIATION, THE ASSOCIATION OF AMERICAN COLLEGES AND UNIVERSITIES, AND THE AMERICAN ASSOCIATION FOR HIGHER EDUCATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF AUTHORITIES

Cases

Bell v. Wolfish, 441 U.S. 520 (1979) 6

Brown v. Board of Educ., 347 U.S. 483 (1954). 1

Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993) 6

Dep't of Taxation & Finance v. Milhelm Attea & Bros., Inc., 512 U.S. 61 (1994) 6

Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000) 4, 5, 21, 23

Hopwood v. Texas, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996) 26

Johnson v. Board of Regents, 263 F.3d 1234 (11th Cir. 2001) 21

Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) 4, 20

United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56 (1981) 6

United States v. Paradise, 480 U.S. 149 (1987) 21

Books, Articles & Papers

Anthony Lising Antonio, *Diversity and the Influence of Friendship Groups in College*, 25 REV. HIGHER EDUC. 63 (2001) 14

Anthony Lising Antonio, et al., *Effects of Racial Diversity on Complex Thinking in College Students* (2003), *available at* http://siher.stanford.edu 11

Anthony Lising Antonio, *The Role of Interracial Interaction in the Development of Leadership Skills*

and Cultural Knowledge and Understanding, 42 RES. HIGHER EDUC. 593 (2001) 13

Alexander W. Astin, *Diversity and Multiculturalism on the Campus: How Are Students Affected?* CHANGE, Mar.-Apr. 1993, at 44 12

WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998) 15, 16, 17

Mitchell J. Chang, *Does Racial Diversity Matter?: The Educational Impact of a Racially Diverse Undergraduate Population*, 40 J. COLLEGE STUDENT DEV. 391 (1999) 12

Mitchell J. Chang, et al., *Diversity of Opinions Among Entering College Students: Does Race Matter?* (Oct. 2002) (paper presented at the National Academy of Education Annual Meeting, Toronto, Canada), *available at* http://www.gseis.ucla.edu/faculty/chang/viewpoints.pdf. 7

COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN HIGHER EDUCATION (Mitcheli Chang, et al. eds., forthcoming 2003) 7

Robert L. Crain & Rita E. Mahard, *The Effect of Research Methodology on Desegregation Achievement Studies: A Meta-Analysis*, 88 AM. J. SOC. 839 (1983) 19

Robert L. Crain, *School Integration and the Academic Achievement of Negroes*, 44 SOC. EDUC. 1 (1971) 19

DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION (Gary Orfield with Michal Kurlaender eds. 2001) 6

Greg J. Duncan, et al., *Empathy or Antipathy? The Consequences of Racially and Socially Diverse*

Peers on Attitudes and Behaviors, available at http://www.jcpr.org/wp/WPprofile.cfm?ID=384 14

Erica Frankenberg, et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* (2003), *available at* http://www.civilrightsproject.harvard.edu 28

Saul Geiser, *Redefining UC's Eligibility Pool to Include a Percentage of Students from Each High School* (1998), *available at* http://www.ucop.edu/sas/research/researchandplanning/welcome.html 29

Roxanne Harvey Gudeman, *Faculty Experience with Diversity: A Case Study of Macalester College, in* DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 251 (Gary Orfield with Michal Kurlaender eds. 2001) 10

Expert Report of Patricia Y. Gurin, *Gratz v. Bollinger*, No. 97-75231 (E.D. Mich.) & *Grutter v. Bollinger*, No. 97-75928 (E.D. Mich.), *in* THE COMPELLING NEED FOR DIVERSITY IN HIGHER EDUCATION 99 (1999) 4, 13, 15, 16

Catherine L. Horn, Diversity in a Race-Neutral Setting: An Empirical Analysis of the Potential Effectiveness of Alternative Selection Criteria in Creating Racially/Ethnically Diverse Student Bodies at Texas Public Universities (2001) (unpublished Ph.D. dissertation, Boston College) (on file with author and with The Civil Rights Project, Harvard University) 25, 29

Catherine L. Horn & Stella Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* 38-39 (2003), *available at* http://www.civilrightsproject.harvard.edu 25, 26, 27, 30

SYLVIA HURTADO, ET AL., ENACTING DIVERSE LEARNING ENVIRONMENTS: IMPROVING THE

CLIMATE FOR RACIAL/ETHNIC DIVERSITY IN HIGHER EDUCATION (1999)..... 7

Sylvia Hurtado, *Linking Diversity and Educational Purpose: How Diversity Impacts the Classroom Environment and Student Development, in* DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 187 (Gary Orfield with Michal Kurlaender eds. 2001)..... 12, 14, 18

Thomas J. Kane, *Misconceptions in the Debate Over Affirmative Action in College Admissions, in* CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES 17 (Gary Orfield & Edward Miller eds., 1998)..... 24

Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions, in* THE BLACK-WHITE TEST SCORE GAP 431 (Christopher Jencks & Meredith Phillips eds., 1998)..... 24

Daniel Koretz, et al., *Testing and Diversity in Postsecondary Education: The Case of California,* 10 EDUC. POL'Y ANALYSIS ARCHIVES (2002), *available at* http://epaa.asu.edu/epaa/v10n1..... 24, 29

George D. Kuh, *What We're Learning About Student Engagement from NSSE,* CHANGE (forthcoming Mar.-Apr. 2003)..... 10, 12

Michal Kurlaender & John T. Yun, *The Impact of Racial and Ethnic Diversity on Educational Outcomes: Cambridge, MA School District, available at* http://www.civilrightsproject.harvard.edu/research/diversity/cambridge_diversity.php#fullreport..... 19, 20

Michal Kurlaender and John T. Yun, *Is Diversity a Compelling Educational Interest?: Evidence from Louisville, in* DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 111 (Gary Orfield with Michal Kurlaender eds. 2001)..... 19, 20

Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions,* 100 MICH. L. REV. 1045 (2002)..... 21, 22

Patricia Marin, *The Educational Possibility of Multi-Racial/ Multi-Ethnic College Classrooms, in* AMERICAN COUNCIL ON EDUCATION & AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, DOES DIVERSITY MAKE A DIFFERENCE? THREE RESEARCH STUDIES ON DIVERSITY IN COLLEGE CLASSROOMS 61 (2000)..... 11

Patricia Marin & Edgar K. Lee, *Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida* (2003), *available at* http://www.civilrightsproject.harvard.edu..... 27, 28

Geoffrey Maruyama & José F. Moreno, *University Faculty Views About the Value of Diversity on Campus and in the Classroom, in* AMERICAN COUNCIL ON EDUCATION & AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, DOES DIVERSITY MAKE A DIFFERENCE? THREE RESEARCH STUDIES ON DIVERSITY IN COLLEGE CLASSROOMS 9 (2000). 10, 13

Jack Meacham, et al., *Student Diversity in Classes and Educational Outcomes: Student and Faculty Perceptions* 20 (1999) (paper presented at American Council on Education's Symposium on Diversity and Affirmative Action)..... 16

Jeffrey F. Milem & Kenji Hakuta, *The Benefits of Racial and Ethnic Diversity in Higher Education, in* MINORITIES IN HIGHER EDUCATION: SEVENTEENTH ANNUAL STATUS REPORT 39 (Deborah J. Wilds ed. 2000)..... 7

José F. Moreno, Affirmative Actions: The Educational Influence of Racial/Ethnic Diversity on Law School Faculty (2000) (unpublished Ed.D. dissertation, Harvard University)..... 11

Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools, in* DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 143 (Gary Orfield with Michal Kurlaender eds. 2001)... 8, 9, 15, 17

Janet Ward Schofield, *Maximizing the Benefits of Student Diversity: Lessons from School Desegregation Research, in* DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 99 (Gary Orfield with Michal Kurlaender eds. 2001) 18

Marta Tienda, et al., *Closing the Gap?: Admissions and Enrollments at the Texas Public Flagships Before and After Affirmative Action, available at* http://www.texastop10.princeton.edu 26

U.S. Comm'n on Civil Rights, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education* (2002), *available at* http://www.usccr.gov 27

Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation,* 64 REV. EDUC. RES. 531 (1994)..... 18

Dean K. Whitla, et al., *Educational Benefits of Diversity in Medical School: A Survey of Students,* 78 ACAD. MED. (forthcoming 2003) (manuscript on file with authors and with The Civil Rights Project, Harvard University) 8, 9, 15, 17

INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, the American Educational Research Association, the Association of American Colleges and Universities, and the American Association for Higher Education submit this brief as *amici curiae* in support of Respondents.[1]

Amici curiae are among the nation's leading associations and institutions committed to improving the quality of higher education in the United States through scholarly inquiry, the exchange and dissemination of information, institutional reform, and public policy development. Collectively, the membership of *amici curiae* includes educational institutions, organizations, and individuals, ranging from major research universities, liberal arts colleges, and community colleges to educators, researchers, university officials, students, and social scientists in disciplines that include education, psychology, sociology, statistics, economics, anthropology, and political science. Individual statements of interest are contained in Appendix A of this brief.

This Court has often employed relevant research studies in its equal protection decisions involving race,[2] and, in determining whether the promotion of educational diversity in higher education is a compelling governmental interest, the Court's decision can and should be informed by credible and reliable research findings. *Amici curiae* have a deep-seated interest in the accurate presentation of relevant research findings addressing the educa-

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[1] All parties have filed with the Court their written consent to the filing of all amicus curiae briefs in this case. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

[2] *See, e.g., Brown v. Board of Educ.*, 347 U.S. 483, 494 n.11 (1954).

tional benefits of student body diversity in higher education. Much of this research has been generated in only the past few years, but the consistency of the findings in demonstrating the educational benefits of diversity is impressive. *Amici curiae* are also concerned about the possible misapplication of research evidence in this litigation, including potentially misleading analyses offered at both the trial court and appellate levels. Accordingly, *amici curiae* provide highlights and citations to relevant research findings in this brief to help clarify the Court's review of the literature.

In addition, research findings bear directly on the question of whether the University of Michigan's admissions policies have been narrowly tailored to advance its compelling interest in promoting educational diversity. Recent studies evaluating the effectiveness of race-neutral admissions policies are highly relevant to the Court's determination of whether the University's race-conscious admissions policies have satisfied the narrow tailoring requirement.

The interrelated arguments of *amici curiae* are contained in this brief and in their brief in the companion case of *Grutter v. Bollinger* (02-241), and *amici curiae* respectfully request that the briefs be reviewed complementarily.

SUMMARY OF ARGUMENT

Consistent with Justice Powell's controlling opinion in *Regents of the University of California v. Bakke*, the district court below correctly ruled that, as a matter of law, promoting diversity in higher education is a compelling governmental interest. This holding is supported both by research evidence introduced in the district court and by a large and growing body of research literature that demonstrates the positive benefits of educational diversity for all students—minority and non-minority alike. Research evidence in the record was

unchallenged by Petitioners, who conceded the value of educational diversity at the summary judgment stage. The research evidence presented by Respondents, including an expert report documenting the positive effects of student diversity, is substantial, and the trial court's findings of fact should be left undisturbed.

Research studies show that student body diversity can promote learning outcomes, democratic values and civic engagement, and preparation for a diverse society and workforce—goals that fall squarely within the basic mission of most universities. Several studies demonstrate that student body diversity broadens the range of intellectual opinions on university campuses and improves classroom learning environments, that diverse learning environments promote thinking skills, and that cross-racial interaction has positive effects on retention, college satisfaction, self-confidence, interpersonal skills, and leadership. Diverse learning environments challenge students to consider alternative viewpoints and to develop tolerance for differences, and can promote participation in civic activities. Studies further show that student diversity better prepares students for an increasingly diverse workforce and society.

The University of Michigan's undergraduate admissions policies are narrowly tailored to advance the compelling interest in promoting educational diversity. The policies employ race flexibly as one of several factors in determining admissions decisions, and they do not unnecessarily burden non-minority applicants by preventing them from competing with minority applicants. Evidence introduced in the district court and recent research studies indicate that race-neutral alternatives, including "percent plans" employed at a number of state universities, are less effective than race-conscious policies in promoting diversity, and would be much less effective in the University of Michigan's circumstances.

ARGUMENT

I. RESEARCH EVIDENCE IN THE RECORD SUPPORTS THE COMPELLING INTEREST IN PROMOTING EDUCATIONAL DIVERSITY.

Consistent with Justice Powell's controlling opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the district court below correctly ruled that the promotion of educational diversity is a compelling governmental interest. In doing so, the district court found "solid evidence regarding the educational benefits that flow from a racially and ethnically diverse student body." *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 822 (E.D. Mich. 2000). Within this body of evidence is the expert's report produced by Professor Patricia Y. Gurin, who analyzed three sources of data—multi-institutional national data, the results of an extensive survey of students at the University of Michigan, and data drawn from a specific classroom program at the University of Michigan. Professor Gurin's study, which carefully controlled for factors other than diversity and employed measures that have been tested and validated extensively in the field, yielded statistically significant and consistent results showing that "[s]tudents who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills." Expert Report of Patricia Y. Gurin, *Gratz v. Bollinger*, No. 97-75231 (E.D. Mich.) & *Grutter v. Bollinger*, No. 97-75928 (E.D. Mich.), *in* THE COMPELLING NEED FOR DIVERSITY IN HIGHER EDUCATION 99, 100 (1999) [hereinafter Gurin Report].

As *amici curiae* American Educational Research Association, et al., document in their complementary brief in *Grutter v. Bollinger*, the Gurin Report is a conceptually and methodologically sound research study which

demonstrates that student diversity promotes positive educational outcomes. *See* Brief of the American Educational Research Association, et al., as *Amici Curiae* in Support of Respondents, *Grutter v. Bollinger* (No. 02-241). Nevertheless, Petitioners and various *amici curiae* have introduced critiques of the Gurin Report through briefs submitted to this Court and the courts below. *See* Brief for *Amicus Curiae* National Association of Scholars in Support of Petitioners, *Gratz v. Bollinger* (No. 02-516), at 6-29; Brief *Amici Curiae* of the Center For Equal Opportunity, the Independent Women's Forum, and the American Civil Rights Institute in Support Of Petitioner, *Gratz v. Bollinger & Grutter v. Bollinger*, at 21-22.

The substantive criticisms of *amici curiae* for Petitioners are addressed in the *amici curiae* brief of the American Educational Research Association, et al., in *Grutter v. Bollinger*. On procedural grounds alone, however, this Court should reject consideration of these critiques. Petitioners should not be allowed to use *amici curiae* to supplement the record in the trial court after they have conceded the absence of a factual dispute in their arguments for summary judgment. Petitioners "presented no argument or evidence rebutting the University['s] assertion that a racially and ethnically diverse student body gives rise to educational benefits for both minority and non-minority students." *Gratz*, 122 F. Supp. 2d at 823. Petitioners had ample opportunity through discovery, cross-examination, and rebuttal to challenge the Gurin Report, but ultimately conceded in oral argument for summary judgment that "diversity is 'good, important, and valuable.'" *Id.*

While it is appropriate for this Court to examine research findings as part of its legislative fact finding to settle a question of law, it is wholly inappropriate to allow Petitioners or their *amici curiae* to undermine summary judgment by attempting to create new issues of fact. The district court plays an essential role as the "gatekeeper" of

expert testimony and scientific evidence such as the Gurin Report, *see Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993), and introducing new evidence to rebut the Gurin Report on appeal undermines the district court's fact-finding prerogative. Moreover, allowing an *amicus curiae* to raise these issues rather than the parties themselves casts the *amicus* into an entirely inappropriate role. As it has in previous cases, this Court should reject the introduction of new arguments by *amici curiae* that were not raised by the parties in the court below. *See, e.g., Dep't of Taxation & Finance v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 76 n.1 (1994); *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 61 n.2 (1981); *Bell v. Wolfish*, 441 U.S. 520, 531 n.13 (1979).

II. RESEARCH STUDIES SUPPORT THE COMPELLING INTEREST IN PROMOTING EDUCATIONAL DIVERSITY.

The district court's holding is further supported by a large and growing body of research demonstrating that diversity can promote positive learning outcomes, democratic values and civic engagement, and preparation for a diverse society and workforce—goals that fall squarely within the University's basic mission. Most of the research in this area has been generated only in the past few years, but the consistency of findings across several types of studies, including surveys, longitudinal studies, and experiments, strongly supports the conclusion that promoting educational diversity is a compelling governmental interest. Several of the leading studies are discussed below, and many more are contained in recently published compilations and research summaries focusing on educational diversity in higher education. *See* DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION (Gary Orfield with Michal Kurlaender eds. 2001); COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN HIGHER EDUCATION (Mitchell Chang, et al. eds., forthcoming

2003); Jeffrey F. Milem & Kenji Hakuta, *The Benefits of Racial and Ethnic Diversity in Higher Education*, *in* MINORITIES IN HIGHER EDUCATION: SEVENTEENTH ANNUAL STATUS REPORT 39 (Deborah J. Wilds ed. 2000); SYLVIA HURTADO, ET AL., ENACTING DIVERSE LEARNING ENVIRONMENTS: IMPROVING THE CLIMATE FOR RACIAL/ETHNIC DIVERSITY IN HIGHER EDUCATION (1999).

A. Student Body Diversity Improves Educational Outcomes.

Recent studies demonstrate that student body diversity can produce a wide variety of positive educational outcomes, including a greater variety of intellectual opinions among students, richer classroom environments, improved thinking ability, higher self-confidence, and improved interpersonal and leadership skills.

1. Student Body Diversity Improves Classroom Learning Environments.

Studies show that a racially and ethnically diverse student body improves classroom learning environments by providing students the opportunity to share a broader set of opinions, perspectives, and experiences. One recent study, for example, drew on a national sample of nearly 290,000 freshmen at 572 colleges and universities and examined whether campuses with higher proportions of underrepresented racial minority students (excluding schools such as tribal colleges and historically black colleges and universities with majority-minority enrollments) have a broader collection of student viewpoints. Mitchell J. Chang, et al., *Diversity of Opinions Among Entering College Students: Does Race Matter?* (Oct. 2002) (paper presented at the National Academy of Education Annual Meeting, Toronto, Canada), *available at* http://www.gseis.ucla.edu/faculty/chang/viewpoints.pdf. Specifically, the study examined students' viewpoints regarding racial inequity and the treatment of criminals—topics chosen because of their likelihood of

being raised in classroom discussions. Researchers found that increased proportions of underrepresented minorities led to a greater variety of opinions, with the effect seen across both public and private institutions and in controlling for factors such as school selectivity and size, parents' educational level, hours of work, participation in extracurricular activities, and geographic diversity.

Surveys of students from the law schools at Harvard University and the University of Michigan, as well as from the medical schools at Harvard and the University of California, San Francisco, show that student body diversity has strong positive effects on the classroom environment, with no statistically significant differences across racial groups. *See* Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools, in* DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 143 (Gary Orfield with Michal Kurlaender eds. 2001) [hereinafter Orfield & Whitla Law School Study]; Dean K. Whitla, et al., *Educational Benefits of Diversity in Medical School: A Survey of Students,* 78 ACAD. MED. (forthcoming 2003) (manuscript on file with authors and with The Civil Rights Project, Harvard University) [hereinafter Whitla, et al., Medical School Study].

In the Orfield and Whitla law school study, the Gallup Organization surveyed 1,820 law students to determine the effects of student body diversity on learning and other educational outcomes. When asked how diversity had affected the way in which they reflected upon problems and solutions in class, 68% of the Harvard students and 73% of the Michigan students responded that diversity had affected discussions positively. Orfield & Whitla Law School Study, *supra,* at 158. Sixty-three percent of the Harvard students and 66% of the Michigan students reported that racial diversity enhanced the manner in which topics were discussed in the majority of their classes. *Id.* at 160. In addition, almost two-thirds of

the law students reported "that most of their classes were better because of diversity." *Id.* at 159. When the law students were asked to compare their homogeneous classes to their diverse classes in three categories—(1) the range of discussion, (2) the level of intellectual challenge, and (3) the seriousness with which alternative views were considered—42% of the students found the diverse classes to be superior in all three respects while only 3% believed the homogeneous classes were superior. *Id.* at 166-67.

The survey of 639 medical students at Harvard University and the University of California, San Francisco yielded similar results. Ninety-four percent of students indicated that a diverse student body was a positive element of their educational experience. Whitla, et al., Medical School Study, *supra* (manuscript at 11). Eighty-four percent of students thought that diversity enhanced classroom discussion, while only 3% thought it detracted from discussion. *Id.* (manuscript at 10). Eighty-six percent of students thought that classroom diversity was more likely to foster serious discussions of alternative viewpoints. *Id.*

Surveys of faculty members also indicate that greater student body diversity leads to improved classroom learning. For example, a nationwide survey of faculty at major research universities found that a high percentage of respondents agreed that classroom diversity broadened the range of perspectives shared in classes; specifically, more than two-thirds of respondents indicated that students benefit from learning in a racially and ethnically diverse environment with respect to exposure to new perspectives and willingness to examine their own personal perspectives. Geoffrey Maruyama & José F. Moreno, *University Faculty Views About the Value of Diversity on Campus and in the Classroom, in* AMERICAN COUNCIL ON EDUCATION & AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, DOES DIVERSITY MAKE A DIFFERENCE? THREE RESEARCH STUDIES ON DIVERSITY IN

COLLEGE CLASSROOMS 9, 14-16 (2000). In a study of the faculty at Macalester College, a liberal arts college in St. Paul, Minnesota, 91% of the faculty agreed that "racial-ethnic diversity in the classroom 'allows for a broader variety of experiences to be shared.'" Roxanne Harvey Gudeman, *Faculty Experience with Diversity: A Case Study of Macalester College, in* DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 251, 258 (Gary Orfield with Michal Kurlaender eds. 2001). Eighty percent of the faculty felt that minority students typically raise issues not normally raised by non-minority students, and 75% of faculty agreed that racial and ethnic issues are discussed more substantively in diverse classroom environments. *Id.*

2. Diverse Learning Environments Promote Thinking Skills.

Research also indicates that students learn more and think more actively when educated in a racially and ethnically diverse learning environment. In her report to the district court below, Professor Gurin states: "Students learn more and think in deeper, more complex ways in a diverse educational environment." Gurin Report, *supra*, at 118. Professor Gurin goes on to show that a diverse educational environment, a curriculum which addresses racial issues, and engagement with peers from diverse backgrounds will result in "a learning environment that fosters conscious, effortful, deep thinking" as opposed to automatic, preconditioned responses. *Id.* at 105; *see also* George D. Kuh, *What We're Learning About Student Engagement from NSSE,* CHANGE (forthcoming Mar.-Apr. 2003), at 30-31 (data drawn from surveys of 285,000 students show that students are more likely to be involved in active and collaborative learning with more exposure to diversity); Gudeman, *supra*, at 271 (non-minority students tend to read course materials more critically when part of a diverse classroom); Maruyama & Moreno, *supra*, at 16 (substantial numbers in faculty survey agree that

diversity is important for developing thinking skills); José F. Moreno, Affirmative Actions: The Educational Influence of Racial/Ethnic Diversity on Law School Faculty 92 (2000) (unpublished Ed.D. dissertation, Harvard University) (law school faculty members report that diversity helps students develop thinking skills). As one researcher indicates, a higher level of thinking can be attributed to the range of ideas and perspectives that diverse students bring to a discussion, which, in turn, "challenge students' stereotypes, broaden their perspectives, and stimulate critical thinking." Patricia Marin, *The Educational Possibility of Multi-Racial/Multi-Ethnic College Classrooms, in* AMERICAN COUNCIL ON EDUCATION & AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, DOES DIVERSITY MAKE A DIFFERENCE? THREE RESEARCH STUDIES ON DIVERSITY IN COLLEGE CLASSROOMS 61, 69 (2000).

Studies using research methods involving controlled laboratory experiments with random assignments underscore these basic propositions; experiments are especially powerful because they provide strong evidence of causation. One recent study employed social psychological techniques to measure the degree of complex thinking that resulted from a diverse group interaction, and found positive effects due to the racial composition of the group. Anthony Lising Antonio, et al., *Effects of Racial Diversity on Complex Thinking in College Students* (2003), *available at* http://siher.stanford.edu. For instance, for participants who reported less racially diverse social contacts in their everyday lives, the exposure to racial diversity in the group discussion resulted in more complex thinking, as measured through pre- and post-discussion essays. *Id.* at 10.

Another line of research shows that studying with peers from diverse backgrounds will have a more pronounced effect on self-reported growth in thinking and problem-solving skills, even more than a curriculum that emphasizes diverse perspectives. Sylvia Hurtado, *Linking*

Diversity and Educational Purpose: How Diversity Impacts the Classroom Environment and Student Development, in DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 187, 198 (Gary Orfield with Michal Kurlaender eds. 2001) [hereinafter Hurtado, Linking Diversity and Educational Purpose]. Drawing on longitudinal data from a nationwide sample of over 4,200 students, this research indicates that the curriculum cannot replace or replicate the positive effects that student diversity will have on students' thinking skills.

3. Cross-Racial Interaction Has Positive Effects on Retention, College Satisfaction, Self-Confidence, and Interpersonal and Leadership Skills.

Research also shows that socializing across racial lines and engaging in discussions about race with diverse peers has positive effects on a variety of educational outcomes that go beyond cognitive abilities and skills. For example, relying on a national longitudinal database containing data from student surveys, one researcher found that increased diversity in the student body had a positive effect on the individual student's likelihood of both socializing with someone of a different racial group and discussing racial issues, which in turn were shown to have significant positive effects on students' intellectual and social self-concept, college satisfaction, and chances of graduating in four years. Mitchell J. Chang, *Does Racial Diversity Matter?: The Educational Impact of a Racially Diverse Undergraduate Population*, 40 J. COLLEGE STUDENT DEV. 391 (1999); *see also* Kuh, *supra*, at 30-31 (data drawn from nationwide surveys of 285,000 students show that students are more likely to be satisfied with college experience with more exposure to diversity); Alexander W. Astin, *Diversity and Multiculturalism on the Campus: How Are Students Affected?* CHANGE, Mar.-Apr. 1993, at 44, 47 (socializing across racial lines has positive effects on students' academic achievement).

Related research has found that interaction among diverse students leads to improved interpersonal skills and leadership skills. Anthony Lising Antonio, *The Role of Interracial Interaction in the Development of Leadership Skills and Cultural Knowledge and Understanding*, 42 RES. HIGHER EDUC. 593 (2001); *see also* Maruyama & Moreno, *supra*, at 15-16 (substantial numbers in faculty survey agree that diversity is important for developing leadership skills).

B. Student Body Diversity Promotes Democratic Values and Increased Civic Engagement.

1. Diverse Learning Environments Challenge Students to Consider Alternative Viewpoints and Develop Tolerance for Differences.

Recent studies demonstrate that diverse learning environments allow students to encounter and consider different perspectives, ultimately leading to a deeper understanding, respect, and tolerance for individual differences. The Gurin Report, for example, indicates that students with the most experience with diversity on their campuses were "most likely to acknowledge that group differences are compatible with the interests of the broader community." Gurin Report, *supra*, at 101. Gurin further found that the students at the University of Michigan who interacted with diverse peers had "[a]n increased sense of commonality with other ethnic groups," and that these students also exhibited a "growth in mutuality or enjoyment in learning about both one's own background and the backgrounds of others, more positive views of conflict, and the perception that diversity is not inevitably divisive in our society." *Id.* at 127.

Studies have found that socializing across racial lines has positive effects on students' cultural awareness and commitment to racial understanding. A study of undergraduates enrolled in the early 1990s found that studying with someone from a different racial or ethnic

background resulted in a positive growth in civic outcomes such as "the acceptance of people of different races/cultures, cultural awareness, tolerance of people with different beliefs, and leadership abilities." Hurtado, Linking Diversity and Educational Purpose, *supra*, at 198. Specific research on friendship groups developed among students on campuses with diverse student bodies reinforces the notion that diversity can provide students with the opportunity to develop close friendships with individuals of different races and ethnicities. These interracial friendships consequently become the norm for more general interracial interaction, thus promoting greater racial understanding and awareness. Anthony Lising Antonio, *Diversity and the Influence of Friendship Groups in College*, 25 REV. HIGHER EDUC. 63 (2001).

A recent study, relying on methods that parallel controlled laboratory experiments, compared the attitudes of white students who had been randomly assigned minority roommates with the attitudes of white students who had been randomly assigned white roommates at a public university and found significant effects resulting from the differences in roommates. Greg J. Duncan, et al., *Empathy or Antipathy? The Consequences of Racially and Socially Diverse Peers on Attitudes and Behaviors*, *available at* http://www.jcpr.org/wp/WPprofile.cfm?ID=384. For instance, students with minority roommates in the first year of college were more likely to express positive attitudes regarding affirmative action policies than their counterparts with white roommates. *Id.* at 10, 12. Students with minority roommates were also more likely to report greater comfort and personal contact with members of other racial and ethnic groups. *Id.* at 11.

Research also indicates that when confronted with new ideas and perspectives in diverse learning environments, students' views and values can be altered. When law students in the Orfield and Whitla study were asked whether conflicts due to racial differences challenged

them to rethink their values, most students responded affirmatively. Orfield & Whitla Law School Study, *supra*, at 162. Sixty-eight percent of the Harvard law students and 75% of the University of Michigan law students answered that such conflicts either enhanced or moderately enhanced a rethinking of their values. *Id.* In addition, 52% of the Harvard students and 60% of the Michigan students reported that conflicts due to racial differences "ultimately [became] positive learning experiences." *Id.* at 163. The Whitla, et al., medical school survey yielded similar findings. Seventy-seven percent of medical students found that they felt challenged to rethink their values when racial conflicts occurred, and 68% thought such occurrences were learning experiences. Whitla, et al., Medical School Study, *supra* (manuscript at 11).

2. Diverse Learning Environments Promote Participation in Civic Activities.

Studies also indicate that students who are educated in a diverse environment are more likely to participate in civic activities. Results from the Gurin Report "strongly support the central role of higher education in helping students to become active citizens and participants in a pluralistic democracy." Gurin Report, *supra*, at 126. Professor Gurin concluded that "[s]tudents educated in diverse settings are more motivated and better able to participate in an increasingly heterogeneous and complex democracy," and that they "showed the most engagement during college in various forms of citizenship." *Id.* at 101.

Researchers found similar results when they conducted a longitudinal study of students graduating from selective colleges and universities that had used affirmative action in their admissions practices. *See* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS vi (1998). Drawing from records of more than 80,000 students who matriculated at twenty-eight selective colleges and uni-

versities in 1951, 1976, and 1989, the Bowen and Bok study found that the 1976 cohort participated in civic activities in very large numbers: in 1995, nearly 90 percent of the cohort participated in one or more civic activity, a figure that exceeded the participation rate for a control group composed of individuals in the same age range. *Id.* at 156. Bowen and Bok also documented the propensity of students who attended colleges with diverse student bodies to engage in political activity after graduating from college. The study found, for instance, that 93% of the 1976 cohort voted in the 1992 presidential election, a figure that exceeded the control group figure. *Id.* at 174.

C. Student Body Diversity Prepares Students for a Diverse Society and Workforce.

Studies further show that the benefits of diverse learning environments better prepare students for an increasingly diverse society and workforce. Work-related skills are especially important, since, as one study states, "[t]o be competitive, in terms of entry-level employment as well as advancement into positions of responsibility and leadership, students must acquire the understandings and the skills necessary for working productively and harmoniously with fellow workers and citizens who bring widely differing backgrounds and experiences to the workplace and to their communities." Jack Meacham, et al., *Student Diversity in Classes and Educational Outcomes: Student and Faculty Perceptions* 20 (1999) (paper presented at American Council on Education's Symposium on Diversity and Affirmative Action).

One of the Gurin Report's basic conclusions was that students in diverse learning environments "were comfortable and prepared to live and work in a diverse society." Gurin Report, *supra,* at 127. Professor Gurin found that students who attended diverse classes reported feeling the most prepared for graduate school. *Id.* at 133. In addition, Professor Gurin found that diverse

experiences during college positively affected the extent to which white graduates in the national study were living racially or ethnically integrated lives in the post-college world. Students who had taken the most diversity courses and who had interacted the most with diverse peers during college had the most cross-racial interactions five years after leaving college. *Id.*

The students in the Orfield and Whitla law school study reported that diversity had affected their "ability to work more effectively and/or get along better with members of other races." Orfield & Whitla Law School Study, *supra,* at 159. Sixty-eight percent of the Harvard law students responded that diversity either "clearly enhanced" or produced a "moderate enhancement" in their ability to work and get along with members of other races. *Id.* Forty-eight percent of the Michigan law students perceived a clear, positive impact on their ability to work and get along with members of diverse backgrounds. *Id.* at 63. Seventy-six percent of students in the Whitla, et al., medical school survey felt that a diverse student body helped them work more effectively with those of diverse racial backgrounds, and 77% indicated that a greater understanding of medical conditions and treatments was more likely when a student body was diverse. Whitla, et al., Medical School Study, *supra* (manuscript at 10).

Students in the Bowen and Bok study were asked what difference their college experience made in "developing [their] ability to work with, and get along with, people of different races and cultures." BOWEN & BOK, *supra,* at 225. Forty-six percent of the white respondents in the 1976 cohort "believe[d] that their undergraduate experience was of considerable value in this regard," and 18 percent assigned the highest rating, saying it helped "a great deal." *Id.* Fifty-seven percent of black respondents in the 1976 cohort "gave college credit for helping them develop these 'getting along' skills." *Id.* Respondents in the 1989 cohort reported even larger

positive effects: 63% of whites and 70% of blacks attributed their ability to work with and get along with people of different races and cultures to their college experiences. *Id.*

A related study found that students credited their improved job-related skills primarily to their ability to study frequently with diverse peers. *See* Hurtado, Linking Diversity and Educational Purpose, *supra,* at 198. Students reported "growth of important skills related to a diverse work force, including their ability to work cooperatively with others." *Id.* The study concluded that interacting with diverse peers "has the substantial positive effect of the development of skills needed to function in an increasingly diverse society. . . ." *Id.* at 199.

D. Diverse Learning Environments in K-12 Educational Settings Provide Comparable Educational Benefits.

Studies of racially integrated learning environments in the K-12 educational system underscore the findings of studies showing the positive benefits of diversity in higher education. Findings in this area are relevant not only because of the parallels between the systems, but because research shows that students' *sustained* exposure to integrated learning environments leads to greater racial interaction as adults. *See, e.g.,* Janet Ward Schofield, *Maximizing the Benefits of Student Diversity: Lessons from School Desegregation Research, in* DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 99 (Gary Orfield with Michal Kurlaender eds. 2001); Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation,* 64 REV. EDUC. RES. 531 (1994).

Studies show that minority students who attend more integrated schools have increased academic achievement and higher test scores. *See* Robert L. Crain & Rita E. Mahard, *The Effect of Research Methodology on*

Desegregation Achievement Studies: A Meta-Analysis, 88 AM. J. SOC. 839 (1983); Robert L. Crain, *School Integration and the Academic Achievement of Negroes,* 44 SOC. EDUC. 1 (1971). Studies also find that desegregated experiences for African American students will lead to increased interaction with members of other racial groups in later years. *See, e.g.,* Wells & Crain, *supra* (review of twenty-one studies applying "perpetuation theory" that minority students exposed to sustained desegregated experience will lead more integrated lives as adults).

Recent surveys on the attitudes of high school students toward their peers of other racial groups indicate that students of all racial and ethnic groups who attend more diverse schools have higher comfort levels with members from racial groups other than their own, have an increased sense of civic engagement, and have a greater desire to live and work in multiracial settings. *See* Michal Kurlaender & John T. Yun, *Is Diversity a Compelling Educational Interest?: Evidence from Louisville, in* DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 111 (Gary Orfield with Michal Kurlaender eds. 2001) [hereinafter Kurlaender & Yun, Louisville Survey]; Michal Kurlaender & John T. Yun, *The Impact of Racial and Ethnic Diversity on Educational Outcomes: Cambridge, MA School District, available at* http://www.civilrightsproject.harvard.edu/research/diversity/cambridge_diversity.php#fullreport [hereinafter Kurlaender & Yun, Cambridge Survey].

For example, in the survey of students in the Jefferson County School District in Louisville, Kentucky, which is one of the nation's most racially integrated school districts because of court-ordered desegregation, 85% of students reported that they were prepared to work in a diverse job setting and would be prepared to do so in the future, while over 80% of African American students and white students reported that their school experience had helped them to work more effectively with and get along

with members of other races and ethnic groups. Kurlaender & Yun, Louisville Survey, *supra*, at 130. Over 90% of high school students surveyed in Cambridge, Massachusetts, a demographically diverse city with a single public high school, reported that they were prepared to live and work among people of diverse racial and ethnic backgrounds, while 84% percent of both African American students and white students said their school experiences had helped them better understand members from different racial and ethnic groups. Kurlaender & Yun, Cambridge Survey, *supra*, at 6-8.

In sum, the research literature documenting the positive effects of diversity is extensive. Studies that range from national surveys to laboratory experiments demonstrate that diversity leads to positive educational outcomes, promotes democratic values and civic participation, and better prepares students for an increasingly diverse society—all of which advance the University's basic mission. These findings strongly support the proposition that promoting diversity in higher education is a compelling governmental interest.

III. THE UNIVERSITY OF MICHIGAN'S ADMISSIONS POLICIES ARE NARROWLY TAILORED TO PROMOTE EDUCATIONAL DIVERSITY.

A. The University's Admissions Policies Employ Race Modestly and Flexibly and Do Not Overburden Non-Minority Applicants.

The district court correctly held that the University of Michigan's current admission policies adhere to the narrow tailoring principles articulated in *Bakke*. *See* 438 U.S. at 317-18. The University is not operating a rigid quota-style admissions program, nor is it utilizing a minority set-aside. Instead, consistent with *Bakke*, every applicant to the undergraduate program is competing for every seat in the class. Race is used as a modest "plus" factor along with a wide and flexible range of admissions criteria, including grades, test scores, quality and composition of high school, socioeconomic status, geographic location and residency, alumni relationships, personal achievement, leadership ability, and personal essays.

The University's policies also satisfy elements of narrow tailoring that are applied in remedial affirmative action cases but are relevant to non-remedial university admissions. *See United States v. Paradise*, 480 U.S. 149 (1987) (applying multi-pronged test examining necessity of relief and efficacy of alternatives, flexibility and duration of relief, relationship of numerical goals to the relevant market, and impact on third parties).[3] The policies are flexible, allowing race to be considered as one of several factors in admissions, and they impose minimal burdens on third parties.

As the Court noted in *Wygant*, the burden imposed on university applicants is highly diffused, representing at worst a denial of an opportunity regained through attendance at another institution. 476 U.S. at 283 & n.11. Moreover, it is a fallacy to suggest that non-minority applicants are burdened significantly because of the benefits gained by minority applicants through a race-conscious admissions policy. *See* Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045 (2002). Because of the wide variety of factors that can be considered in a selective admissions process, no individual can be assured of admission, regardless of whether a policy is race-conscious or race-neutral. In addition, differences in the *average* likelihood of admissions for minority students versus non-

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[3] As the district court below noted, a University's interest in diversity is ongoing, even though a policy to advance that interest will have limits on duration. *Gratz*, 122 F. Supp. 2d at 824. Because the University is not trying to rectify its own past discrimination, it need not adopt numerical goals to make up for admissions that would have been expected if there had been no past discrimination. *See Johnson v. Board of Regents*, 263 F.3d 1234, 1252 (11th Cir. 2001).

minority students do not change significantly in moving from a race-conscious to a race-neutral policy.[4] "In any highly selective competition where white applicants greatly outnumber minority applicants, and where multiple objective and nonobjective criteria are relevant, the average white applicant will not fare significantly worse under a selection process that is race-conscious than under a process that is race-neutral." *Id.* at 1078. Under the University of Michigan's policies, the burdens are significantly minimized: although many applicants cannot obtain twenty points for being a member of an underrepresented minority group, they are still eligible to gain twenty points under other criteria, including socioeconomic disadvantage, attending a predominantly minority high school, or, through the Provost's discretion, possessing an attribute or background that can contribute to the diversity of the student body.

B. Race-Neutral Policies are Less Efficacious Than Race-Conscious Policies in Promoting Educational Diversity.

In considering the efficacy of alternatives to the University of Michigan's undergraduate admissions policies under the *Paradise* factors, this Court may choose to consider the availability of race-neutral admissions policies, including policies based on class or socioeconomic status and "percent plans" that guarantee admission to public universities to a fixed percentage of the highest ranking graduates of each high school in a state. Contrary to the contention of Petitioners and their *amici curiae*, research in this area shows that race-neutral policies are considerably less efficacious than race-conscious policies in promoting educational diversity.

[4] Liu, for example, calculates that in 1994, the year of Petitioner Gratz's application to the University, the race-conscious policy increased the average likelihood of rejection for white applicants with similar test scores and grades as Gratz from 61% to 68%. Liu, *supra*, at 1073-74. Thus, most white applicants with comparable test scores and grades would be rejected under either a race-conscious policy or a race-neutral policy.

1. Research Studies Show that Race-Neutral Policies are Not Effective Alternatives to Race-Conscious Policies.

Statistical evidence introduced in the district court below demonstrates that a race-neutral admissions policy would substantially reduce the number of underrepresented minority students in the incoming class of the University of Michigan's College of Literature, Science, and the Arts. *Gratz*, 122 F. Supp. at 830 (citing Supplemental Expert Report of Stephen W. Raudenbush (Feb. 24, 2000) at 4-5; Supplemental Expert Report of Stephen W. Raudenbush (March 3, 1999) at 9-11). As the court below noted, "if race were not taken into account, the probability of acceptance for minority applicants would be cut dramatically, while non-minority students would see only a very small positive effect on their probability of admission . . . ." *Id.* The court also relied on expert evidence to find that a system that rested entirely on standardized test scores would lead to the rejection of many qualified minority applicants, because minorities are significantly underrepresented at the higher test score levels and overrepresented at lower test score levels. *Id.* (citing Expert Report of William G. Bowen, President Emeritus of Princeton University).

Numerous studies underscore the lower court's findings by demonstrating that race-neutral admissions policies—in particular, policies focusing on class or economic disadvantage—are not as effective as race-conscious admissions policies in promoting educational diversity. For instance, one study employing data drawn from a sample of students from over 1,000 public and private high schools compared outcomes from statistical analyses of race-conscious and race-neutral admissions policies and found that the "idea that nonracial criteria could substitute for race-based policies is simply an illusion." Thomas

J. Kane, *Misconceptions in the Debate Over Affirmative Action in College Admissions, in* CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES 17, 28 (Gary Orfield & Edward Miller eds., 1998); *see also* Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions, in* THE BLACK-WHITE TEST SCORE GAP 431 (Christopher Jencks & Meredith Phillips eds., 1998) (parallel analyses of race-conscious and race-neutral admissions policies). Comparing class-based policies with race-based policies, the Kane study found that a selective college drawing from the top ten percent of a test score distribution would have to admit *six times* as many students under a class-based policy in order to admit the same number of minority students under a race-based policy. Kane, *Misconceptions, supra* at 24-25. Employing another statistical model, the Kane study found that in order to obtain a comparable level of diversity, a class-based policy would have to assign disadvantages to applicants based on higher income levels and parents' educational level, and would even have to assign a *negative* value to SAT scores for some applicants. *Id.* at 26-27. Results were even more extreme when the statistical model assigned greater weight to test scores and grades. *Id.*

Another study employed a model of the University of California admissions process and actual standardized test scores to examine the effectiveness of admissions policies focusing on disadvantaged background, as measured by factors such as income, parent's education, high school graduation rate, percent of students on free school lunch programs, and school location. Daniel Koretz, et al., *Testing and Diversity in Postsecondary Education: The Case of California,* 10 EDUC. POL'Y ANALYSIS ARCHIVES (2002), *available at* http://epaa.asu.edu/epaa/v10n1. The study found that even the largest effects of these factors did not substantially increase the diversity of the admitted pool of applicants compared to a model that considered only grade point average and test scores—a model in

which racial minorities were already underrepresented relative to a race-conscious policy.

A similar study relied on data from seven public universities in Texas and test score data to examine, among other things, the effectiveness of race-neutral admissions policies based solely on SAT and class rank and the effectiveness of policies that gave preference to various non-racial admissions criteria, including high school location, parents' education, percent of the high school that was economically disadvantaged, percent of the high school that was mobile, and socioeconomic status. Catherine L. Horn, Diversity in a Race-Neutral Setting: An Empirical Analysis of the Potential Effectiveness of Alternative Selection Criteria in Creating Racially/Ethnically Diverse Student Bodies at Texas Public Universities (2001) (unpublished Ph.D. dissertation, Boston College) (on file with author and with The Civil Rights Project, Harvard University). The study found that race-neutral admissions policies relying on test scores and class rank have the greatest effect of reducing African American and Latino representation at the most selective institutions in Texas. The study also found that while consideration of criteria based on economic disadvantage can result in a small boost in minority representation at the most selective institutions, minority representation did not reach the levels that would be expected under a race-conscious admissions policy.

Analyses of undergraduate admissions data from public universities in states that have changed from race-conscious to race-neutral policies because of legal prohibitions on race-conscious measures also show the relative ineffectiveness of race-neutral policies. In Texas, the two most selective institutions—the University of Texas at Austin and Texas Agricultural and Mechanical University (Texas A&M)—have seen declines in the undergraduate admissions of racial minority students after 1996, following the Fifth Circuit's decision in

Hopwood v. Texas, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996). *See* Catherine L. Horn & Stella Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* 38-39 (2003), *available at* http://www.civilrightsproject.harvard.edu . At the University of Texas at Austin, 5% of the admitted undergraduate students in 1996 were African American and 14% were Latino; the following year, only 3% were African American and 13% were Latino. By 2001, African Americans were 3.5% of the admitted classes, and Latinos were 14.7%. *Id.* One study has estimated that at Texas A&M, which does not release its data publicly, an average of 4.7% of the admitted classes between 1992 and 1996 were African American, but only 2.8% of the admitted class in 1998 and only 3.5% of the admitted class in 2001 were African American; for Latinos, the figures are 14.7% for the classes between 1992 and 1996, dropping to only 9.5% in 1998 and rising to only 11.6% in 2001. Marta Tienda, et al., *Closing the Gap?: Admissions and Enrollments at the Texas Public Flagships Before and After Affirmative Action* 49, *available at* http://www.texastop10.princeton.edu. The lack of growth in Latino admittees at both universities is particularly stark because of the growing population of Latinos in Texas that is becoming a larger share of the state's overall population: in 1990, one-third of the 15-to-19-year-old population in Texas was Latino; by 2000, nearly 40% of that age group was Latino. Horn & Flores, *supra*, at 26.

In California, undergraduate admissions at the University of California's most selective institutions, Berkeley and UCLA, saw similar declines following the enactment of Proposition 209, the state ballot initiative prohibiting race-conscious admissions in the state. *See* Horn & Flores, *supra*, at 39-40. At the University of California, Berkeley, 7.3% of the freshman admittees in 1995 were African American and 18.5% were Latino; in 1998, only 3.2% were African American and 8.5% were Latino; by 2001, numbers had increased somewhat, but

only 4.1% were African American and 12.5% were Latino. *Id.* At UCLA, 6.7% of the freshman admittees in 1995 were African American, and 20.1% were Latino; in 1998, only 3.0% were African American, and 10.1% were Latino; in 2001, numbers had increased slightly, but only 3.3% were African American and 12.7% were Latino. Like Texas, California has a large and growing Latino population that is becoming a larger share of the state's overall population: in 1990, 35% of the 15-to-19-year-old population in California was Latino; by 2000, 39% of that age group was Latino. Horn & Flores, *supra*, at 26.

2. "Percent Plans" are Not Effective Alternatives to Race-Conscious Policies.

Petitioners and various *amici curiae*, including the United States and the state of Florida, have proposed that "percent plan" policies adopted in Texas, California, and Florida are effective alternatives to the University of Michigan's race-conscious admissions policies. Although the percent plan policies vary significantly in each state and data are far from complete, recent analyses of these policies make clear that they are far less effective than race-conscious policies in promoting educational diversity. *See* Horn & Flores, *supra;* Tienda, et al., *supra*; Patricia Marin & Edgar K. Lee, *Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida* (2003), *available at* http://www.civilrightsproject.harvard.edu; U.S. Comm'n on Civil Rights, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education* (2002), *available at* http://www.usccr.gov.

Studies analyzing percent plans in Texas, California, and Florida make clear that even their *potential* applicability as an alternative to a race-conscious admissions policy is limited. As a practical matter, percent plan policies are implemented only at the undergraduate level at large state universities. They cannot be applied to private institutions, small institutions, national institutions, or to graduate and professional school programs. Just as im-

portantly, percent plans rely heavily on significant levels of racial isolation in a state's K-12 educational system in order to draw racial minority students. Horn & Flores, *supra*, 13-19. Texas and Florida, for instance, have long histories of de jure and de facto segregation in their public school systems, and the public school systems for all three states are among the most segregated in the nation. *See* Erica Frankenberg, et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* 50-52 (2003), *available at* http://www.civilrightsproject.harvard.edu. In addition, some percent plan policies appear to be more effective than other percent plan policies only because they are supplemented by race-conscious policies focusing on outreach, recruitment, financial aid, and academic support. Horn & Flores, at 51-58 (showing that recent gains in minority enrollments at the University of Texas at Austin and the University of Florida are linked to race-attentive recruitment, financial aid, and support). An entirely race-neutral percent plan may, in fact, be illusory. And, ultimately, percent plan policies may have only limited practical effect because many of the students admitted under the plans would have likely qualified for admission to the state university system anyway, even if a percent plan were not in place. *Id.* at 42; Marin & Lee, *supra*, at 22-23 (concluding that less than 1% of students admitted in the Florida Talented 20 program needed the percent plan to gain admission to the state system).

Because of the particular mission and circumstances of the University of Michigan and because of the demography of the state of Michigan, a percent plan policy is thus particularly ill-suited as an alternative to the University's current undergraduate admissions policies. The University is not part of a statewide university system; thus, if applications to the University exceed available seats in the entering class, rejected applicants cannot be guaranteed admission to another public university in the state. The University also recruits students from a national and international pool, and

approximately one-third of the student body is from outside the state. In addition, as the current admissions policy already acknowledges, the most underrepresented high schools in Michigan are in rural and predominantly white areas of the state.

Notwithstanding the practical limitations, studies based on statistical modeling and studies based on analyses of recent admissions data indicate that percent plans are inadequate substitutes for race-conscious policies. For instance, in one study employing statistical models focusing on the University of California, researchers concluded that automatically accepting the top 4% of graduates from each high school in the state would not appreciably affect the proportion of African American or Latino students entering the system.[5] Koretz, et al., *supra*, at 25; *see also* Saul Geiser, *Redefining UC's Eligibility Pool to Include a Percentage of Students from Each High School* (1998) (simulation for University of California finding limited changes in minority admissions under 4% plan), *available at* http://www.ucop.edu/sas/research/researchandplanning/welcome.html. A study relying on similar models focusing on Texas found that the impact of a 10% rule on African American and Latino admissions was a marginal increase at one school, the University of Texas at Austin, and no increases at the other state universities. Horn, *supra*, at 159-60. Indeed, the 10% rule often had the effect of decreasing minority admissions in the model; for example, at Angelo State

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[5] Models suggest that in order to have an appreciable effect on minority admissions, the plans must allow a much higher percentage of high school graduates to gain automatic admission. The Koretz, et al., study focusing on the University of California found that an automatic admissions policy for the top 12.5% of graduates of each high school in California could lead to increases in the numbers of admitted minority students, but that lower percentages (4% or 6%) would not have an effect. Koretz, et al., *supra*, at 24-26. Admitting such a high percentage of students in order to see gains in minority enrollment is unworkable, however, because of the limited number of spaces available in the UC system.

University, African American admissions dropped by 4.6% and Latino admissions dropped by 6.7%. *Id.* at 161.

As shown by the admissions data summarized in section III.B.1., *supra*, minority admissions at the most selective institutions in Texas and California remain well below the levels attained through race-conscious admissions policies, even with the introduction of percent plans in those states. More specific analyses of admissions and enrollment data related to percent plans in Texas and California, as well as Florida, indicate that percent plans have had negligible effects on increasing the enrollment of racial minority students. Analyzing census data, applications data, admissions data, and enrollment data from the three states over several years, one leading study concludes: "[T]he gap between the college freshman age population, by race, and the applications, admissions, and enrollments to the states' university systems and to their premier campuses is substantial and has grown even as the states have become more diverse." Horn & Flores, *supra*, at 41. The study further concludes: "[D]ata, albeit scarce in the case of California and Florida, suggest that percent plans have fallen well short of creating the diverse flagship campuses reflective of the states they are intended to serve." *Id.* at 42.

CONCLUSION

For the foregoing reasons, the judgment of the district court upholding the constitutionality of the University of Michigan's undergraduate admissions policies should be affirmed.

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APPENDIX A

STATEMENTS OF INTEREST OF *AMICI CURIAE*

Since its founding in 1916, the *American Educational Research Association (AERA)* has worked to advance science-based knowledge of educational systems and processes. AERA members center their efforts on ensuring that educational research addresses fundamental problems and informs practice and policy that relate to education across the life span and contexts of learning. Researchers in this field address all aspects of education from the processes of teaching and learning, curriculum development, and the social organization of schools to the effects of education on cognitive and social capacity, human development, and health and at-risk behaviors. As the paramount interdisciplinary research society in education, AERA has embraced the role of improving the nation's education research capacity by promoting application of scientific standards, and by providing training programs, research and mentoring fellowships, and seminars on advanced statistical techniques. The work of the Association is greatly enhanced by the ongoing efforts of its 20,000 individual members to produce and disseminate knowledge, refine methods and measures, and stimulate translations and practical applications of research results.

The *Association of American Colleges and Universities (AAC&U)* is the leading national association devoted to advancing and strengthening liberal learning for all students, regardless of academic specialization or intended career. Since its founding in 1915, AAC&U's membership has grown to more than 800 accredited public and private colleges and universities of every type and size. AAC&U functions as a catalyst and facilitator, forging links among presidents, administrators, and faculty members who are engaged in institutional and curricular

planning. Its mission is to reinforce the collective commitment to liberal education at both the national and local levels and to help individual institutions keep the quality of student learning at the core of their work as they evolve to meet new economic and social challenges.

The *American Association for Higher Education (AAHE)* is a national organization of individuals dedicated to the common cause of improving the quality of higher education. Since 1879, under the auspices of the National Education Association, AAHE has sponsored an annual conference on the state of higher education in America. As a diverse group of individuals, its over 9,000 members step beyond their institutional roles to engage in a campus-wide perspective. Through this lens, members examine the changes higher education must make—in both theory and practice—to ensure its effectiveness in a complex, interconnected world. AAHE concentrates its work within four fields of inquiry and action: learning about learning; partners in learning; assessing for learning; and organizing for learning. In each field, AAHE promotes praxis, the intersection of theory and practice. Each of these fields is fueled by research, projects, convenings, and publications, through which AAHE's members, other constituents, and staff members tackle issues that arise in a fast-changing higher education environment. The fields of inquiry allow AAHE and its members to explore both the depth and breadth of current core programmatic areas, and to address emerging trends. AAHE has a strong commitment to access and diversity. Part of its mission is to "advocate learning practices that help individuals and institutions benefit from diversity," by documenting and promoting multiple forms of scholarship and disseminating this body of knowledge on teaching and learning about diversity to a national and international audience.

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No. 02-516

Supreme Court, U.S.
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IN THE

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JENNIFER GRATZ and PATRICK HAMACHER,
Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, and
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and

EBONY PATTERSON, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

BRIEF OF MEMBERS OF THE UNITED STATES CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Does the University of Michigan's use of racial preferences in undergraduate admissions violate the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), or 42 U.S.C. § 1981?

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FEDERAL CASES	Page
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Ambach v. Norwick, 441 U.S. 68 (1979)	20
Brown v. Board of Educ., 347 U.S. 483 (1954)	3, 5, 6
Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002)	16
Holland v. Illinois, 493 U.S. 474 (1990)	23
Metro Broad., Inc. v. F.C.C., 497 U.S. 547 (1990)	23
Regents Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)	3, 19, 23
San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973)	8, 9
Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986)	20
STATE CASES	
Abbott v. Burke, 575 A.2d 359 (N.J. 1990)	9, 10
Horton v. Meskill, 376 A.2d 359 (Conn. 1977)	10
Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989)	11, 12
Washakie Co. Sch. Dist. v. Herschler, 606 P.2d 310 (Wyo. 1980)	10
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42 U.S.C. § 2000d	4

TABLE OF AUTHORITIES—Continued

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H.J.Res. 2, 108th Cong. (2003) (presented to the President)	12
A Joint Resolution Supporting the Day of Honor 2000 to Honor and Recognize the Service of Minority Veterans in the United States Armed Forces during World War II, Pub. L. No. 106-205	22
Student Bill of Rights, H.R. 236, 108th Cong. § 3(a)(16) (2003)	2
Student Bill of Rights, S. 2912, H.R. 5346, 107th Cong. (2002)	2
State Department Reauthorization: Hearing Before the Senate Committee on Foreign Relations, 108th Cong. (2003)	21
OTHER AUTHORITIES	
Brief of *Amicus Curiae* Ward Connerly *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (No. 02-241)	16
Council of the Great City Schools, *Adequate State Financing of Urban Schools: An Analysis of State Funding of the New York City Public Schools* (2000)	7
John Dayton, *Correlating Expenditures and Educational Opportunity in School Funding Litigation: The Judicial Perspectives*, 19 J. Educ. Fin. 167 (1993)	10
Educational Testing Service, *Crossing the Great Divide: Can We Achieve Equity When Generation Y Goes to College?* (2000)	15
Representative Chaka Fattah, *Revisiting the Federal Role*, Education Week, Apr. 22, 1998 *available at* http://www.edweek.org	6

TABLE OF AUTHORITIES—Continued

	Page
Jerry Gray, *Ruling Puts New Jersey in Eye of School Financing Issue*, N.Y. Times, Sept. 2, 1993	9
Halls of Justice: A Weekly Look Inside the Justice Department, *ABC News.com, available at* http://abcnews.go.com/section/vs/Hallsofjustice/hallofjustice109.html	20
Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* (2003)	17
Memorandum from the Congressional Research Service to the Honorable Chaka Fattah, *Consideration of Minority Status in the Distribution of Federal Funding for Elementary and Secondary Education* (2003)	12
National Research Council, *Making Money Matter: Financing America's Schools* (1999)	5
Justice Sandra Day O'Connor, *A Tribute to Justice Thurgood Marshall: Thurgood Marshall: The Influence of a Raconteur,* 44 Stan. L. Rev. 1217 (1992)	21, 26
Colin L. Powell, Address to the Republican National Convention (July 31, 2001)	21, 22
Press Release, The Harvard Civil Rights Project, Harvard University, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* (Feb. 7, 2003) *available at* http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.php#fullreport	17, 18, 19

TABLE OF AUTHORITIES—Continued

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Press Release, The U.S. Department of Justice, *Justice Department Initiates New Diversity Program* (Feb. 5, 2003) *available at* http://www.us.doj.gov/opa/pr/2003/February/03_ag_070.htm 22

Richard W. Riley, *The Role of the Federal Government in Education—Supporting a National Desire for Support for State and Local Education*, 17 St. Louis U. Pub. L. Rev. 29 (1997) 2

Richard W. Riley, Address at the College Board's First Annual AP National Conference 11 (July 19, 2002) 15

Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship,* 62 U. Chi. L. Rev. 131 (1995) 9

Saundra Smokes, *Fix Disparities Among Our Schools*, USA Today, Apr. 28, 2000 8

Rochelle L. Stanfield, *Making Money Matter*, National Journal, May 23, 1998 6

Karen Swenson, *School Finance Reform Litigation: Why Are Some State Supreme Courts Activist And Others Restrained*? 63 Alb. L. Rev. 1147 (2000) 9

The Way America Pays for Public Schools, Daily Education News, June 19, 1998 6

Unequal Education: Better Teacher Training and Equitable Funding Could Improve Public Schools for All Children, The Philadelphia Inquirer, Jan. 18, 1999 8

U.S. Department of Education, National Center for Education Statistics, *Paving the Way to Postsecondary Education: K-12 Intervention Programs for Underrepresented Youth* (2001).. 14

TABLE OF AUTHORITIES—Continued

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U.S. Department of Education, Office of Elementary and Secondary Education, Planning and Evaluation Services, *State ESEA Title I Participation Information for 1999-2000: Final Summary Report* (2002) 13

U.S. General Accounting Office, *Title I Program: Stronger Accountability Needed for Performance of Disadvantaged Students* (2000) 5

George F. Will, *Straight Talk From Arizona*, Newsweek, Apr. 17, 2000 7

World Economic Forum, *The Global Competitiveness Report 2001-2002* (2002) 5

Jill Zuckman, *The Next Education Crisis: Equalizing School Funds*, Congressional Quarterly, Mar. 27, 1993 ..... 6, 11

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BRIEF OF MEMBERS OF THE UNITED STATES CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*

Amici curiae are a group comprising 60 members of the United States Congress,[1] representing 24 States and two Territories, and an array of racial and ethnic diversity. *Amici*

[1] A list of the individual members of Congress is included in the Appendix. Counsel for the Congressional *Amici* were the sole authors of this brief. No person or entity other than the *Amici* made a financial contribution to this brief. Pursuant to Supreme Court Rule 37.2(3)(a), all parties have consented to the filing of this brief. These consents were filed with this Court in December 2002.

have devoted their professional lives to public service and to assuring that all citizens have an equal opportunity to realize their individual and collective potential.

Amici have a vital interest here because of their constitutional role in enacting legislation to enhance and support opportunity for all students in primary, secondary, and post-secondary education. "Because a well-educated populace is critical to the Nation's political and economic well-being and national security, the Federal Government has a substantial interest in ensuring that States provide a high-quality education by ensuring that all children have access to the fundamentals of educational opportunity . . . to enable the children to succeed academically and in life." Student Bill of Rights, H.R. 236, 108th Cong. § 3(a)(16) (2003); *see also* Student Bill of Rights, S. 2912, H.R. 5346, 107th Cong. (2002). The leadership role of the Federal Government in education "has been a particularly important one during times of national crisis. Whether as a response to the Civil War, the Great Depression, a world war, or economic conditions, or through efforts such as Lyndon Johnson's 'War on Poverty,' education has always been a key part of the solution."[2]

Accordingly, ensuring that all Americans are educated equally to high standards is a long-standing and necessary focus of Congress. Stark disparities in the opportunity to realize this goal, however, remain a reality for growing numbers of minority children. *Id.* Indeed, President Bush's signature K-12 education bill, "No Child Left Behind," has a stated purpose of "closing the achievement gap between high- and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers." 20 U.S.C. § 6301(3).

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[2] Richard W. Riley, *The Role of the Federal Government in Education —Supporting a National Desire for Support for State and Local Education*, 17 St. Louis U. Pub. L. Rev. 29, 40 (1997).

Amici have a significant and historic duty to eliminate the racial discrimination that impedes educational equity and equality at all levels. In their focus on primary and secondary public education, *Amici* put before the Court the argument that there is a necessary link between K-12 education and the ability of higher education leaders to meet their core missions, including that of diversity.

For these historical and institutional reasons, *Amici* urge this Court not to overturn the seminal holding in *Regents Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) that diversity is a compelling interest, and that educators may establish narrowly tailored programs to achieve that goal. Therefore, the holdings of the Court of Appeals for the Sixth Circuit should be affirmed.

SUMMARY OF ARGUMENT

Fundamentally, education is the foundation of social and economic advancement in America. American parents rightly hope that no matter their own station in life, their children can realize their dreams, so long as they start out in life with a quality education. However, Congress and the courts have long known that minority children in school have faced inappropriate and unconstitutional barriers to achieving that goal.

Certainly, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), and the social movements that followed have produced great strides in eliminating State-sponsored or -supported segregation in schools. But we have much work yet to do. The same discrimination and disparate opportunity the Supreme Court found unconstitutional fifty years ago continues to deprive many minority children today of the valuable educational opportunities available to their white counterparts.

The question before this Court is whether the University of Michigan's use of racial preferences in undergraduate admissions violates the Equal Protection Clause of the

Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), or 42 U.S.C. § 1981. *Amici* urge this Court to answer that question in the negative.

Whether diversity in education remains a permissible and compelling government interest must be addressed in the context of the entire educational continuum. Because K-12 public education in many instances fails currently to provide quality educational opportunity to minority school children in increasing numbers, the achievement of diversity in higher education requires that admissions programs continue to take race and ethnicity into account. It is entirely right, constitutional, and lawful that they do so. The racial and ethnic disparities that presently exist in K-12 public education and the compelling interest that we all have in diversity as a means of promoting both quality education and democracy make such programs what this Court has held a "legitimate . . . use[ ] of race in governmental decision-making." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228 (1995).

ARGUMENT

Under the laws of the United States, educators may consider race and ethnicity along with other factors when making admissions decisions. Courts must evaluate such programs to ensure they are narrowly tailored to serve a compelling State interest. *Id.* at 227. This Court has held, however, that strict scrutiny may be "strict in theory, but [is not] fatal in fact." *Id.* at 237. "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Id.* Nowhere is the government's response to persistent racial inequalities more important and more necessary than in the area of education.

I. THE COURT MUST CONSIDER THE NEXUS BETWEEN K-12 EDUCATIONAL OPPORTUNITY AND DIVERSITY IN HIGHER EDUCATION.

A. Minority Children Face Persistent, Pernicious Inequities in Primary and Secondary Public Education.

Amici begin from a fundamental proposition of both law and policy: a quality education available to all students on the same terms is essential to the survival and prosperity of our country. "It is the very foundation of good citizenship . . . . [I]t is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown, supra*, 347 U.S. at 493. In *Brown*, this Court concluded that, by its very nature, a "separate" education for minority students can never be "equal" to what the majority receives. *Id.* at 494.

The discrimination that precipitated this landmark holding in 1954 continues to plague students at the K-12 level and has resulted in an ever-widening gap in educational opportunity and achievement, especially for low-income, urban, minority students. According to the World Economic Forum's Global Competitiveness Report 2001-2002, the United States ranks last among the developed countries in the difference in the quality of schools available to rich and poor students,[3] and studies prove that the children suffering in poor schools are much more likely to be minorities.[4]

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[3] World Economic Forum, *The Global Competitiveness Report 2001-2002* at 394 (2002).

[4] National Research Council, *Making Money Matter: Financing America's Schools* 19 (1999); U.S. General Accounting Office, *Title I Program: Stronger Accountability Needed for Performance of Disadvantaged Students* 18 (2000) (reporting that schools with poverty rates *of*

The right to receive a public education is fundamental.[5] Millions of students in grades K-12 nationwide are currently being denied this right, however, in large measure because of inequitable systems of financing schools at the State and local levels.[6]

Public school systems nationwide are financed through a hodgepodge of property-related tax schemes whose lack of parity inexorably engenders inequality in educational opportunities.[7] The race of the schoolchildren in a district

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50 percent or greater are more likely to be elementary schools located in urban areas, and to have a higher percentage of minority students).

[5] *See Brown*, *supra*, 347 U.S. at 493 ("Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."). *See* Representative Chaka Fattah, *Revisiting the Federal Role*, Education Week, Apr. 22, 1998 ("Equal access to widespread systems of public education are the very cornerstone of our democracy.").

[6] *See also,* Rochelle L. Stanfield, *Making Money Matter*, National Journal, May 23, 1998, at 1176 ("The highly charged school desegregation lawsuits over the past 44 years have involved many racial and philosophical issues, but ultimately have come down to money: whether minority children in low-income neighborhoods would have access to the same educational opportunities as white youngsters in middle-class communities."); *The Way America Pays for Public Schools,* Daily Education News, June 19, 1998, at 9 ("The disparities in many states are so great that some communities have twice as much money or more to spend per pupil as nearby towns.").

[7] *See* Jill Zuckman, *The Next Education Crisis: Equalizing School Funds*, Congressional Quarterly, Mar. 27, 1993, at 753 ("The financing of public education varies from town to town, each with its own local

plays a significant role in the educational resources made available to it: children of color living in impoverished areas in America bear the principal brunt of the widespread inequities in school financing systems.

That inequalities exist among financing schemes is an axiom accepted across party lines by liberals and conservatives alike. *See, e.g.*, George F. Will, *Straight Talk From Arizona*, Newsweek, Apr. 17, 2000, at 76. Studies confirm that the critical variable is race, not economic advantage. School districts that are heavily populated with impoverished minority children receive fewer State resources for educational uses than those districts where white children live in poverty.[8] For example, a 2000 report by the Council of the Great City Schools found that the City of New York

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customs and methods for raising money. The one common denominator is the property tax: the nicer the neighborhood, the more money that is likely to be raised and spent on schools. The poorer neighborhoods may even tax themselves at a higher rate, but because their property values are so much lower, the money they raise never equals the amount raised in wealthier towns. Furthermore, some school districts include a lucrative source of funds: commercial property, such as shopping centers and factories. In Ohio, for example, some school districts spend nine times as much money per student as others. 'The Ohio legislature has no responsibility to any child in that state to explain why it gives $22,000 to one and $2,500 to another,' said Kern Alexander, an education professor who specializes in school finance at Virginia Polytechnic Institute in Blackburg.'").

[8] *See, e.g.*, Council of the Great City Schools, *Adequate State Financing of Urban Schools: An Analysis of State Funding of the New York City Public Schools* 43 (2000)("In other words, [New York's] formula for distributing school aid over-adjusts for poverty in school districts with few students of color and under-adjusts in school districts with many. This means that poverty among white children in the State is being more adequately compensated through the school aid formula than poverty among children of color. Conversely, the lack of resources among students of color in New York State is being under-compensated in the school aid formula.").

distributes more educational aid funds in poor school districts where white students predominate than in districts heavily populated by minority children.[9] Educational inequality is most significant in inner-city communities that have been the subject of unsuccessful court-ordered desegregation in the past. The resulting inadequate education provided to children in such areas is further exacerbated by white flight from those neighborhoods.[10]

The legal framework for analyzing claims of disparity in educational funding legislation, of course, was established by this Court's ruling in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). There, the Court

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[9] *Id.* at 49 ("New York State's distribution of education aid under-compensates for the poverty of minority children and undermines student achievement.") (emphasis in original). Widespread perception of inequality in this area has spurred civic action leading to scores of litigation.

> [A] growing number of civic and parent coalitions rightfully are asking the courts to intervene to force states to distribute the money they now get more fairly among students. They want the courts to determine the legality of a skewed formula that works like this in many school districts: the poorer and browner the children, the poorer the condition of their schools, availability of certified teachers and resources. They say these inequities lead to the deficient academic performances that are the hallmark of such schools.

Saundra Smokes, *Fix Disparities Among Our Schools*, USA Today, Apr. 28, 2000, at 17A.

[10] "Throughout the 1960s and '70s, some communities resisted court-ordered desegregation, while others attempted to comply with programs such as busing and magnet schools. But simultaneously, whites fled cities in droves, along with businesses, jobs and tax revenues that fund public schools. The cities they left behind became increasingly poor, increasingly minority—and so did the schools." *Unequal Education: Better Teacher Training and Equitable Funding Could Improve Public Schools for All Children*, The Philadelphia Inquirer, Jan. 18, 1999, at A12.

held that educational finance reform must come from the legislative branch, not the judiciary. *San Antonio*, 411 U.S. at 58-59.

Since *Rodriguez*, however, the highest courts of at least 29 States have nonetheless ruled on the inequities of school finance legislation.[11] The Supreme Court of New Jersey has struck down five separate legislative schemes.[12] School finance measures have been attacked as unconstitutional in the overwhelming majority of the States over the past 30 years,[13] with State financing systems being struck down by numerous State supreme courts,[14] and in at least one case, the highest State court declared the entire elementary and secondary school system of the State—not simply its financing scheme—unconstitutional.[15]

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[11] Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. Chi. L. Rev. 131, 194 (1995).

[12] *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990). *See also* Sherry, *supra*, at 194; Jerry Gray, *Ruling Puts New Jersey in Eye of School Financing Issue*, N.Y. Times, Sept. 2, 1993, at B6.

[13] "Since the 1970s, lawsuits attacking inequitable school finance systems have been filed in 43 states; so far, 16 state courts (but not Pennsylvania's) have ruled unconstitutional their state's system of funding public schools. But the glacial pace of change—such as in New Jersey, which took 28 years to implement comprehensive remedies—shows benign neglect has a longer life than proactive solutions." *Unequal Education, supra* at A12.

[14] Karen Swenson, *School Finance Reform Litigation: Why Are Some State Supreme Courts Activist And Others Restrained?* 63 Alb. L. Rev. 1147, 1181 (2000)(citing cases in which courts struck down school funding schemes in Arizona, Arkansas, California, Connecticut, Kentucky, Massachusetts, Montana, New Jersey, New Hampshire, Ohio, Tennessee, Texas, Vermont, Washington, West Virginia, and Wyoming).

[15] In perhaps the most dramatic school reform and finance case, *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989), the Kentucky Supreme Court found the Commonwealth's entire elementary and secondary school system unconstitutional. *Id.* at 215 ("Lest there be any

The findings by the courts in education finance litigation highlight the real costs of unequal funding.[16] For example, the New Jersey Supreme Court's decision in *Abbott v. Burke*[17] revealed that in elementary school in Paterson, New Jersey, lunch was served to children in the boiler room area of the school basement. A space formerly used as a bathroom was used for remedial classes. A coal bin was converted to a classroom in another school, as were closets and storage rooms. In East Orange, New Jersey, one elementary school lacked a cafeteria; the children used the first floor hallway to eat lunch in shifts. In another school, built in Jersey City in 1900, the library was a converted cloakroom. Accordingly, the *Abbott* court held the State was not providing a constitutionally adequate education to all of its children.[18]

Minority students will remain at a disadvantage so long as State legislatures support financing measures for education that fail to provide equal opportunities for all. "[I]t is grossly unfair to expect all students to reach the same finish line

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doubt, the result of our decision is that Kentucky's entire system of common schools is unconstitutional."). *Id.*

[16] In *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977), the Connecticut Supreme Court found a "direct relationship between per pupil school expenditures and the breadth and quality of educational programs." The Wyoming Supreme Court, in *Washakie County Sch. Dist. Number One v. Herschler*, 606 P.2d 310, 334 (Wyo. 1980), expressly rejected all decisions disputing the relationship between per pupil school expenditures and quality of education. Numerous State courts have analyzed the correlation between educational opportunity and funding, with at least thirteen State supreme courts recognizing the correlation, while four did not. All but two of the thirteen States ruled in favor of plaintiffs attacking school funding schemes. John Dayton, *Correlating Expenditures and Educational Opportunity in School Funding Litigation: The Judicial Perspectives*, 19 J. Educ. Fin. 167, 182 (1993).

[17] *Abbott, supra*, 575 A.2d 359.

[18] *Id.*

when some are given far more help than others to get there."[19] Worse, even in the cases where State school finance systems have been held unconstitutional, remedial efforts can take years to implement—in some cases nearly 30 years[20]—and generations of students of color fail to advance in life because their beginnings were stunted by a lack of opportunity in education.

Certainly, *Amici* do not ask this Court to cause a more equitable means of funding education at the local school level. But it is clear, as demonstrated below, that a child who is schooled in the type of settings outlined above, with their attendant dearth of resources, as recognized and struck down by a growing number of State courts, stands little chance of competing for a space in an academic institution such as the University of Michigan. Overwhelmingly, the students who are most significantly disadvantaged are of racial and ethnic minority backgrounds. It is certainly, therefore, within the proper role of higher education administrators to do what they can to right these imbalances by taking students' race into account in the admissions process. This Court should not impede those efforts.

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[19] Zuckman, *supra*, at 749-50; *see also Rose, supra*, 790 S.W.2d at 197 ("The achievement test scores in the poorer districts are lower than those in the richer districts and expert opinion clearly established that there is a correlation between those scores and the wealth of the district. Student-teacher ratios are higher in the poorer districts. Moreover, although Kentucky's per capita income is low, it makes an even lower per capita effort to support the common schools. Students in property poor districts receive inadequate and inferior educational opportunities as compared to those offered to those students in the more affluent districts.").

[20] *Id.*

B. Congress Has Long Recognized Educational Disparities, Especially in K-12 Education, That Are Correlated to Race.

Since 1965, Congress has recognized the disparities that fall disproportionately upon minority and disadvantaged students and has sought to assist public schools with additional funding. Title I of the nation's education law specifically targets funding to States for low-income and at-risk children. 20 U.S.C. § 6301 *et seq.* This non-discretionary program seeks to "clos[e] the achievement gap between high- and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers." *Id.* at § 6301(3). In FY2002, Title I grants to states totaled $10.35 billion, [21] and this year, Congress authorized $11.75 billion.[22]

As implemented, Title I itself demonstrates that inequalities in K-12 education disproportionately impact minority children. Even though this program targets disadvantaged students across all races and ethnicities, statistics show that Title I funds disproportionately serve minority students.[23] For example, in school year 1999-2000, 27 percent of Title I students were black, non-Hispanic; 31 percent were Hispanic, and 7 percent were from other racial

[21] Memorandum from the Congressional Research Service to the Honorable Chaka Fattah, *Consideration of Minority Status in the Distribution of Federal Funding for Elementary and Secondary Education* 2 (2003) (hereinafter "CRS Memorandum") (on file with author).

[22] H.J.Res. 2, 108th Cong. (2003) (presented to the President).

[23] CRS Memorandum, *supra*, at 2.

and ethnic minorities.[24] Only 35 percent of Title I students nationwide were white, non-minority.[25]

Congress continues its efforts to address the disparities and to help ensure that all of America's children receive a quality education. However, *Amici* and their colleagues recognize the enormity of this challenge and well know that the playing field in K-12 education is far from level:

> Historically, many low- or moderate-income students or students who are otherwise disadvantaged or are disabled have needed extra assistance and support to acquire the basics to pay for college. Often the communities that serve these children have the least resources. As a General Accounting Office (GAO) study demonstrates, the U.S. Department of Education's funds are targeted to students of greatest need. While states try to provide the foundation funding for public schools in equitable fashion, generally at any given time about one-third to one-half of schools are in state courts because their state funding system is inequitable.[26]

[24] U.S. Department of Education, Office of Elementary and Secondary Education, Planning and Evaluation Services, *State ESEA Title I Participation Information for 1999-2000: Final Summary Report* 9 (2002).

[25] *Id.*

[26] Riley, *The Role of the Federal Government in Education*, *supra*, at 37 (omitting footnote).

II. RACIAL INEQUITIES IN K-12 REQUIRE COLLEGES AND UNIVERSITIES TO TAKE RACE AND ETHNICITY INTO ACCOUNT IN THE ADMISSIONS PROCESS.

A. Disparate Educational Opportunities in K-12 Directly Impact Higher Education Admissions.

Many colleges and universities take race and ethnicity into account to ensure that their student bodies reflect the diversity needed to provide their students with a quality education that prepares them for complete participation in our democracy. Currently, and particularly in consideration of the challenges that continue to plague our college preparatory institutions, it is not possible to achieve this goal without taking race and ethnicity into account.

In its September 2001 study, *Paving the Way to Post-secondary Education: K-12 Intervention Programs for Underrepresented Youth,* the U.S. Department of Education's National Center for Education Statistics, the government's primary federal entity for collecting and analyzing data related to education in the United States and other nations, in collaboration with the National Postsecondary Education Cooperative, reported that "[b]eyond socioeconomic status and risk characteristics, the kind of education to which students are exposed in the K-12 years may be more effective at predicting their postsecondary choices than any other variable, including socioeconomic status."[27] "No single factor, including test scores and GPA, better predicts college completion for underrepresented students than the rigor of courses students have taken in high school."[28] And this variable still correlates to race.

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[27] U.S. Department of Education, National Center for Education Statistics, *Paving the Way to Postsecondary Education: K-12 Intervention Programs for Underrepresented Youth* 7 (2001).

[28] *Id.*

In his July 19, 2002 speech to the College Board's First Annual AP National Conference, former U.S. Education Secretary Richard W. Riley noted this stark reality:

> Several years ago a study was published by the Educational Testing Service, entitled *Crossing the Great Divide*. This report notes that our college campuses will be missing 250,000 African-Americans and 550,000 Hispanic undergraduates by the year 2015 because we did not prepare them to do college-level work. This is why I urge all of you to make every possible effort to encourage more minority students to take AP courses.
>
> Let's remember that these young people often have to overcome many disincentives to get on the path to college—everything from low expectations as to their achievement ability, lack of institutional support and negative peer pressure, just to name a few.[29]

The Educational Testing Service report Mr. Riley cited in his speech continues, "[i]f the economy continues to demand ever-higher skills for good jobs, minorities will have to run faster just to stay in place."[30]

B. The Percentage Programs Adopted in Texas, California, and Florida Do Nothing to Help Close the Gaps.

Petitioners may argue that this is all well and good but that the percentage-based admissions plans in Texas, California, and Florida (where race-conscious admissions arrangements have been outlawed) achieve the goals of leveling the playing field and fostering diversity without taking race into account. They are wrong. Indeed, perhaps the most shocking reality of

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[29] Richard W. Riley, Address at the College Board's First Annual AP National Conference 11 (July 19, 2002) (unpublished, on file with author).

[30] Educational Testing Service, *Crossing the Great Divide: Can We Achieve Equity When Generation Y Goes to College?* 32 (2000).

the percentage plans Petitioners defend so emphatically is that the students in Texas, California, and Florida are being educated in racially segregated schools reminiscent of a painful history this country and the courts have long fought to overcome. Also, plans select high school students solely on the basis of their comparative ranking among their classmates, requiring an educator to discount other desirable factors such as leadership qualities, extracurricular activities, teacher recommendations, and the many other individual characteristics that universities can and should measure—the very type of factors courts have found should be considered, along with race.[31]

On February 10, 2003, The Harvard Civil Rights Project released two of the most comprehensive reports to date on both the claims regarding, and the effectiveness of, these percent programs. Notably, the study *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences*, establishes that

> [a]lthough these plans have been presented as effective alternatives to race-conscious affirmative action, our research shows that it is incorrect to attribute any significant increase in campus diversity to a percent plan alone. A variety of race-conscious outreach, recruitment, financial aid, and support programs appears to be central to the ability of some campuses to even partially recover from the loss of minority students that follows the abolition of affirmative action. In almost every case, however, even with these additional efforts in place, institutions have not been successful in maintaining

[31] This result, of course, creates the exact scenario *Amicus* Ward Connerly argues to support his opposition to affirmative action—that "no one student can be fairly said to be representative of their race, or even more demeaning their race's viewpoint in class." Brief of *Amicus Curiae* Ward Connerly at 23, *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (No. 02-241).

> racially/ethnically diverse campuses through percent plans. And, relative to the current college-age population in each of these states, none of the campuses reflects the students they are intended to serve.[32]

Specifically, some of the study's major findings conclude that: 1) there is simply not enough evidence to support an argument that percent plans, even with other race-conscious methods, are effective alternatives to using race/ethnicity as a factor in admissions processes; 2) because such plans set only basic requirements as to who should automatically be admitted to a campus or to a system, their effect varies dramatically at different institutions; 3) these plans do not address admissions challenges to private colleges or to graduate or professional programs, nor do they apply to out-of-state students. Particularly key to *Amici's* argument before this Court, *each of the states adopting such programs has deeply unequal educational K-12 outcomes by race and ethnicity and serious increases in racial segregation.*[33]

There are other dramatic and significant problems with Petitioners' argument that such plans affect an appropriate and race-neutral means to achieve diversity. For example, the University of Texas at Austin ("UT") actually supplements the 10 percent plan with outreach and scholarship programs targeted at a specific set of traditionally underrepresented high schools in communities where large numbers of blacks and Hispanics live. This makes UT's purported "race-

[32] Press Release, The Harvard Civil Rights Project, Harvard University, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* (February 7, 2003) *available at* http://www.Civil rightsproject.harvard.edu/research/affirmativeaction/tristate.php#full report.

[33] *Id.; see also* Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* (2003).

neutral" program in fact "race-attentive." [34] Worse, at Texas A&M, the 10 percent plan has not worked at all. Indeed, that plan has failed to lead to diversity at the levels achieved through the use of affirmative action.[35]

This most recent comprehensive report concludes that

> [p]ercent plans alone will not serve as effective alternatives to affirmative action. In the best of circumstances, they have only been able to promote racial and ethnic diversity on campuses when they are coupled with recruitment, outreach, financial aid, and support programs targeted at underrepresented communities with large minority student populations—all elements of solid race-conscious affirmative action plans. Race-conscious affirmative action remains a stronger and more effective strategy for achieving racially and ethnically diverse campuses, particularly if it was bolstered by some of the resources and policies developed in the wake of its elimination.[36]

III. DIVERSITY IS AN EDUCATIONAL AND DEMOCRATIC IMPERATIVE WHICH REQUIRES THAT RACE BE TAKEN INTO ACCOUNT, AS ONE FACTOR AMONG OTHERS, IN THE ADMISSIONS PROCESS.

A. Diversity Is A Continuing and Compelling Educational Need, A Prerequisite to Advancement, and *Bakke* Is Still Good Law.

This Court has long recognized that diversity is a compelling interest in education.[37] As Justice Powell noted in

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[34] Horn & Flores, *supra, at 58-59.*

[35] *Id. at 52-54.*

[36] Press Release, The Harvard Civil Rights Project, *supra.*

[37] *Amici* agree with the numerous briefs that set forth the explanation as to why Justice Powell's conclusion that diversity is a compelling interest remains the law of the land and do not expand on those arguments in this brief.

Bakke, supra, 438 U.S. at 312-15, a diverse student body is "a constitutionally permissible goal for an institution of higher education" because "[t]he atmosphere of 'speculation, experiment, and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body." *Id.* at 311-12 (footnote omitted). Diversity is essential to the quality of higher education because it provides students with the opportunity to interact with peers from different racial and ethnic backgrounds—both formally and informally. This exposure to multiple perspectives enhances the ability of students to think more critically and to understand more complex issues.[38] Diversity enriches the educational experience, promotes personal growth, strengthens the community and workplace, and enhances economic competitiveness. Justice Stevens underscored the Court's recognition of diversity as a compelling interest and described the appropriateness of that holding:

> In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty. For one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous "melting pot" do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher

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[38] *See generally,* Press Release, The Harvard Civil Rights Project, *supra.*

> that color, like beauty, is only "skin deep"; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process.

Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 315 (1986) (Stevens, J., dissenting) (footnote omitted).

B. Diversity Is Essential to the Maintenance of American Democracy.

A diverse public education also assists in preparing "individuals for participation as citizens, and in the preservation of the values on which our society rests." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). Ensuring the continuation of our democracy is a compelling interest and diversity is essential to achieving that goal. To prosper and survive, America must draw on the variety of strengths of all of its citizens. Diversity in education helps to ensure America's survival, allowing students to take advantage of this diversity by learning to work together.

As America fights the war on terrorism, the importance of diversity is even more compelling and more closely linked to the continued operation of our democracy. The investigations into the September 11th attacks highlighted whether our military and intelligence men and women represented a community diverse enough to carry out key operational and other missions. That challenge persists. Indeed, the Federal Bureau of Investigation's (FBI) post September 11 reorganization calls for the recruitment of "those with certain critical skills deemed essential" for the new FBI, "including Foreign language—particularly Arabic, Farsi, Pashtu, Urdu, Chinese, Japanese, Korean, Russian, Spanish, and Vietnamese"[39].

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[39] Halls of Justice: *A Weekly Look Inside the Justice Department*, ABC News.com *available at* http://abcnews.go.com/section/vs/HallsofJustice/hallofjustice109.html.

More recently, Secretary of State Colin L. Powell has recognized the need for diversity in education to ensure a strong military and Foreign Service Corps. When speaking before the U.S. Senate Committee on Foreign Relations, he and Committee Chairman Richard G. Lugar, also a former Indianapolis Public Schools Board member, stressed the importance of diversity for our country's national security in the following exchange.

> Secretary Powell: I'd like to just brag about one point, if I may. On the last Foreign Service exam we gave, among those who passed the exam, was 38 percent minority. So we are working out, working very hard to make our Foreign Service look like our country. The beautiful diversity, which is the strength of this country should be reflected in the Foreign Service . . . .
>
> Senator Lugar: Well, thank you Mr. Secretary, I just have to pause to underline this remarkable statistic you shared with us. In this rigorous, merit-based test for the Foreign Service, 38 percent of those who passed were minorities. It's an important point, and I appreciate your making it.

State Department Reauthorization: Hearing Before the Senate Committee on Foreign Relations, 108th Cong. (2003) (transcript publication forthcoming).

This very Court benefits from the uniquely relevant judicial and social perspectives of its members. Indeed, Justice O'Connor has eloquently written about the important influence of Justice Thurgood Marshall's experiences of sustained prejudice on the Court, noting that Mr. Marshall's conversations about these experiences "perhaps change[d] the way I see the world."[40]

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[40] Justice Sandra Day O'Connor, *A Tribute to Justice Thurgood Marshall: Thurgood Marshall: The Influence of a Raconteur*, 44 Stan. L. Rev. 1217, 1218 (1992).

This view is not new. Our nation's leaders have long sought and continue to govern a nation that "promotes [the] fundamental unity [of] Americans and acknowledges our diversity as our greatest strength." A Joint Resolution Supporting the Day of Honor 2000 to Honor and Recognize the Service of Minority Veterans in the United States Armed Forces during World War II, Pub. L. No. 106-205. And as recently as just a week ago, the United States Department of Justice announced plans to create a new position dedicated solely to recruiting minority lawyers.[41] Additional plans for increasing the racial, ethnic, economic, and geographic mix among Justice Department lawyers reportedly include diversity training for managers and a formal mentoring program for new hires.

Clearly, diversity remains a compelling governmental interest—indeed an imperative—in education, in the military, and on the bench. And, race still matters.[42]

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[41] Press Release, The U.S. Department of Justice, *Justice Department Initiates New Diversity Program* (February 5, 2003) *available at* http://www.us.doj.gov/opa/pr/2003/February/03_ag_070.htm ("Our pursuit of justice is stronger and the fulfillment of our national mission more efficient, when we bring to bear the experience, judgment and energy of colleages from a wide spectrum of racial, ethnic and geographical backgrounds.").

[42] As Secretary of State Colin L. Powell told the delegates at the National Republican Convention:

> The issue of race still casts a shadow over our society, despite the impressive progress we have made over the last 40 years to overcome the legacy of our troubled past. So, with all the success we have enjoyed and with all the wealth we have created, we have much more work to do and a long way to go to bring about the promise of America to every American.

Colin L. Powell, Address to the Republican National Convention (July 31, 2001).

C. Accordingly, The Promotion of Diversity In Education Remains A Compelling Government Interest.

That diversity remains a compelling governmental interest is consistent with the Court's precedent since *Bakke*, 438 U.S. at 312-15. Not only is diversity important as a matter of policy, but achieving and maintaining it, honoring and respecting it, are among the proper roles of our government.

In *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547 (1990), the majority of this Court relied upon the reasoning of Mr. Powell in *Bakke*, to the effect that a "'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which race-conscious university admissions programs may be predicated." *Metro Broadcasting*, 497 U.S. at 568 (quoting *Bakke*, 438 U.S. at 311-13 (Powell, J.)).[43] In that case, the Court upheld a Federal Communications Commission program that expressly took race and ethnicity into account in awarding ownership of broadcast radio and television stations in order to assure a fair cross-section (*i.e.*, diversity) of content. "A broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogeneous group." *Id.* at 579.

A similar sentiment influenced the Court's decision in *Holland v. Illinois*, 493 U.S. 474, 480-81 (1990), which prohibited the exclusion of individuals of a certain race or

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[43] *Amici* acknowledge that this Court in *Adarand*, 515 U.S. at 256 (Stevens, J., dissenting), overruled the use of "intermediate scrutiny" as articulated in *Metro Broadcasting*. However, the majority's reasoning as to the importance of diversity remains good law, untouched by *Adarand*. *See Adarand*, 515 U.S. at 258 (Stevens, J., dissenting) ("The proposition that fostering diversity may provide a sufficient interest to justify [a racial or ethnic classification] is not inconsistent with the Court's holding today—indeed, the question is not remotely presented in this case.").

gender from a jury venire because "[w]ithout that requirement, the State could draw up jury lists in such manner as to produce a pool of prospective jurors disproportionately ill disposed towards one or all classes of defendants, and thus more likely to yield petit juries with similar disposition."

These cases show the Court's understanding of and consistent, unwavering belief in the important principle that obtaining a "fair cross-section" of society is critical in education, the media, and the administration of justice. To ensure such a cross-section requires a means of providing that individuals of different races and ethnicities are fully represented in every aspect of our democratic lives.

D. Reaffirming Diversity As A Compelling State Interest Is Consistent with Limiting Principles.

It is important to note that *Amici* do not seek to correct a societal wrong through the courts. As legislators, they well know that the responsibility for such action lies within their own purview. This matter is *not* about remedying societal racism. Rather, it is about recognizing that in education both Congress and the courts have long realized that disparities in primary and secondary education impair the ability of colleges and universities to enroll a diverse student body. Education is a continuing process that begins for most children at age five and continues for some—those who are provided the tools to get there—through college and graduate school.

Nor does reaffirming diversity as a compelling interest in educating and preparing our citizens to participate fully and productively in our democracy mean that the Court is embarking on an unending path. Instead, it recognizes the essence of America today—the need for our diverse population to work together to preserve the values of our society.

Finally, and perhaps most importantly, this is not a question of requiring an individual white student to carry

society's burden by being eliminated from a specific college or university class. When universities and colleges take race into account, they act on behalf of the present and future benefit of *all* students—white as well as black, Hispanic, Asian, Native American, and others. Only with a fair cross section of students can colleges and universities provide an educational setting that promotes diversity, which leads to the "speculation, experimentation, and creation" for all, that all educators strive to engender.

CONCLUSION

A number of *Amici* have noted in their submissions that the Court's grant of *certiorari* in this case puts the nation at a crossroads with regard to the government's continued consideration of race in public life. Clearly, both the tenor and the number of *Amicus* briefs in this matter demonstrate the importance of this case to the future viability of our nation's democracy.

Those offering this brief for the Court's consideration believe, however, that much of the traveling has already been done. In reauthorizing the nation's K-12 education law at the end of 2001, Congress has already recognized that, even now, "achievement gaps between minority and nonminority students" persist, *see* 20 U.S.C. § 6301(3). It has noted that it is "in the best interest of the United States" to provide federal support for "local educational agencies that are voluntarily seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stage of such students' education." 20 U.S.C. § 7231.

However much we may wish it were otherwise, it is simply not a reflection of reality to say that race no longer matters in America, or that education of comparable quality is freely available to all students, both majority and minority, in K-12 or in college. Thus, it is *Amici*'s hope that this Court will affirm these facts as truths, acknowledge the nexus between

quality K-12 education educational opportunity and achievement and higher education success, and recognize the correlation and importance of race in determining these outcomes.

Finally, it is especially critical in this case to understand "the impact of legal rules on human lives[,]" "that the law is not an abstract concept removed from the society it serves, and that judges, as safeguarders of the Constitution, must constantly strive to narrow the gap between the ideal of equal justice and the reality of social inequality."[44]

The decision below should therefore be affirmed.

Respectfully submitted,

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[44] O'Connor, *supra*, at 1218.

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In The
Supreme Court of the United States

JENNIFER GRATZ AND PATRICK HAMACHER,
Petitioners,

v.

LEE BOLLINGER, et al.,
Respondents.

On Writ Of Certiorari To The
United States Court of Appeals For The Sixth Circuit

BRIEF OF THE AUTHORS OF THE TEXAS TEN PERCENT PLAN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000).....10

Grutter v. Bollinger, 288 F. 3d 732 (6th Cir. 2002).....3,9

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Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)..... 9-11

Rodriquez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).....10

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986). 10

Books, Articles & Papers

Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* 38-39 (2003), *available at* http://www.civilrightsproject.harvard.edu .....*passim*

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INTEREST OF *AMICUS CURIAE*

The individuals responsible for drafting and devising the Texas Top Ten Percent Plan (H.B. 588) in the 1997 Texas Legislature submit this brief[1] as *Amici Curiae* in support of Respondents University of Michigan President Lee Bollinger, et al., urging the Court to affirm the Sixth Circuit's judgment that promoting racial diversity in public college admissions is a compelling governmental interest, one that permits the use of race as one factor in order to promote diversity. Many observers, including President George Bush, have urged the use of percentage plans as substitutes for racial consideration in admissions to public institutions of higher education. As the "authors" of the first such state plan, we do not agree that it is possible to use such plans as substitutes for racial considerations in admissions. These *amicus curiae* are:

1. Hon. Irma Rangel, Texas State Representative, legislative author of HB 588, The Texas Ten Percent Plan, and Vice Chair and former Chair, Higher Education Committee, Texas House of Representatives,
2. Dr. David Montejano, Associate Professor, Department of Ethnic Studies, The University of California at Berkeley, formerly Associate Professor of History, University of Texas at Austin,
3. Dr. Michael A. Olivas, Associate Dean and William B. Bates Distinguished Chair, University of Houston Law Center,

---

[1] All parties have filed with the Court their written consent to the filing of all *amicus curiae* briefs in this case. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

4. Dr. Jorge Chapa, Professor and Director, Latino Studies Program, Indiana University, Bloomington, Indiana, formerly Professor, LBJ School of Public Affairs, University of Texas at Austin,
5. Mr. Gerald Torres, H. O. Head Centennial Professor in Real Property Law, University of Texas School of Law,
6. Mr. Albert Kauffman, Senior Legal & Policy Advocate Associate, The Civil Rights Project, Harvard University, formerly Regional Counsel, Mexican American Legal Defense and Educational Fund, San Antonio, Texas.

SUMMARY OF ARGUMENT

The Sixth Circuit correctly held that furthering diversity in public college admissions is a compelling governmental interest and that considering race as a single factor among many is permissible in order to create such diversity. Percent plans such as the one developed for students in Texas do not provide a more efficacious means for ensuring racial diversity in higher education. In our experience, no percentage plan is a complete substitute for race sensitive admissions.

ARGUMENT

I. PERCENTAGE PLANS IN PUBLIC HIGHER EDUCATION ARE NOT EFFECTIVE ALTERNATIVES TO THE USE OF RACE AND NATIONAL ORIGIN AS FACTORS IN ADMISSIONS SYSTEMS.

A. Percentage Plans Are Not Substitutes for Race-Based Admissions.

In urging reversal of *Grutter*,[2] President Bush and Secretary of Education Rod Paige touted percentage plans as alternatives, arguing that racial admissions were unfair. Brief of the United States as *amicus curiae* at 14-15. They are wrong in urging that percentage plans are reasonable alternatives to race-based admissions. After nearly five years of operating under the Texas Percentage Plan, minority enrollments have not risen to pre-Hopwood levels, which were evidence of significant under-representation then. Of course, Texas minority populations continue to increase at high rates, both numerically and as a proportion of Texas population, high school graduates and college age population, increasing the gap between white and minority Texas university enrollments. That Texas universities have not climbed back to pre-*Hopwood* levels is evidence that the plans cannot substitute for race.

We believe that the Texas Ten Percent Plan, which we analyzed, wrote and supported, has had an effect only at the University of Texas at Austin. Based on our experience with Texas higher education as legislators, professors, students, scholars and advocates, we do not believe that the Ten Percent Plan will reverse the losses that the elimination of affirmative action occasioned or become the alternative that the President and others believe it has become.

B. Percentage Plans Require Certain Demographic Features Not Present in All States or in All Public University Systems.

In Texas, there are two first tier public systems of higher education (the University of Texas System (UT) and the Texas A&M University System (TAMU), as well as several other comprehensive public systems (such as

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[2] *Grutter v. Bollinger*, 288 F. 3d 732 (6th Cir. 2002)

the University of Houston with its five campuses and the multiple campuses of the Texas State College and University System) and single campus public institutions (such as Texas Tech University and Texas Southern University). In addition, there are dozens of multi-campus public community (two year) colleges and technical institutes, and four of the state's university systems have medical schools. The tier one UT and TAMU systems have highly competitive flagship campuses in Austin and College Station, respectively.

Most states do not have such extensive or decentralized governance structures. The Texas higher education system was carved out over the years from a combination of private and municipal colleges made into public state institutions, and even "public" programs contracted by the state from private institutions, such as the Baylor College of Medicine, which "rents" out medical school spots for resident Texans.

California's percent plan guarantees University of California (UC) admission for the state's top four percent students, but only for a place at one of the UC campuses, not necessarily at one of the most highly competitive campuses. Florida's plan is for all its campuses, but expanded to the top twenty percent, and does not guarantee admission to a particular campus and most pointedly not to flagship campuses that operate as gateways to other opportunities. In other words, these programs are not interchangeable, range widely in their reach, and cannot work in many states that have different racial patterns, college-going patterns, and urban/rural mixes. Urging all states to use such plans, even states without all the requisite ingredients, is chimerical and

not grounded in a realistic appraisal of each state's demography, higher education structure and history.[3]

C. The Texas Plan Has Not Increased Diversity in Texas Higher Education Back to Pre-*Hopwood* or Pre-Ten Percent Plan Levels, and the Gap Between the Pool of Qualified Students and Enrollment Has Increased.

By 2003, the fifth full year of the Texas Ten Percent Plan, it can only truly be said that the plan has, combined with many other changes in recruitment and scholarship processes, had modest success at the flagship campus of the University of Texas-Austin (UT-Austin). We attribute this modest success to policies that are racially neutral on their face, but have a strong and positive effect on African American and Latino students.

The other tier one flagship campus, TAMU-College Station, has been less successful in its implementation of the Texas Plan. For example, using the *Hopwood* case as a benchmark, TAMU-College Station's black undergraduate enrollments fell from 3.7% in 1992-96 to 2.4% in 1997-2000, and Hispanic undergraduate enrollment fell from 12.6% to 9.2% during the same period. As a result, the TAMU-College Station campus's white enrollments rose from 79.3% to 82.6%. At UT- Austin the African American enrollment went from 4.0 % to 3.3%, while Hispanics declined from 15.8% to 13.7%.[4] These significant minority enrollment decreases

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[3] Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions*, 68 U. COLO. L. REV. 1065 (1997)

[4] Marta Tienda, et al., *Closing the Gap?: Admissions and Enrollments at the Texas Public Flagships Before and After Affirmative Action* (2003) at 49, *available at*

occurred during a period when the state's population and the public K-12 education enrollments were increasingly minority, both numerically and proportionally.[5] For example, the Houston Independent School District, Texas's largest district with 200,000 students was less than 10% white in 2002. In the decade of the 1990's, the state's Hispanic college-aged population increased ten percent.[6]

The gap between the African American and Latino proportions of the enrollment at TAMU-College Station and UT Austin and the African American and Latino proportions of Texas high school graduates has increased since the *Hopwood* decision.[7]

D. The Texas Ten Percent Plan Has Been Modestly Efficacious Only When Institutions Expend Considerable Resources Focused on Underserved High Schools.

It is clear that even modestly successful implementation can only occur with substantial resources and institutional commitment, focused on those high

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http://www.texastop10.princeton.edu/publications/tienda012103.pdf.

[5] Between 1990 and 2000, the Hispanic proportion of Texas's 15-19 year old population increased from 33% to 39%, blacks decreased slightly from 14% to 13% and Whites decreased from 51% to 44%. Between 1996 and 2001, Hispanics increased from 29% to 32% of high school graduates, blacks increased form 12% to 13% and Whites decreased from 55% to 51%. Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences, available at* http://www.civilrightsproject.harvard.edu, at 26-28

[6] Tienda, *supra* at 6-7.

[7] See ftnt 5, *supra.*

schools that have traditionally been underserved by the flagship institutions.

The Longhorn Opportunity Scholarships (LOS), a comprehensive four-year scholarship aimed specifically at students in schools that have traditionally sent few applicants to UT Austin, has been a major factor in reducing the precipitous decline in minority enrollment after *Hopwood*. A Longhorn Opportunity Scholarship school is one that is poor and one that traditionally sends few, if any, applicants to UT-Austin. These high schools are predominantly, but not exclusively, Latino and African American.[8]

This year, the university awarded 235 "Longhorn Scholarships," which provide $4000 per year to students from 64 schools that had sent few, if any, students, to UT Austin, as compared to other Texas high schools of similar enrollment. The money is not the only thing that comes with the scholarship, however. The LOS students are guaranteed housing, access to small classes and academic assistance if they need it. They are welcomed to the campus.

Skyline High School in Dallas is a good example of how the Longhorn Opportunity Scholarship program opens UT-Austin to students from diverse backgrounds who previously would not have aspired to the flagship university. Skyline is predominantly African-American. In the entering class of 1998-99, Skyline sent nine students to UT-Austin. The Longhorn Opportunity Scholarships have led to an increased enrollment last fall to 21 students. Highlands High School, a predominantly Latino high school in San Antonio, is another example. Before the Longhorn Opportunity Scholarship program,

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[8] University of Texas press release, available at http://www.utexas.edu/admin/opa/news/03newsreleases/nr_200301/nr_toptenpercent030116.html

Highlands High School had sent one student to UT-Austin. In last year's entering class, 14 Highlands graduates enrolled at UT. This is a phenomenon that is being seen across the 64 Longhorn Opportunity Scholarship Schools.

Under the Texas Ten Percent Plan, students are admitted regardless of their SAT/ACT scores. This tends to neutralize the adverse impact these standardized test scores have upon African American and Latino students, even when the effects of family income are controlled for.[9]

As scholars, legislators, and attorneys who have actively fought for more inclusive admissions processes, we are dismayed by the *Hopwood* decision and other anti-affirmative action measures -- including efforts to use percentage plans as a rationale for discarding affirmative action. As Texas has shown, properly designed and implemented percentage plans, coupled with a narrowly tailored plan of affirmative action, have inherent value beyond increased racial and geographic diversity. Percent plans can be used *together with* affirmative action, giving colleges and universities the considerable benefits of both strategies. The Texas Ten Percent Plan will, we believe, help in the struggle to defend affirmative action.

E. Percentage Plans Cannot Work in Graduate or Post-baccalaureate Admissions, Such as Law, Medical, Dental, Business, or Masters or Doctoral Programs.

We were addressing undergraduate admissions when we drafted HB 588, not graduate or professional programs. Given all the problems we have identified with undergraduate admissions in a post-*Hopwood* world, we

[9] See ,e.g. The Journal of Blacks in Higher Education, *The Expanding Racial Scoring Gap Between Black and White SAT Test Takers*, January 23, 2003.

simply have no confidence that these plans can or should be extended to law schools or similar graduate programs.

II. IF WE WISH TO INCREASE THE DIVERSITY OF OUR MOST COMPETITIVE UNIVERSITIES, NO OTHER CRITERION CAN SUBSTITUTE FOR THE USE OF RACE.

Because our contribution is to improve understanding of the value and limitations of Percentage Plans, we only wish to state what has been an article of faith in our deliberations: *Bakke*[10] is the law of the land, and is good law.

We believe that the Supreme Court got it right in *Bakke*, and urge its affirmance here. The Sixth Circuit also got it right in *Grutter*.[11] In Part V-C of *Bakke*, in which Justices Brennan, Blackmun, Marshall, and White joined, thus constituting a five-Justice majority, Justice Powell wrote:

> In enjoining [UC-D] from ever considering the race of any applicant, . . the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins [UC-D] from any consideration of the race of any applicant must be reversed.

In Part V-A, which no other Justice joined, Justice Powell explained that the "substantial interest" was

[10] *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)
[11] *Grutter v. Bollinger*, 288 F. 3d 732 (6th Cir. 2002)

diversity; in Part IV-D, he wrote that admitting a "diverse student body. . . .clearly is a constitutionally permissible goal for an institution of higher education. . . . [I]t is not too much to say that the nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples."

Although the two-judge panel in Hopwood treated the *Bakke* holding (what they termed Justice Powell's "lonely opinion") as questionable precedent, this Court has neither overturned *Bakke* nor accepted until now for review any higher education affirmative action case since its 1978 decision in *Bakke*. Justice O'Connor, in her concurring opinion in *Wygant*,[12] noted that "although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest."

In the Fifth Circuit *Hopwood* opinion, Judges Smith and DeMoss simply omit mention of Part V-C, the authentic, five-member central opinion, and ignore its "substantial interest" holding. Further, by declaring *Bakke* dead, they ignore *Rodriguez de Quijas v. Shearson/American Express, Inc.*,[13] a recent Supreme Court holding that reserves to this Court "the prerogative of overruling its own decisions." Moreover, in *Adarand*,[14] Justice O'Connor held, "When race-based action is necessary to further a compelling interest, such action is within the Constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous

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[12] *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986)
[13] *Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989)
[14] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995)

cases." This hardly sounds like the death knell for well-crafted admissions programs, which we believe to be compelling.

We, the authors of the Texas Ten Percent Plan urge the affirmance of *Bakke* and *Gratz*.

CONCLUSION

For the foregoing reasons, the judgment of the district court upholding the constitutionality of the University of Michigan's undergraduate admissions policies should be affirmed.

Respectfully submitted,

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FOR ARGUMENT

FEB 18 2003

No. 02-516

IN THE

Supreme Court of the United States

JENNIFER GRATZ, ET AL.,
Petitioners,
v.
LEE BOLLINGER, ET AL.,
Respondents.

On Writ of Certiorari to the United States District Court for the Eastern District of Michigan

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CASES:

Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982) 6

Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000) 10, 16

Keyishian v. Board of Regents of Univ. of N.Y., 385 U.S. 589 (1967) 3, 6

Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) 3, 6

Sweezy v. New Hampshire, 354 U.S. 234 (1957) 3, 6

OTHER AUTHORITIES:

ACT, Inc., Ass'n for Institutional Research, the College Bd., Educ. Testing Serv., Nat'l Ass'n for College Admission Counseling, *Trends in College Admission 2000* (2002) 8

Am. Educ. Research Ass'n, Am. Psychological Ass'n, Nat'l Council on Measurement in Educ., *Standards of Psychological and Educational Testing* (1999) 8

Ass'n of American Univs., *On the Importance of Diversity in University Admissions* (Apr. 14, 1997) in *The New York Times*, Apr. 24, 1997 14

William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (1998) 4, 15

Brent Bridgeman, *et al.*, *Predictions of Freshman Grade-Point Average from the Revised and Recentered SAT I: Reasoning Test* (2000) 9

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES:

Nancy W. Burton & Leonard Ramist, *Predicting Success in College: SAT Studies of Classes Graduating Since 1980* (2001) 9

Wayne J. Camara and Amy Elizabeth Schmidt, *Group Differences in Standardized Testing and Social Stratification* (1999) 11, 12

Gerhard Casper, *Statement on Affirmative Action at Stanford Univ.* (Oct. 4, 1995) 4

The College Board, *2002 College-Bound Seniors* (2002) 11

The College Board, *Best Practices in Admissions Decisions* (2002) 5

The College Board, *College-Bound Seniors 1992 Profile* (1992) 11

The College Board, *College Board Program Handbook* (2002) 4, 9

The College Board, *Guidelines on the Uses of College Board Test Scores and Related Data* (2002) 9, 10

The College Board, *Outreach Program Handbook* (2001) 18

The College Board, *Reaching the Top: A Report of the National Task Force on Minority High Achievement* (1999) 19

Patricia Gandara & Julie Maxwell-Jolly, *Priming the Pump: Strategies for Increasing the Achievement of Underrepresented Minority Undergraduates* (1999) 16

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES:

Higher Educ. Presidential Ass'ns, *Statement on Affirmative Action Cases Before the United States Supreme Court* (2003) 15

Jerome Karabel, *No Alternative: The Effects of Color-Blind Admissions in California, in Chilling Admissions* (Gary Orfield & Edward Miller eds., 1998) 15, 16, 19

Michael T. Nettles, *et al.*, *Race and Testing in College Admissions, in Chilling Admissions* (Gary Orfield & Edward Miller eds., 1998) 7

Greg Perfetto, *et al., Toward a Taxonomy of the Admissions Decision-Making Process* (1999) 6

Gretchen W. Rigol, *Admissions Decision-Making Models* (2003) 5, 6, 8, 14

Jacques Steinberg, *The New Calculus of Diversity on Campus*, *The New York Times*, Feb. 2, 2003, Section 4, Page 3 17

The Expanding Racial Scoring Gap Between Black and White SAT Test Takers, J. of Blacks in Higher Educ. (Jan 23, 2003) 12

U.S. Comm'n on Civil Rights Office for Civil Rights, Staff Report, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education* (2002) 19

Warren W. Willingham & Hunter M. Breland, *Personal Qualities and College Admissions* (1982) 7

IN THE

Supreme Court of the United States

No. 02-516

JENNIFER GRATZ, *ET AL.*,
Petitioners,
v.
LEE BOLLINGER, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States District Court for the Eastern District of Michigan

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BRIEF *AMICUS CURIAE* OF THE COLLEGE BOARD

All parties consent to the filing of this brief.[1]

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae College Entrance Examination Board, commonly referred to as the College Board, is a national nonprofit membership organization dedicated to preparing, inspiring, and connecting students to college success and opportunity with a commitment to excellence and equity. Founded in 1900, the association comprises more than 4,300 schools, colleges, universities, and other educational

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[1] No party or its counsel authored this brief in whole or in part nor made a monetary contribution to *amicus* for the preparation or submission of it.

organizations. Each year, the College Board serves over three million students and their parents, 23,000 high schools, and 3,500 colleges, through major programs and services in college admissions, guidance, assessment, financial aid, enrollment and teaching, and learning. Among its programs are the SAT®, the PSAT/NMSQT®, and the Advanced Placement Program® (AP®). At issue in this case is whether consideration of applicants' race and ethnicity in admissions decisions is appropriate, and whether adequate race-neutral alternatives are available. The College Board's perspective on these issues is based on expertise in the admissions field.

SUMMARY OF ARGUMENT

The college admissions process entails judgment by admissions professionals based on experience in the context of the particular institution's mission. For that reason, there can be no universal standard of merit for higher education. The models for admissions decision-making are as varied as the institutions themselves.

The College Board's experience in college admissions teaches that sound admissions decisions are based on multiple criteria. Neither the SAT, nor any other metric, should be the sole measure of merit. Overreliance on any single measure tends to exclude qualified applicants from admission to an institution. Consideration of multiple factors best enables the institutions to pursue their missions. For most colleges and universities, student body diversity is essential, because in the judgment of the institutions it enhances the educational experience for all students. Thus, a student who adds diversity may merit admission because the student helps advance the institution's goals.

Although petitioners argue that race-neutral alternatives can yield sufficient diversity, the evidence on these programs is uneven and incomplete. Research shows that class-conscious policies do not produce the diversity colleges and universities need. Percent plans do not address diversity in non-public institutions or in graduate and professional

programs and would have an attenuated impact in states where secondary schools are not racially identifiable. The College Board's experience shows that outreach partnerships are promising, but absent a sustained, well-financed effort, outreach partnerships alone cannot ensure that adequate numbers of underrepresented minority students would be admitted to selective colleges and universities. A national commitment to these programs, combined with race- and ethnicity-sensitive admissions, offers the best chance for higher education institutions to attain diversity.

ARGUMENT

I. EDUCATIONAL JUDGMENTS OF ADMISSIONS PROFESSIONALS SHOULD BE ACCORDED DEFERENCE.

Professional judgment and institutional experience inform college and university admissions. The institutions, which have designed and administered admissions plans over many years, are best positioned to make the sensitive judgments the admissions process requires. They employ admissions professionals who are experienced in selecting the students who bring the qualities that enhance the particular institution's life. These professionals understand the links among the institution's admissions policy, the institution's mission, and the capacity of the cohort admitted to respond well to the institution's academic program. Decisions by admissions professionals are worthy of deference.

Academic freedom, "a special concern of the First Amendment," protects such judgments. A college or university must have freedom "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 285, 312 (1978) (opinion of Powell, J.) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 236 (1957) (Frankfurter, J., concurring)); *accord*, *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). *See* Brief of Amici Curiae American Council on

Education and 53 other Higher Education Associations in Support of Respondents (discussing the latitude government historically has granted higher education institutions to conduct higher education).

A. Admissions Criteria Cannot Be Divorced from the Institution's Own Mission.

Because higher education institutions have distinct identities and missions, sound admissions decisions can be made only in the institutional context. There are several thousand higher education institutions in the United States. Some are large public universities, others small private colleges; some are highly specialized, others offer a liberal arts education; some are co-educational, some all-women's, some secular, some faith-based, some two-year, some four-year, some historically-black, some Hispanic-serving, and some tribal. Their missions and goals vary broadly. The College Board, *College Board Program Handbook* 2 (2002), *available at* http://www.collegeboard.com/highered/ra/sat/sat_resources.html.[2]

"To admit 'on the merits,' then, is to admit by following complex rules derived from the institution's own mission and based on its own experience of educating students with different talents and backgrounds * * * * Above all, merit must be defined in light of what educational institutions are trying to accomplish." William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 278 (1998). As a leading university's president wrote, "[t]he terms 'merit' and 'qualified' occasionally are used as if they were self-defining. Merit, however, ordinarily depends on many qualities of an individual and on judgments about how their combination might further the tasks of a university * * * *" Gerhard Casper, *Statement on Affirmative Action at Stanford*

[2] The College Board will provide to the Court copies of any publication cited in this brief that the Court indicates it would like to receive.

University (Oct. 4, 1995) (transcript available *at* http://www.stanford.edu/dept/pres-provost/president/speeches/951004affaction.html).

Assembling a new class of students is a weighty responsibility. A college or university admissions staff must thoroughly understand the institution, its mission, and its goals. Admissions officers interact with prospective students and their families, and are in close touch with the president, administrators, faculty, enrolled students, and alumni. Each admissions cycle, most invest hundreds of hours learning enough about applicants to make sound judgments about which of them will form an incoming class that is likely to enhance the institutional mission and the educational experience of all who enroll.

B. In Higher Education There Can be No Universal Standard of Merit.

No uniform, nationally agreed-upon definition of "merit" applies to college admissions. Many admissions models are successfully used. To better understand and explain variation among college admission approaches in the United States, the College Board in 1998 initiated the Admissions Models Project. The research demonstrated that no one model is appropriate for all institutions. Each institution must develop admissions practices that are based on its mission, goals, objectives, and priorities. *See* The College Board, *Best Practices in Admissions Decisions* 7, 31 (2002), *available at* http://www.collegeboard.com/html/pdf/BestPractAdmis.pdf. *See also* Gretchen W. Rigol, *Admissions Decision-Making Models* (forthcoming 2003) (manuscript at 51-54, available from the College Board).

A student considered among the best applicants at one institution can be unqualified for another. For example, a private liberal arts college may seek students who demonstrate intellectual curiosity, leadership, and a commitment to community service. A public university may operate under a state mandate to provide educational

opportunities to all students who have met certain requirements, such as completion of core courses in high school, specified grades, class rank, and standardized test results. An engineering college is likely to apply a different definition of merit than does a college of art and design.

How a college or university defines merit for admission heavily influences the type of institution it will be. To impose a single definition would be to deny institutions the freedom to pursue their missions. *See Bakke*, 438 U.S. at 312 (citing *Keyishian*, 385 U.S. at 603); *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring). *See also Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982); Greg Perfetto, *et al., Toward a Taxonomy of the Admissions Decision-Making Process* 5-7 (1999). For example, some institutions view higher education as an entitlement that should be available to all who are qualified. Others see it as a reward for the academically successful, the virtuous, the diligent or the public-spirited. Still others would have their institutions seek and nurture talent, to promote social and economic mobility. Yet other models hold that admissions decisions should advance goals of the nation or special institutional needs.

Colleges and universities often do not limit themselves to any one such model, but instead employ several simultaneously or sequentially. Review of their published admissions materials reveals that many institutions explicitly inform prospective applicants that they seek students in a number of the categories identified above, or others. Many such statements emphasize interest in enrolling students who have demonstrated academic strengths, as well as those who evidence potential both to benefit from and contribute to the campus community. Most such statements also note an interest in enrolling a student body with diverse backgrounds, talents, skills, and interests. *See* Rigol, *supra*, at 7, 57-59.

In assessing academic qualifications, many institutions consider numerical or quantitative criteria, such as the

number of courses taken, high school grade-point-average, rank in class, and standardized test results. Academic criteria of a more qualitative nature are also often employed, such as strength of the curriculum, intellectual curiosity, ability to undertake independent study, and communication skills. Likewise, different kinds of criteria are often used to assess non-academic attributes—nominal attributes, such as geographic, racial or ethnic origin, or parents' occupations, and somewhat less readily gauged attributes, such as leadership, creativity, commitment, and special talents. These less readily gauged considerations can require close review of the application by an experienced admissions officer. Admissions professionals know that "grade-point averages and test scores measure only certain kinds of achievement and potential, and that broader criteria are equally, and sometimes more, valid as indicators of students' potential." Michael T. Nettles, *et al.*, *Race and Testing in College Admissions, in Chilling Admissions* (Gary Orfield & Edward Miller eds. 1998).

While persons unfamiliar with them sometimes categorize admissions criteria as either objective or subjective, the distinction is rarely clear. For example, grades, which may appear to be objective, generally embody teachers' subjective evaluation of the student's performance. Classroom performance encompasses factors such as participation, growth, and attentiveness, as well as mastery of subject matter and quality of work. While academic standards are the most important factor in most admissions decisions, other factors have become increasingly important at many institutions. A major research study conducted for the College Board suggests that personal qualities, particularly those that reflect productivity and follow-through, are highly pertinent to sound admissions decisions. *See* Warren W. Willingham & Hunter M. Breland, *Personal Qualities and College Admissions* 6-7, 170-173 (1982). Thus, private as well as public institutions value such attributes as leadership, participation in extracurricular activities, community

activities, motivation, and initiative. ACT, Inc., Ass'n for Institutional Research, the College Bd., Educ. Testing Serv., Nat'l Ass'n for College Admission Counseling, *Trends in College Admissions 2000*, 74 (2002).

Colleges and universities also evaluate applicants in the context of opportunities and disadvantages encountered. For example, students who attend a high school at which honors or Advanced Placement offerings are limited are often not penalized for having taken few advanced courses. Non-academic achievements often are also evaluated in context. Many institutions invite students to submit additional material that describes extenuating circumstances or unusual situations of which the admissions office should be aware. Thus, often a student who works or takes care of younger siblings is not expected to participate in extracurricular activities to the same extent as are students who don't. Rigol, *supra*, at 20. Admissions professionals recognize that human performance is influenced by context and that the college admissions process cannot be reduced to a rigid formula.

II. THE MOST RELIABLE ADMISSIONS DECISIONS ARE BASED ON MULTIPLE CRITERIA.

A. Reliance on any Single Metric Would Eliminate Qualified Candidates from Consideration.

Petitioners and their *amici* assume that a student with higher SAT or other admission test scores is, *ipso facto*, better qualified. They would require educational institutions to show that a higher-scoring unsuccessful applicant was not subjected to discrimination. Based on its long experience, the College Board knows that standardized test scores should not be the sole criterion for determining merit for admission. Overreliance on test scores, or on any other single measure, is strongly discouraged by test developers, test users, professional organizations, and research findings. *See generally* Am. Educ. Research Ass'n, Am. Psychological Ass'n, Nat'l Council on Measurement in Educ., *Standards of Psychological and Educational Testing* (1999).

The College Board knows well the benefits and limitations of standardized admissions tests. Having a common yardstick by which to assess students' preparedness for college success can be quite useful to admissions professionals; the value of SAT scores as a predictor of college grades should not be discounted. *College Board Program Handbook*, *supra*, at 13. With more than 27,000 United States secondary schools that have vastly different fiscal and human resources, teaching models, and grading systems, standardized test scores can assist admissions personnel to understand and interpret students' qualifications and preparedness. *See* The College Board, *Guidelines on the Uses of College Board Test Scores and Related Data* 2 (2002), *available at* http://www.collegeboard.com/prod_downloads/research/RDGuideUseCBTest020729.pdf.

The predictive value of the SAT for college success has been widely studied. Data collected by the College Board and others have consistently found that SAT scores work well as a predictor of college grades, *College Board Program Handbook* at 13; *see also, e.g.*, Brent Bridgeman, *et al.*, *Predictions of Freshman Grade-Point Average from the Revised and Recentered SAT I: Reasoning Test* (2000), including both early and later college performance, as well as of retention and graduation. Nancy W. Burton and Leonard Ramist, *Predicting Success in College: SAT Studies of Classes Graduating Since 1980* (2001).

But the SAT is not intended to be and cannot soundly be the sole measure of merit for admissions. The *Guidelines on the Use of College Board Test Scores and Related Data* encourage admissions professionals to use standardized test scores "in conjunction with other indicators, such as secondary school record (grades and courses), interviews, personal statements, writing samples, portfolios, recommendations, etc., in evaluating the applicant's admissibility at a particular institution." *See Guidelines, supra*, at 9, 10. The *Guidelines* further indicate that

admissions test scores should be viewed "as contemporary and approximate indicators rather than as fixed and exact measures of a student's preparation for college-level work." *Id.* at 9.

Overreliance on standardized test scores can have the unintended effect of excluding qualified, meritorious applicants. In this case, reliance solely on test scores by the University of Michigan would have led to rejection of a number of qualified minority applicants. "This is due to the fact that nationally, minorities are very underrepresented at the higher level of standardized test scores, and over-represented at the lower level." *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 830 (E.D. Mich. 2000).

It is well documented that average standardized test scores of students from underrepresented minority groups are lower than national averages. The College Board for many years has published reports that show average SAT scores by racial/ethnic group, including for high school graduates who took the SAT in 2002. Although there has been a gradual increase in average scores, particularly in math, for most groups during the past decade, persistent gaps remain between underrepresented minorities and white test-takers—203 points for African Americans, 157 for Mexican Americans, 154 for Puerto Ricans, and 98 for Native Americans. *See generally* The College Board, *College-Bound Seniors 1992 Profile;* The College Board, *2002 College-Bound Seniors, both available at* http://www.collegeboard.com/press/article/0,,11752,00.html.

Pertinent demographic characteristics of underrepresented minority SAT-takers also differ from those of whites. For example, the highest level of education of parents of 52 percent of African American students and 69 percent of Mexican American students was a high school diploma (or less). By contrast, only 31 percent of white students had parents in that category. Broad differences are also evident at the other end of the education spectrum, with only 14

percent of African American students and 10 percent of Mexican American students reporting a parental graduate degree, compared to 28 percent of white students.

Information on family income shows similar pertinent differences. Only 15 percent of both African American and Mexican American students reported annual family income over $70,000, compared to 48 percent of white students. There is also a major difference between Mexican American and white students in terms of language background, with 39 percent of Mexican American students reporting that English was their first language learned, compared to 95 percent of white students.

Average SAT scores reflect such differences. The types of abilities and skills the SAT measures are developed in and out of school. Students whose parents have less education are likely to be exposed to fewer books in the home; students whose families have lower incomes are more likely to enroll in schools that have fewer resources and fewer advanced offerings.

Similar gaps are evident in other admissions tests, such as the ACT, Graduate Record Examinations, Graduate Management Admissions Test, Law School Admissions Test, and Medical College Admissions Test, as well as other standardized measures, such as the National Assessment of Educational Progress. "[G]roup differences appear fairly consistent across standardized admissions tests, with the largest gaps between white and African-American test-takers, followed by Hispanic test-takers." Wayne J. Camara and Amy Elizabeth Schmidt, *Group Differences in Standardized Testing and Social Stratification* 1 (1999). College Board data suggest that differences in a great many factors may explain the persistence of these gaps, including "family income, class rank, access to rigorous and advanced courses, segregated surroundings, white teacher, counselor and administrator low expectations of African American and Latino students, and what [researcher] Claude Steele calls

'stereotype vulnerability.' " *The Expanding Racial Scoring Gap Between Black and White SAT Test Takers*, J. of Blacks in Higher Educ. (Jan. 23, 2003).

Many of the factors that contribute to differences in SAT scores are reflected in differences in high school grades. As former College Board president Donald M. Stewart has noted, the "stark differences * * * illustrate the inequities minorities have suffered, through inadequate academic preparation, poverty, and discrimination; years of tracking into dead-end educational programs; lack of advanced and rigorous courses in inner-city schools, or lack of access to such programs when available; threadbare facilities and overcrowding; teachers in critical need of professional development; less family support and experience in higher education; and low expectations." Camara and Schmidt, *supra*, at 13.

A great many students with lower test scores or high school grade-point-averages succeed in college. In the admissions process, institutions make case-by-case judgments, based on experience and institutional retention and graduation data, about whether a student has potential to overcome deficits in preparation. Admissions officers know that many highly motivated students, even if academically less well prepared, can be successful students.

B. Consideration of a Broad Set of Criteria Allows Colleges and Universities to Pursue Their Educational Missions.

While merit can be defined only in the context of each institution, certain common groupings of factors are considered by many institutions. These include, for example:

- Academic Achievement, Quality, and Potential
  - Direct measures (*e.g.*, AP courses taken, class rank, test scores)
  - Caliber of high school
  - Evaluative measures

- Non-academic characteristics and attributes
  - Geographic
  - Personal background
  - Extra-curricular activities, service, and leadership
  - Personal attributes
  - Extenuating circumstances

Within each of these groupings, specific qualities on which the student may be evaluated are often included. For example, academic evaluative measures often include:

- Academic recognition and awards
- Artistic talent
- Depth in one or more academic areas related to student interests
- Evidence of academic passion
- Grasp of world events
- Independent academic research
- Intellectual curiosity
- Sophisticated vocabulary and command of the English language
- Writing quality

Personal background characteristics often include, for example:

- Alumni connection
- Cultural diversity
- Faculty/staff connection
- First generation to go to college from family
- Low economic family background
- Military veteran
- Peace Corps, Americorps, etc.

- Personal disadvantage
- Returning student
- Gender

See Rigol, *supra*, at 19, 75-77.

Admissions officers strive, with an extraordinary record of success, to consider such factors in a manner that is fair, reasonable and based on individual merit, not arbitrary, stigmatizing or quota-driven.

None of the foregoing criteria, separately or collectively, have proven to be effective substitutes for consideration of race and ethnicity when an institution seeks a racially and ethnically diverse student body. Virtually all colleges and universities seek a student body with diverse backgrounds and experiences, because they believe student body diversity vital to education. In 1997, 62 major research universities, including eight Ivy League institutions and over 30 public institutions, issued a statement "reaffirm[ing] [their] * * * strong conviction concerning the continuing need to take into account a wide range of considerations—including ethnicity, race, and gender—as [they] * * * evaluate the students whom [they] * * * select for admission." Association of American Universities, *On the Importance of Diversity in University Admissions* (Apr. 14, 1997) in *The New York Times*, Apr. 24, 1997, at A27. The broad support for consideration of many factors, including race and ethnicity, in determining merit was recently affirmed in a statement signed by the heads of the nation's major higher education associations, representing public, private, land-grant, faith-based, and secular colleges and universities; historically white, historically black, and Hispanic-serving institutions; independent, co-ed and women's institutions; large and small, two-year, and four-year institutions. The statement emphasized

> the importance of educating Americans of all backgrounds. We believe there is a national imperative to ensure that Americans who represent the diversity of races, ethnic groups, religious beliefs, and economic circumstances participate in higher education at all levels, including graduate and professional schools.

Statement of Higher Education Presidential Associations on Affirmative Action Cases Before the United States Supreme Court (Jan. 24, 2003).

Because an institution's mission shapes its definition of merit, and therefore its admissions decisions, the concept of diversity is fully consistent with the concept of merit. For many institutions, the applicant's ability to bring diversity to the institution is an element of merit, as are other attributes that advance the institution's mission and goals. Colleges and universities are not simply means of transmitting knowledge. They seek to cultivate students' intellectual, moral and social growth; and they have a responsibility to the nation to make higher education broadly accessible to its citizens. "[R]ace is relevant in determining which candidates 'merit' admission because taking account of race helps institutions achieve three objectives central to their mission—identifying individuals of high potential, permitting students to benefit educationally from diversity on campus, and addressing long-term societal needs." Bowen & Bok, *supra*, at 278. And research shows that consideration of the factors identified above cannot itself produce the racial and ethnic diversity that colleges and universities need. *See* Jerome Karabel, *No Alternative: The Effects of Color Blind Admissions in California, in Chilling Admissions*, *supra*, at 32.

III. THE EVIDENCE ON RACE-NEUTRAL ALTERNATIVES IS UNEVEN AND INCOMPLETE.

Petitioners and their *amici* contend that "race-neutral" alternatives would yield sufficient diversity at the University of Michigan. The district court, after extensive review of alternatives—total reliance on test scores, income-based

strategies, and vigorous minority recruitment efforts—concluded that none would yield more than a token number of underrepresented minority students. *See Gratz*, 122 F. Supp. 2d at 830. The court was correct.

As to jurisdictions where race- and ethnicity-conscious diversity plans in higher education admissions have been barred, we are only now beginning to gather evidence on the efficacy of such purportedly race-neutral alternatives as grade-point-averages, class-conscious policies, percent plans, and outreach policies. To date, none has demonstrated sustained results that are consistent or successful across the pertinent demographics.

A. Class-Conscious Policies

Some colleges and universities have opted to use socioeconomic status as an alternative to race and ethnicity. Research shows that such "[c]lass-conscious policies" do not "produce campuses with anything near the levels of racial and ethnic diversity attained by the nation's leading undergraduate institutions and professional schools in recent decades. [Ethno]-racial differences simply are not reducible to class differences just as class differences are not reducible to racial ones." Jerome Karabel, *No Alternative: The Effects of Color-Blind Admissions in California, in Chilling Admissions*, *supra,* at 34. Ethnicity, race, and class are separate sources of disadvantage in the United States. "Many participants in this debate, however, warned that this strategy would likely result in lower numbers of African American, Latino, and Native American admittees because many of these students with aspirations to attend four-year colleges are, in fact, middle class * * * * Middle-class students of color may well be the best prepared minority students * * * to persist in competitive college environments." Patricia Gandara with Julie Maxwell-Jolly, *Priming the Pump: Strategies for Increasing the Achievement of Underrepresented Minority Undergraduates* 20 (1999).

B. Percent Plans

Under the so-called "percent plans," admission is guaranteed at state-funded higher education institutions to a fixed percentage of graduates at each high school in the state. All students above a designated class rank, regardless of the characteristics of the school or the rigor of its curriculum, are eligible for admission.

A flaw characterizes implementation of percent plans. These apparently race- and ethnicity-neutral alternatives to affirmative action tend, paradoxically, to be race- and ethnicity-influenced to a very considerable extent. They appear to yield a diverse admissions pool if there is a sufficient number of racially and ethnically identifiable schools in the state to raise the number of underrepresented minorities in the top-percentages applicant pool. In those instances in which the school systems are racially and ethnically diverse, the top performers, both in terms of grade-point-averages and test scores, tend to be white and Asian students. *College Bound Seniors 1992 Profile, supra*; *2002 College-Bound Seniors, supra*. *See* Jacques Steinberg, *The New Calculus of Diversity on Campus*, *The New York Times,* Feb. 2, 2003, sect. 4, at 3.

Regional differences, too, characterize racial and ethnic representation in the top ranks of high school classes. For example, among SAT takers in the class of 2002 from New England states, 36 percent of Asian American and 29 percent of white students reported they were in the top 20 percent of their classes, compared with 21 percent of Hispanic students and 19 percent of African American students. In Southern states, 38 percent of Asian American students and 37 percent of white students reported they were in the top 20 percent of their classes, compared with 24 percent of African American

and 26 percent of Hispanic students.[3] For these reasons, percent plans would not be effective in many states.

C. Outreach Programs

The goal of outreach initiatives is to provide all students with more opportunities to prepare for and succeed in college. Such programs provide multi-tiered systems of training and support to prepare students—especially those from high-priority middle and high schools—to be successful in advanced coursework taught by qualified teachers, and to gain admittance to and achieve success in college.

In 1999 and 2000, the College Board collected data on more than one thousand of the nation's early outreach programs, through the National Survey of Outreach Programs. The survey was designed to assist practitioners, policymakers, researchers, and philanthropists to better understand programs designed to help historically underrepresented students gain the prerequisite college success skills and aspiration to succeed in college. *See generally* The College Board, *Outreach Program Handbook* (2001). The data were collected on programs in all 50 states, the District of Columbia, Puerto Rico, Guam, and Micronesia. Data were gathered on programs that emanated from colleges and universities, philanthropists, the community, and school systems. Such programs entail a wide array of services for students, 69 percent of whom are non-white and 71 percent of whom are first-generation Americans. The services provide tutoring, mentoring, test-taking and study skills development, financial planning, and a range of other efforts designed to promote college awareness, college aspirations, attendance, and persistence. *Id.* at xv-xvi.

The College Board has extensive experience working with the states and local governments in early outreach partnerships aimed at increasing the pool of underrepresented

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[3] These findings are based on College Board data that are unpublished but available to the public, and the Court, on request.

students who possess college success skills. Although these programs are having a positive impact on the numbers of students who successfully complete college-prep and college level coursework in high school, the programs are by definition long-term and do not offer an immediate solution. Analysis of the programs shows that broadening the pipeline of qualified minority applicants is laborious and slow, has not yet eliminated the need for admissions policies that take into account race and ethnicity, and is unlikely to do so for some time to come. *See, e.g.,* United States Commission on Civil Rights Office for Civil Rights, Staff Report, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education* (2002); Karabel, *supra,* at 39-40.

Most Americans see college as a gateway to the greater rewards of life in a democratic society. Unfortunately, many members of traditionally underserved populations do not receive the appropriate preparation to enable development of skills needed for college and further opportunity. In 1999, the College Board's National Task Force on Minority High Achievement issued a report, a key recommendation of which focused on early preparation of minority students through programs such as the College Board's outreach partnership model. The College Board, *Reaching the Top: A Report of the National Task Force on Minority High Achievement* 1 (1999). Florida, for example, has adopted and made a substantial commitment to such an effort. Many states and school districts are moving towards replication of outreach partnership models, as they come to recognize such models' value in raising standards and achievement for all students—especially underrepresented minority students in grades 6-12. However, most have yet to commit the time, effort, and financial resources that such programs require.

Absent a broad, sustained, amply-funded national effort, such programs alone cannot ensure that adequate numbers of underrepresented minority students would be admitted to selective colleges and universities were consideration of race

and ethnicity barred. Until the time when there is broad access both to high quality secondary education and programs that allow students to develop needed skills, a segment of the student population will struggle to demonstrate the potential for success in higher education. A national commitment to outreach measures and to affirmative action programs by higher education institutions offers the best available opportunity for the institutions to serve their educational missions.

CONCLUSION

For the foregoing reasons, the district court judgment should be affirmed.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF LATINO ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Ambach v. Norwick, 441 U.S. 68 (1979)	17, 18
Brown v. Board of Education, 347 U.S. 483 (1954)	4, 17, 20
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)	18, 19
Garcia v. Spun Steak Co., 998 F. 2d 1480 (9th Cir. 1993)	6
Hernandez v. Texas, 347 U.S. 475 (1954)	4, 20
Keyes v. School District No. 1, 413 U.S. 189 (1973)	20
Lau v. Nichols, 414 U.S. 563 (1974)	20, 21
Long v. First Union Corp. of Virg., 86 F. 3d 1151 (4th Cir. 1996)	6
Plyler v. Doe, 457 U.S. 202 (1982)	17, 18
United States v. Texas, 342 F. Supp. 24 (E.D. Tex. 1971)	21

Page

Other Authorities

Census Data

U.S. Census Bureau, *Census 2000 Summary File 3* 5, 8, 10

U.S. Census Bureau, *Current Population Reports: School Enrollment in the United States – Social and Economic Characteristics of Students* (October 1999) 11

U.S. Census Bureau, *Current Population Reports: The Hispanic Population in the United States* (March 2000) 8, 9, 10

U.S. Census Bureau, *Current Population Survey* (March 2000) 8, 24

U.S. Census Bureau, *Current Population Survey* (October 2000) 23

U.S. Census Bureau, *Profile of the Foreign Born Population in the United States: 2000* 11

U.S. Census Bureau, *Race and Hispanic Origin of the Population by Nativity: 1850 to 1990* 12

U.S. Census Bureau, *Money Income in the United States 2001* 10

Page

Articles And Books

Carlos M. Alcala and Jorge C. Rangel, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 Harv. CR-CL L. Rev. 307 (1972) 19

Susan Auerbach, *"Why Do They Give the Good Classes to Some and Not to Others?" Latino Parent Narratives of Struggle in a College Access Program*, 104 Teachers College Record 1369 (2002) 22

Jack M. Balkin, *What Brown v. Board of Education Should Have Said* (2001) 19, 20

Jonathan Baron and M. Frank Norman, *SATs, Achievement Test, and High School Class Rank as Predictors of College Performance*, 52(4) Educational and Psychological Measurement 1047 (1992) 29

Michelle N-K Collison, *For Hispanics, Demographic Imperative Drives Educational Mandate*, 16 Black Issues in Higher Educ. 56 (1999) 23

David Erlach, *Hispanics and Higher Education: Multicultural Myopia*, 75 J. of Educ. for Bus. 283 (May-June 2000) 23

Heriberto Godina, *The Violation of Mexican American Students' Education Rights: A Midwestern Ethnography*, 2 J. of Gender Race & Just. 387 (1999) 21, 22,23

Page

David G. Gutierrez, *Walls and Mirrors*: *Mexican Americans, Mexican Immigrants, and the Politics of Ethnicity* (University of California Press, 1995) 12

Barbara Hines, *So Near Yet So Far Away*: *The Effect of September 11th on Mexican Immigrants in the United States*, 8 Tex. His. J. L. Public Policy 37 (2002) 13

Anne C. Lewis, *Growing Hispanic Enrollments*: *Challenge and Opportunity*, 80 Phi Delta Kappan 3 (1998) 7, 21

George Martinez & Kevin Johnson, *Discrimination by Proxy*: *The Case of Proposition 227 and the Ban of Bilingual Education*, 33 U.C. Davis L. Rev. 1227 (2000) 6

Margaret E. Montoya, *A Brief History of Chicana/o School Segregation*: *One Rationale for Affirmative Action*, 12 La Raza L.J. 159 (2001) 20

Barbara Z. Pearson, *Predictive Validity of the Scholastic Aptitude Test (SAT) for Hispanic Bilingual Students*, 15(3) Hispanic Journal of Behavioral Sciences 342 (1993) 29

Clara Mercedes Piloto, *Stilled Voices in America's Educational System*, 93 McNair Journal (University of California, Berkeley) 6

Page

Miscellaneous

ACT Average Composite Score Steady for Fifth Straight Year, available at www.act.org/bews/releases/2001/08-15-01.html 29

Expert Report of James D. Anderson (filed in district court) 25, 26

Robert Aponte & Marcelo E. Siles, *Michigan's Hispanics*: *A Socio-Economic Profile* (JSRI 1994) 8, 9

Genaro C. Armas, *Hispanics Now Outnumber Blacks in U.S.*, Associated Press (January 22, 2003) ... 12

Deposition of Diego Bernal (filed with district court) 26

Declaration of Dr. Albert Camarillo (October 12, 2001) (filed in *Ruiz v. Santa Maria*, CV 92-4879 LGB (Shx) (C.D. Cal. 1992) 14

Expert Report of Dr. Albert Camarillo (July 1, 2000) (filed in *Ruiz v. Santa Maria*, CV 92-4879 LGB (Shx) (C.D. Cal. 1992) 15

The College Board, *2001 College Board Seniors are the Largest, Most Diverse Group in History* 29

Expert Report of Joe R. Feagin (filed in district court) 26

Cited Authorities

Page

Erica Frankenberg, et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, The Civil Rights Project, Harvard University (2003) 19, 20, 21

Richard Fry, *Latinos in Higher Education: Many Enroll, Too Few Graduate* (Pew Hispanic Center 2002) 23

Patricia Gandara, *Latinos and Higher Education: A California Imperative Chicano/Latino Public Policy Seminar and Legislative Day* – Proceedings (Feb. 1-2, 2000) 11, 24

T. Falbo, *Latino Youth and High-School Graduation*, Amer. Psychological Assoc. (1996) 23

Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences*, The Civil Rights Project, Harvard University (February 2003) ... 24

House Report 123, 105th Congress, 1st session (1996) 6

International Labour Organization, *Discrimination Against Racial/Ethnic Minorities in Access to Employment in the United States: Empirical Findings from Situation Testing* 16

Leadership Conference on Civil Rights, *Justice on Trial: Racial Disparities in the American Criminal Justice System* 16

Cited Authorities

Page

Los Angeles Times, *Latino Majority Arrives – Among State's Babies* (February 6, 2003) 12

Michigan Daily On-Line, A Discriminatory Union: Police Must Patrol All Events Equally (Nov. 22, 1999) 26

National Council of La Raza , *Beyond the Census: Hispanics and an American Agenda* (August 2001) ..... *passim*

National Council of La Raza, *Hispanic Income Fact Sheet* (November 2002) 10

National Council of La Raza, *Latinos and the Federal Criminal Justice System* (July 2002) ... 16

National Council of La Raza, *The Hispanic Population of the United States* (March 2000) .. 13

Office of the Attorney General of New York, *The New York City Police Department's "Stop and Frisk" Practices* (1999) 16

Christina Perez, "The Truth Behind the Hype: A Closer Look at the SAT" (Paper Presentation, 2002 NEACAC Conference, Fairfield University) 29

Pew Hispanic Center/Henry J. Kaiser Family Foundation, *2002 National Survey of Latinos* .. 12

The Princeton Review, University of Michigan-Ann Arbor, Student Body Profile 19

Page

Pamela Anne Quiroz, *The Silencing of the Lambs: How Latin Students Lose Their Voice in School*, Working Paper No. 31 (JSRI 1997) 22, 23

R. Reese, *Language Diversity and the Politics of the English OnlyMovement in the U.S.*, Paper Presentation: 34th World Congress of the International Institute of Sociology, Tel Aviv, Israel (July 10-16, 1999) 6

Expert Report of Dr. Ricardo Romo (March 6, 1994) (filed in *Ruiz v. Santa Maria*, CV 92-4879 LGB (Shx) (C.D. Cal. 1992) 15

Schools Blamed for Racial Gap in SAT Scores, August 28, 2001, available at http://www.cnn.com/2001/fyi/teachers.ednews/08/28/sat.scores/index.html 29

Expert Witness Report of Dr. Jacob Silver and Dr. James Rudolph (filed in district court) 28, 29

Maria Teresa Tatto, et al., *The Education of Migrant Children in Michigan: A Policy Analysis Report*, Latino Studies Series Occasional Paper No. 72 (November 2000) 22

Expert Report of Dr. Andres Tijerina (October 6, 2001) (filed in *Balderas v. Texas*, Civil Action No 6.01 CV158 (E.D. Tex. 2001) ..... *passim*

Preliminary Expert Witness Report of Dr. Trent 28, 29

Page

The Urban Institute, *Discrimination in Metropolitan Housing Markets: National Results from Phase I HDS 2000* (November 2002) 15

U.S. Dept of Education, National Center for Education Statistics, *Fall Enrollment in Colleges and Universities Survey* (Table 207) (2000) 24

U.S. Dept of Education, National Center for Education Statistics, *National Postsecondary Student Aid Study* (2000) 24

U.S. Dept of Education, *The Condition of Education* (1995) 23

U.S. Dept of Education, *The Condition of Education* (2002) 23

U.S. Dept. of Justice, *1997 Statistical Yearbook of the Immigration and Naturalization Service* 11

Lori J. Vogelgesang, *The Development of Civic Values and Skills: An Analysis by Race, Gender and Social Class, available at* http://www.diversityweb.org/Digest/Sp.Sm00/civic.html 7

INTEREST OF *AMICI*

Amici curiae National Council of La Raza and other Latino organizations respectfully submit this brief pursuant to Rule 37.3 of this Court. The statements of interest of all *amici* appear in the Appendix to this brief.[1]

SUMMARY OF ARGUMENT

In this brief, *amici* adopt by reference the principal legal arguments that support the University's and Intervenors' positions, which are well addressed by the University, by the Intervenors, and by other *amici.* Consistent with the legal framework established by this Court, this brief addresses the scope of the University's interest in securing the educational benefits provided by increased representation of Latino students and in remedying the continuing effects of discrimination against Latinos within the public educational system, including the University itself.

Amici address two points. Part I considers the unique contributions of Latino students to the exchange of ideas, thoughts, and views on a university campus, an exchange central to the state's educational mission. Due to a variety of historical, legal, and societal factors, Latinos constitute a distinct group and share a common identity. This identity is shaped by several common (though not universal) characteristics, including a Spanish language tradition; underachievement as a group in the educational system; disproportionate concentration in lower-income labor/service sectors; the presence of a large immigrant population; and an enduring history of racial discrimination. Although each Latino's individual circumstances may differ, these characteristics—all prevalent within the Latino community

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1. This brief is filed with the consent of both petitioners and respondents, and letters reflecting those consents have been lodged with the Clerk of this Court. Pursuant to the Court's Rule 37.6, *amici* state that this brief has not been authored in whole or in part by counsel for a party and that no person or entity, other than *amici*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

in Michigan and nationwide—combine to create unique life experiences for Latino students. By virtue of being part of that community, Latino students possess unique, often personal, insights into a variety of topics that are central to a comprehensive and diverse college educational experience: language and cultural issues such as bilingual education and globalization; educational issues such as educational reform and equity; socioeconomic issues such as labor rights, class structures, and poverty; immigration issues such as immigrant rights and assimilation; and equality issues such as racial and ethnic discrimination in housing, voting, and employment.

Part II examines the history and current reality of discrimination against Latinos within the public educational system as a whole and the University in particular. The University draws upon a nationwide pool of students. Unfortunately, American public schools have systematically discriminated against Latinos in various ways, including the perpetuation of *de facto* and *de jure* segregation of Latinos; failure to provide adequate learning resources to Spanish-speaking students; and disproportionate tracking of Latino students into remedial and vocational classes. All these forms of discrimination have hindered the educational progress of Latino students, as reflected in their dismal record of educational attainment at both the secondary and postsecondary school levels. The University itself has also engaged both in active discrimination against Latino students through the misconduct of its faculty and staff and in passive discrimination through its failure to mitigate the hostile racial climate on campus. Further, the University utilizes certain admissions criteria (unrelated to merit) that have a clear discriminatory impact on Latino students and would further reduce the representation of Latino students absent the counterbalancing consideration of race. As a public educational institution, the University has both the ability and responsibility to remedy the continuing effects of this discrimination.

ARGUMENT

I. LATINO STUDENTS ARE IN A UNIQUE POSITION TO ENHANCE THE DIVERSITY OF IDEAS ON COLLEGE CAMPUSES IN FURTHERANCE OF THE UNIVERSITY'S EDUCATIONAL MISSION

This Part discusses the distinct and shared experience of members of the Latino community in the United States, and the unique perspective that Latino students can contribute to the diversity of academic and social exchange in furtherance of the University's educational mission.

A. Latinos Are a Unique and Distinct Group in the United States[2]

Despite having recently become the nation's largest minority group,[3] Latinos may appear to some observers to be a group of relative newcomers to this nation—largely indistinguishable from previous waves of immigrants from Europe. This perniciously ahistorical view has a policy corollary—that Latinos should be treated no differently from previous European immigrant groups and should be expected to overcome presumptively momentary spasms of anti-Latino sentiment without government assistance, and, in particular, without affirmative action. In all respects, this view ignores the history of Latinos as a distinct group and their unique position in contemporary American society.[4]

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2. A more complete discussion of Latinos as a distinct American ethnic group is included in the amicus brief filed by the Mexican American Legal Defense and Educational Fund ("MALDEF") on behalf of Latino organizations in *Grutter v. Bollinger, et al.* To avoid repetition, only a brief discussion is included here.

3. The United States Census Bureau estimates that, as of July 2001, 37 million Latinos lived in the United States, comprising thirteen percent of the population and slightly surpassing African Americans as the nation's largest minority group.

4. For example, although many Americans view the nation's two largest Latino subgroups—Mexican Americans and Puerto Ricans—as

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Latinos, whether immigrant or native-born, have long been subject to discrimination in the United States based upon their ethnicity.[5] As a result of this discrimination and numerous other factors (several of which are discussed *infra* in Part I.B), Latinos have forged a community with a unique, albeit varied, experience; one heavily influenced by the distinction of being Latino in the United States. This experience informs, in significant part, the viewpoints of Latinos. It is this dimension—the experience of being a member of the Latino community separate and apart from the individual economic and other circumstances of each Latino—that is worthy of consideration by admission officers in constructing a rich educational environment.[6]

B. Several Common Characteristics of Latino Students Add Diversity to the College Educational Experience

The shared group identity discussed above is shaped by several common (though certainly not universal) characteristics, including a Spanish language tradition; underachievement as a group in the educational system; disproportionate concentration of Latinos in lower-income labor/service sectors; the immigrant

(Cont'd)
recent immigrants, those two subgroups share an experience claimed only by African Americans and Native Americans – namely the forcible and involuntary introduction of the group into the United States.

5. Nearly a half century ago, in the same term as *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court recognized this history in *Hernandez v. Texas*, 347 U.S. 475 (1954), which held that Latinos should be viewed as a separate and distinct group for purposes of civil rights protections.

6. The recognition of a common identity is not, of course, intended to suggest that all Latinos share identical views. Rather, the common cultural experience of the Latino community has produced a great diversity of views within that community. This diversity of views underscores the need for greater numbers of Latino students on campuses to reflect the variety of views that can come from those with common ethnic roots.

experience; and a history of persistent and enduring racial discrimination. Although there are more direct proxies than the Latino classification for any particular characteristic, and although not all Latinos come from identical socio-economic or familial backgrounds, the factors listed above, in combination, provide a composite picture of the shared life experiences of members of the Latino community. In this section, we explore how and to what extent these characteristics affect the life experience of Latinos, and how that experience positions Latinos to make a unique contribution to the exchange of ideas on a university campus.

1. *The Spanish Language and its Cultural Influence*

Many Latinos can speak, read, and write Spanish with varying levels of proficiency. For numerous Latinos, Spanish remains the native tongue and their first language. According to the 2000 census, over 28,000,000 Americans (over ten percent of the United States population) speak Spanish in the home. *See* U.S. Census Bureau, *Census 2000 Summary File ("SF") 3*. Almost half of the Spanish-speaking population speaks English less than "very well." *See id.* Thus, even for prospective Latino students who are fluent in English only, English is a second language for many family members, thus affecting their experience and perspective.[7]

The widespread knowledge of Spanish among Latinos has several implications for the educational experience of all students. First, language-related issues have come to the forefront of political and academic debate in recent years. Such issues include the designation of English as the official

7. Although the University could award extra points to all students who speak a foreign language—surely a legitimate consideration—the fact remains that a Latino coming from a community in which Spanish is a unifying trait adds an independently valuable cultural perspective on the importance of the Spanish language to the broader Latino community, apart from the value of the language skill itself.

language,[8] "English-only" workplace rules,[9] bilingual education,[10] and multilingual voting ballots. Because these issues have been framed largely with respect to the Latino population, Latinos have a special perspective—regardless of whether a particular Latino student speaks Spanish herself or would favor or disfavor such rules—to contribute to discussions of these issues.

8. As of 1999, 24 states had made English their official language, and 14 states considered such bills that year. Some of these laws also limit or bar the government's provision of services in languages other than English. The most restrictive of these was Arizona's Proposition 106, which would have imposed legal sanctions for noncompliance but was struck down by the Arizona Supreme Court. *See* R. Reese, *Language Diversity and the Politics of the English Only Movement in the U.S.*, Paper Presentation: 34th World Congress of the International Institute of Sociology, Tel Aviv, Israel (July 10-16, 1999). In 1996, the House of Representatives passed a bill declaring English the official language of the government of the United States. *See* H.R. 123, 105th Congress, 1st session (1996). However, the Senate did not act on the bill, rendering it void. *See* Reese, *supra*.

9. Some companies have begun to implement rules that prohibit workers from speaking languages other than English at the workplace. Although the EEOC states that such rules may violate Title VII of the Civil Rights Act unless shown to be a "business necessity," courts have generally been reluctant to strike them down. *See* Reese, *supra* (citing *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993); *Long v. First Union Corp of Virg.*, 86 F.3d 1151 (4th Cir. 1996)).

10. The issue of bilingual education is not new. Both Texas and California banned classroom instruction in Spanish during the 1850s, despite the fact that many Latino children knew only Spanish. *See* Tijerina Expert Rpt., *infra*, at 24; Clara Mercedes Piloto, *Stilled Voices in America's Educational System*, 93 McNair Journal (University of California, Berkeley). More recently, despite court intervention to require bilingual educational services, *see infra* Part II.B.2, California, Arizona, and Massachusetts have all passed ballot initiatives to restrict bilingual education. Indeed, the heated campaign for the California initiative was expressly targeted at Spanish-speaking students. *See* George Martinez & Kevin Johnson, *Discrimination by Proxy: The Case of Proposition 227 and the Ban of Bilingual Education*, 33 U.C. Davis L. Rev. 1227 (2000).

Second, Spanish-speaking students or students accustomed to interacting with a Spanish-speaking community add to the language and cultural diversity of the campus. Such students can serve as a language and cultural resource to their classmates learning Spanish—providing insight into local customs and dialects—in preparation for study abroad or for a career in an increasingly international economy. As one education policy analyst has written, "Here is a resource to help schools become truly global in outlook and in the ways they prepare students. . . . [S]chools could build on the skills and culture that Hispanic[s] bring to school with them in order to make all students both bilingual and more successful learners." Anne C. Lewis, *Growing Hispanic Enrollments: Challenge and Opportunity*, 80 Phi Delta Kappan 3-4 (1998).

Third, because many Spanish-speaking communities are underserved, Spanish language ability and sensitivity (and thus the presence of Latino students) is relevant to enhancing a university's community service programs.[11] The improvement of these programs provides numerous benefits to the University as a whole, as students experience the personal and professional benefit that comes from serving those less fortunate.

2. *Educational Attainment*

The Latino community has attained lower levels of education than any other major racial or ethnic group in the United States. The statistics are alarming, if not shameful.

11. In a study of 19,915 college students, Latino students tended to increase their commitment to activism over the course of their college years (defined as a composite measure of seven items reflecting the importance of getting involved in one's community and working for political and social change), whereas white students tended to decrease their commitment to activism over the same time period. *See* Lori J. Vogelgesang, *The Development of Civic Values and Skills: An Analysis by Race, Gender and Social Class*, *available at* http:/www.diversityweb.org/Digest/Sp.Sm00/civic.html. The study also noted that those white students who participated in more cross-racial interactions increase their commitment to activism, yet another benefit of ethnic/racial diversity. *See id.*

Nationally, a striking 27.3% of Latinos over the age of twenty-five have less than a ninth grade education; in comparison, just 4.2% of whites suffer such low education attainment. *See* U.S. Census Bureau, *Current Population Reports: The Hispanic Population in the United States* at 4-5 (March 2000). In addition, only 57.0% of Latinos over the age of twenty-five have graduated high school, compared to 88.4% of whites. *See id.* As one might expect, these trends carry over into higher education. Just 10.6% of Latinos hold bachelor degrees, compared to 28.1% of whites. *See id.* at 5. In addition, only 2.2% of Latinos hold masters degrees, 0.7% hold professional degrees, and 0.5% h ve doctorate degrees, whereas the white population has attain d each of these credentials at almost three times those rates. *See* U.S. Census Bureau, Current Population Survey (March 2000) (unpublished data).

The numbers for the Latino population in Michigan, the home state for the majority of the University's students, are not much better. As of 2000, 19.2% of Latinos in Michigan over the age of twenty-five had less than a ninth grade education, compared to 5.7% of blacks and 4.1% of whites. *See* U.S. Census Bureau, *SF 3*, *supra* (figures compiled by Dr. Robert Aponte, co-author of Robert Aponte & Marcelo E. Siles, *Michigan's Hispanics: A Socio-Economic Profile* (JSRI 1994) (analyzing these same indicators based on 1990 census data)). In addition, only 62.3% of Latinos statewide graduated high school, compared to 74.1% of blacks and 85.3% of whites, and just 12.9% of Michigan Latinos had attained bachelor degrees, compared to 22.6% of whites. *See id.*

In light of this educational gap in the Latino community, Latino students who qualify for college or postgraduate education possess unique perspectives and insights into issues of educational reform, educational equity, and other related topics (e.g. access to information on higher education, school vouchers, funding schemes, standardized testing, charter schools). Discussions of how to narrow the education gap and why the current educational system is failing certain groups

require a diversity of experiences and perspectives. Because many students grapple with these issues for the first time in college or law school, the Latino perspective—often grounded in first-hand experience and observation—is integral to ensuring a comprehensive and nuanced dialogue.

3. *Employment and Economic Profile*

Although Latinos show strong levels of labor force participation—indeed, higher than both whites and blacks—Latinos, on average, are unemployed at roughly twice the rate of whites. *See, e.g.*, U.S. Census Bureau, *The Hispanic Population in the United States*, *supra*, at 5. In addition, among those employed, Latinos are more likely than any other racial or ethnic group to be in low-wage service sector jobs—including food preparation, personal service, cleaning/maintenance jobs—and least likely to be in high-paying managerial positions and professional occupations. *See id.* For example, 19.4% of Latinos toil in the service sector, compared to just 11.8% of whites, and only 14.0% of Latinos work in professional positions, compared to 33.2% percent of whites. *See id.* The story is much the same in Michigan, where unemployment rates of Latino males have been almost double those of white males, and where a majority of employed Latinos work in low-wage manufacturing, service, and retail trade jobs.[12] *See* Aponte & Siles, *supra*, at 5-7.

As a result of this skewed job distribution, Latinos trail all other racial and ethnic groups in benefits and income levels. Even though two-parent working families are more prevalent among Latinos than other groups, only 28.1% of Latino workers had employer-provided pension plans in 1999, compared to 41.6% of African-Americans and 46.6% of whites. *See* NCLR, *Beyond the Census: Hispanics and an American Agenda*, at 19 (August 2001) (citing March 1999 Current Population Survey). Similarly, Latino families are the least likely to have health

12. The number of Latinos in agricultural jobs was artificially depressed because of the seasonal nature of those jobs and the timing of the census survey. *See* Aponte & Siles, *supra*, at 7.

insurance benefits. In 1999, only 43.4% of Latinos had employer-based health coverage, compared to 52.0% of blacks and 68.4% of whites. *See id.* at 22 (citing March 2000 Current Population Survey). Latinos also earn the lowest annual per capita income among all major racial and ethnic groups at just $13,003, compared to $14,953 for blacks and $26,134 for whites. *See* NCLR, *Hispanic Income Fact Sheet* (November 2002) (citing U.S. Census Bureau, *Money Income in the United States: 2001*). Furthermore, the median household income for Latino married-couple families in 1999 was only $40,614, whereas black and white families enjoyed median incomes of $51,514 and $63,862, respectively. *See id.* Similarly, in Michigan, the median household income for Latinos was $38,481, lagging behind whites by well over $8,000. *See* U.S. Census Bureau, *SF 3*, *supra* (figures compiled by Dr. Aponte).

Not surprisingly, given these benefit and income figures, Latinos trail whites in net asset accumulation. In fact, in 1998, Latino families held just four percent of the wealth of white families. *See* NCLR, *Beyond the Census*, *supra*, at 19. Moreover, 22.8% of Latinos nationwide—including 30.3% of Latino children—live in poverty, compared to only 7.7% of whites; and 19.2% of Latinos in Michigan—including 21.7% of Latino children—live in poverty, compared to 7.4% of whites. *See* U.S. Census Bureau, *The Hispanic Population in the United States*, *supra*, at 6; U.S. Census Bureau, *SF 3*, *supra* (figures compiled by Dr. Aponte).

Given this dire employment and economic profile, Latinos as a group share a community experience of struggle—whether they are among the bulk of Latinos in poverty or among the more fortunate.[13] As a result, Latino students are likely to have

13. On a related note, the shift to an admissions policy focusing on socio-economic status instead of race is problematic. Often with no more than one generation out of poverty, low levels of accumulated wealth, and weak educational backgrounds, many children of the Latino middle class are not sufficiently prepared to compete with their middle-
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personal insights into a range of employment and economic issues, such as employment law, class structures, social programs and health care reform. These personal insights will often lead to viewpoints that are distinct from those of the majority of American society—viewpoints that are integral to a rich and complete classroom discussion. Given the importance of these difficult issues to the future of the country, it is appropriate for the state to take measures to ensure that college and law students be presented with these perspectives.

4. *Immigration and Citizenship*

Although the majority of Latinos in the United States are native born and a significant number are second- or third-generation United States citizens, Latinos are unique among contemporary American ethnic groups, in part, because a large percentage of their population is foreign born. According to the 2000 census, nearly forty percent of the Latino population is foreign born, and Latinos make up nearly half of the total foreign-born population of the United States. U.S. Census Bureau, *Profile of the Foreign Born Population in the United States: 2000* at 24 (issued Dec. 2001).[14] By comparison, less than four percent of the white population is foreign born. *Id.* Furthermore, whereas approximately seven percent of the white population has at least one parent who is foreign born, nearly thirty percent of the Latino population falls into that category.[15] *Id.* at 25. As a

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class white peers. *See* Patricia Gandara, *Latinos and Higher Education: A California Imperative, Chicano/Latino Public Policy Seminar and Legislative Day* – Proceedings (Feb. 1-2, 2000).

14. This data excludes the undocumented immigrant population, which is estimated to be well over five million persons and primarily Latino. *See* U.S. Dep't. of Justice, *1997 Statistical Yearbook of the Immigration and Naturalization Service* (Issued Oct. 1999) at 199. This data also excludes Puerto Ricans, who were granted statutory United States citizenship in 1917.

15. In fact, sixty-five percent of Latino students in elementary and high school have at least one foreign-born parent. U.S. Census Bureau, *Current Population Reports: School Enrollment in the United States – Social and Economic Characteristics of Students* (issued Oct. 1999).

result, the majority of Latinos in the United States have personal experience with issues of immigration, either through their own life experiences or those of a parent.

Latinos are also unique among American ethnic groups in terms of the pattern of their migration to the United States. Unlike the typical model of European immigration to America, which was characterized by a short wave of large-scale immigration, Latino immigration has continued at a high level throughout the twentieth century. This has produced dramatic changes in the demographics of American society. In fact, as stated *supra*, Latinos have now surpassed African Americans as the largest minority group in the United States, and, for the first time since the nineteenth century, constitute the majority of the children born in the State of California. *See* Genaro C. Armas, *Hispanics Now Outnumber Blacks in U.S.*, Associated Press, January 22, 2003; *Latino Majority Arrives – Among State's Babies*, Los Angeles Times, February 6, 2003, at A1. Moreover, immigration has transformed the Latino community itself. Whereas in 1970 over eighty percent of American residents of Mexican descent were born in the United States, recent data indicates that figure is now less than forty percent of the Mexican descent population. David G. Gutierrez, *Walls and Mirrors: Mexican Americans, Mexican Immigrants, and the Politics of Ethnicity* 183 (University of California Press, 1995); Pew Hispanic Center/Henry J. Kaiser Family Foundation, *2002 National Survey of Latinos* at Table 1.16 (issued Dec. 2002).[16] Thus, unlike European immigrants, who over time were exposed to smaller and smaller numbers of persons who had immigrated from their country of origin, American-born Latinos have

16. These numbers are also true of the Latino population as a whole, although to a lesser degree. Whereas nearly forty percent of the present Latino population of the United States is foreign born (*supra*), in 1970, less than twenty percent of the Latino population was born outside the United States. U.S. Census Bureau, *Race and Hispanic Origin of the Population by Nativity: 1850 to 1990* (Issued March 2001).

continued to interact with Latino immigrants, thereby reinforcing ties based on family, language, history, and culture.[17]

The personal experience of Latinos with immigration allows them to bring a unique perspective to the classroom. Discussions regarding legal distinctions between citizens and non-citizens, the rights of immigrants generally, and issues of assimilation and Americanization are enhanced by the presence of Latino students. This is particularly true in light of debates—following the September 2001 terrorist attacks—about balancing an increasingly open border with the need to protect homeland security. Barbara Hines, *So Near Yet So Far Away: The Effect of September 11th on Mexican Immigrants in the United States*, 8 Tex. Hisp. J. L. & Pol'y. 37 (2002). As to each of the issues listed above, as well as numerous others, the presence of a critical mass of Latino students will improve the education of other students by adding to the diversity of the views expressed in the classroom and providing personal familiarity with issues of immigration, naturalization, and Americanization in the twenty-first century by persons whose culture has been shaped by a unique immigration experience.

5. *Racial Discrimination*

As is the case with African Americans and Native Americans, Latinos have suffered a long history of racial discrimination in the United States. For Mexican Americans, that history stretches back to the nineteenth century, when they were systematically dispossessed of their land holdings by incoming Anglo settlers. Expert Report of Dr. Andres Tijerina ("Tijerina Expert Rpt.") at 6 (October 11, 2001) (filed in *Balderas v. Texas*, Civil Action No. 6:01 CV158 (E.D. Tex. 2001)). In addition, for both Mexican Americans and other

17. Conversely, it is undoubtedly true that American-born Latinos and America itself has had a strong influence on Latino immigrants. In fact, of those Latinos who immigrated to the United States prior to 1970, approximately seventy-five percent have become American citizens. NCLR, *The Hispanic Population of the United States, supra,* at 3.

Latino groups, racial discrimination has been and continues to be a persistent element of the American experience in the twentieth and twenty-first centuries.

Racial discrimination against Latinos—though present in many elements of society—has been epitomized by the enforced segregation of Latinos from white Americans in housing, as well as by other forms of discrimination against Latinos in voting, employment, and the criminal justice system. The segregation of Latinos in education is discussed in detail, *infra* Part II.B.1. The residential segregation of Mexican Americans in the Southwest was accomplished primarily through the use of racially restrictive housing covenants that continued from the early 1900s to the late 1970s. Tijerina Expert Rpt. at 23. For example, in the County of Los Angeles during the mid-1940s, approximately eighty percent of municipalities employed restrictive housing covenants that excluded Latinos, African Americans and Asians. Declaration of Dr. Albert M. Camarillo ("Camarillo Decl.") at 8 (October 12, 2001) (filed in *Ruiz v. Santa Maria*, CV 92-4879 LGB (Shx) (C.D. Cal. 1992)). The separate and unequal status of Latinos in housing was replicated in public spaces. In both Texas and California, Latinos were denied service in restaurants, swimming pools, barber shops and theaters. Camarillo Decl. ¶11; Tijerina Expert Rpt. at 23. In fact, so as to avoid any confusion, Latinos in both Texas and California were often greeted with signs stating "No Negroes or Mexicans Allowed" or "White Trade Only." Camarillo Decl. ¶11. Similar, though subtler, racial discrimination against Latinos remains evident today. For example, despite the fact that the Latino population has grown dramatically in recent years, Latinos are now more segregated from white Americans than at any time in the recent past. NCLR, *Beyond the Census, supra*, at 9. Whereas the average white American lives in a neighborhood that is approximately six percent Latino,

the average Latino resides in a neighborhood that is over forty percent Latino. *Id.*[18]

The second-class status of Latinos also extended to the area of voting rights. During the early 1900s, Latinos in Texas were discouraged or precluded from voting through the use of poll taxes, the elimination of interpreters at the polls, and the institution of a "White Man's Primary" by the Democratic Party, which as one newspaper reported, "absolutely eliminate[d] the Mexican vote as a factor in nominating county candidates . . ." Tijerina Expert Rpt. at 14. Many of these practices were replicated in California, where the Latino vote was rendered irrelevant through racial gerrymandering and the use of at-large elections for city positions. Expert Report of Dr. Albert Camarillo ("Camarillo Expert Rpt.") at 9-10 (July 1, 2000) (filed in *Ruiz v. Santa Maria*, CV 92-4879 LGB (Shx) (C.D. Cal. 1992)); Expert Report of Dr. Ricardo Romo ("Romo Expert Rpt.") at 36 (March 6, 1994) (filed in *Ruiz v. Santa Maria*, CV 92-4879 LGB (Shx) (C.D. Cal. 1992)). As a result, despite the presence of a large Latino population in Los Angeles throughout the twentieth century, only one Latino was elected to the Los Angeles City Council prior to the mid-1980s. Camarillo Expert Rpt. at 11.

Latinos have also suffered racial discrimination in the area of employment. In the American Southwest, Anglo stereotypes of Latinos often limited the latter to low-wage, agricultural labor repugnant to white Americans. Romo Expert Rpt. at 23-30. In addition, efforts by Latinos to unionize or otherwise advocate for improved labor conditions were often met with violence on the part of local Anglo residents. *Id.* Unfortunately, several recent studies indicate that racial discrimination against

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18. The increasing segregation of Latinos is explained, in part, by a recent report prepared for the Department of Housing and Urban Development, which indicates that discrimination against Latinos in the housing market rose during the 1990s. The Urban Institute, *Discrimination in Metropolitan Housing Markets: National Results from Phase I HDS 2000* at iii (November 2002).

Latinos in employment is not a remnant of American history. International Labour Organization, *Discrimination Against Racial/Ethnic Minorities in Access to Employment in the United States: Empirical Findings From Situation Testing* at 4.51, *available at* http://www.ilo.org/public/english/protection/migrant/papers/usempir/index.html (finding that discrimination against Latinos and African Americans in employment remained prevalent). For example, even after accounting for differences in education, experience and other job-relevant qualifications, racial and ethnic minorities, including Latinos, remain under-represented in higher-level occupations, do not receive the same wages as non-minorities for performing the same work and experience higher rates of job dismissal. *Id.* at 2.2.1.

Current statistics from the criminal justice system are even more disturbing. Whereas Latinos constitute approximately twelve percent of the nation's population, they comprise nearly thirty percent of the federal prison population. National Council of La Raza, *Latinos and the Federal Criminal Justice System* (July 2002). This is particularly troublesome given that studies show that Latinos and other ethnic/racial minorities continue to be targeted by local police due to racial profiling. Leadership Conference on Civil Rights, *Justice on Trial: Racial Disparities in the American Criminal Justice System.*[19]

The experience of racial discrimination provides Latino students with a unique perspective in numerous classroom settings. For example, Latino students are likely to provide

19. The report cites two particularly poignant examples of the racial profiling of Latinos. First, a Louisiana State Police Department training film specifically encouraged officers to initiate pretextual traffic stops against Latinos. *Id.* at 2. Second, a December 1999 report by the New York Attorney General found that African Americans and Latinos made up over eighty-four percent of those targeted for "stop and frisk" pat downs by New York Police Department officers, despite the fact that minorities were less than fifty percent of the city population, and stops of minorities were less likely to yield arrests that those of white New Yorkers. *Id.* at 4-5; Office of the Att'y. Gen. of N.Y., *The New York City Police Department's "Stop and Frisk" Practices* at Table II.A.3 (1999).

distinct contributions to discussions of race in American history, the history of American colonialism, voting rights and segregation. In addition, Latino students may bring unique perspectives to discussions of various "hot button" issues, such as bilingual education, racial profiling, the role of the mass media in perpetuating ethnic stereotypes, the death penalty, and hate crime legislation. As to each of these issues, Latino students will increase the variety of the viewpoints expressed at the University and thereby the vitality and diversity of the academic debate.

II. THE UNIVERSITY OF MICHIGAN HAS A COMPELLING INTEREST IN REMEDYING THE CONTINUING EFFECTS OF DISCRIMINATION AGAINST LATINOS

A. Public Education Bears A Special Responsibility in Eradicating Societal Discrimination

Among the most frequently excerpted portions of this Court's unanimous opinion in *Brown v. Board of Education* is the paragraph that begins by recognizing that "[t]oday, education is perhaps the most important function of state and local governments." 347 U.S. 483, 493 (1954). Chief Justice Earl Warren's eloquent description remains as true today as it was then. As the Court has stated, education plays a vital role in "'inculcating fundamental values necessary to the maintenance of a democratic political system,'" as well as in "provid[ing] the basic tools by which individuals might lead economically productive lives to the benefit of us all." *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (quoting *Ambach v. Norwick*, 441 U.S. 68, 77 (1979)).

Education's "fundamental role in maintaining the fabric of our society," *id.*, embraces both a capability and an obligation to address fundamental social issues, with respect to both the individual and the community as a whole. As to the issue of general societal discrimination, public education is implicated in two ways. First, public education bears a responsibility for the continued existence of societal discrimination because it

reflects, at minimum, a failure to inculcate successfully one of our nation's central ideals—equal treatment regardless of race. Second, state-run educational institutions are uniquely situated to take steps to eliminate societal discrimination and to promote the equality that could flourish in its absence.

The teaching of anti-discrimination values in education necessarily requires the presence of persons who have been and remain the frequent targets of societal discrimination, such as Latinos. Through academic discourse and extracurricular experience, the presence of racial/ethnic diversity plays a critical role in fulfilling education's fundamental mission of "transmitting 'the values on which our society rests.'" *Plyler*, 457 U.S. at 221 (quoting *Ambach*, 441 U.S. at 77). Consequently, in determining whether an individual minority student should be admitted, public institutions of higher education take an important step toward redressing discrimination and toward ensuring its future demise. Failure to take this step misses a critical opportunity and undermines the educational mission. As this Court has stated, "by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority." *Plyler*, 457 U.S. at 222. This conclusion applies with equal vigor to higher education today. By increasing minority access to the most-esteemed professions, the state strikes a strong blow against future societal discrimination.

B. Latinos Encounter Discrimination at All Levels of the American Public Educational System

Even if some question remains as to the scope of a public educational institution's responsibility to address societal discrimination, there should not be any question as to its ability to rectify the effects of discrimination within the public educational system itself. This Court has repeatedly held that race-conscious affirmative action programs are permissible where the government actor has a "strong basis in evidence" for its conclusion that remedial action is necessary. *City of*

Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989). The law is also clear that a public actor's remedial interest encompasses the power not only to remedy the effects of its own past discrimination, but also to act race-consciously to avoid the perpetuation of discrimination caused by other public or private entities. *See id.* at 492. Therefore, the University of Michigan should have the authority to eradicate the effects of discrimination within the school systems that fall within its "jurisdiction," or potential pool of students. Because the University draws from a national pool of students, discrimination within school systems nationwide may have a bearing on the equal protection inquiry. *See* The Princeton Review, University of Michigan-Ann Arbor, Student Body Profile, *available at* http://www.princetonreview.com; University of Michigan Law School, Prospective Students: Admissions, *available at* http://www.law.umich.edu/Prospectivestudents/admissions (over 30% of the University's undergraduate student body and over 70% of the Law School's students are from outside Michigan). Accordingly, in this section, we chronicle the history and current reality of discrimination against Latinos in public education in the United States.

1. *School Segregation*

As a result of both *de facto* and *de jure* segregation, Latino students are the most segregated minority group in contemporary American public education. *See* Erica Frankenberg *et al.*, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, The Civil Rights Project, Harvard University, at 4, 32-33 (2003) (hereinafter, "Harvard Study"); Jack M. Balkin, *What Brown v. Board of Education Should Have Said*, 6 (2001). Latinos have been segregated from whites in public schools largely as a result of the *de jure* residential segregation practices documented *supra* in Part I.A.5. However, school officials and their policies have also, as a matter of state authority, ensured segregation by establishing the separate education of Latinos. *See, e.g.*, Carlos M. Alcala & Jorge C. Rangel, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 Harv.

De Jure Segregation of Chicanos in Texas Schools, 7 Harv. C.R.-C.L. L. Rev. 307 (1972).

Although this Court recognized Latinos as a group for purposes of civil rights protection under the Fourteenth Amendment in 1954 in *Hernandez v. Texas*, efforts to desegregate Latinos did not achieve the same level of success as efforts to desegregate African Americans throughout much of the civil rights era.[20] *See* Harvard Study, at 19; Montoya, *supra*, at 165-70. Moreover, in the aftermath of *Lau v. Nichols*, 414 U.S. 563 (1974) (holding that school district violated Title VI of the 1964 Civil Rights Act and discriminated on the basis of race and national origin because its failure to provide remedial English instruction to non-English-speaking students denied them a "meaningful opportunity to participate in the educational program"), court-ordered remedies did not focus on the rights of Latinos in the same manner as other victims of discrimination, but rather tended to focus on the enforcement of orders providing for bilingual education. *See* Harvard Study, at 20 & n.75.

Despite the history of legal battles, Latino students today are the most segregated minority group in the United States, with steadily rising rates of segregation. *See* Harvard Study, at 4, 32-33; Balkin, *supra,* at 6 ("The present tendency toward segregation of Latinos is, if anything, even more pronounced than that with respect to blacks."). Currently, 76.3% of Latinos attend predominantly minority schools, 37.4% of Latinos attend 90-100% minority schools, and 10.8% attend 99-100% minority schools. *See* Harvard Study, at 28. In stark contrast, 10.8% of whites attend predominantly minority schools, just 0.7% attend 90-100% minority schools, and just 0.03% attend 99-100% minority schools. *See id.* at 28. The average Latino student goes to school where less than thirty percent of the school population

20. Indeed, this Court did not explicitly recognize the right to school desegregation of Latinos alongside African Americans until 1973, *see Keyes v. School District No. 1*, 413 U.S. 189 (1973) (addressing segregation in the Denver school system), nearly two decades after its historic decision in *Brown v. Board of Education*.

is white, and the percent poor (44%) is more than twice that in a white student's school (19%). *See id.* at 35. This trend is reflected in Michigan, which ranks near the top third of most segregated states for Latino students, as measured by the percentage of those students in 90-100% minority schools. *See id.* at 50-52.

2. *Language-Based Discrimination and Barriers*

Language barriers, perpetuated both through unlawful state practices and through less direct means, continue to hurt Latino students. The history of language-based discrimination against Latinos in education dates back to the 1800s. *See supra* note 10. Starting in the 1970s, courts occasionally intervened to prevent students from being denied a meaningful opportunity for education on the basis of language. *See, e.g., Lau v. Nichols*, *supra*; *United States v. Texas*, 342 F. Supp. 24 (E.D. Tex. 1971) (ordering bilingual/bicultural education to prevent segregation of Mexican Americans). Nevertheless, subtler forms of language discrimination have persisted on local levels. *See, e.g.*, Lewis, *supra* at 3-4 (school districts forbidding Latino students to speak Spanish on the playground and punishing those who did); Heriberto Godina, *The Violation of Mexican American Students' Education Rights: A Midwestern Ethnography*, 2 J. of Gender Race & Just. 387, 398 (1999) (informal school policy did not permit students to speak Spanish). The new movement—largely directed at Latinos—is not so subtle, and has succeeded in restricting access to bilingual education in several states. *See supra* note 10. Regardless of the merits of this movement, few, if any, school districts have adopted effective alternatives to bilingual education to prevent Spanish-speaking children from being left behind.

In addition, the language, cultural, and socioeconomic divide between school personnel and the Latino community limits detection of discrimination and often precludes effective participation by Latino parents in their children's educations. "The gulf between parents of color and schools remains especially wide, separated by legacies of racism, deficit thinking,

and mutual distrust. . . . [Latino] parents and their children not only face more institutional barriers, such as discriminatory tracking, but also have fewer resources for overcoming them, such as high status cultural and social capital." Susan Auerbach, *"Why Do They Give the Good Classes to Some and Not to Others?" Latino Parent Narratives of Struggle in a College Access Program*, 104 Teachers College Record 1369, 1370-72 (2002) (examining struggles of Latino parents and stories of bureaucratic rebuff in their encounters with school staff); *see also* Godina, *supra*, at 391 ("[T]he lack of communication between the Mexicano parents and school personnel contributed to their children's marginalization."). A Michigan State University study of migrant Latino children in Michigan found similar barriers between school and home. *See* Maria Teresa Tatto, et al., *The Education of Migrant Children in Michigan: A Policy Analysis Report*, Latino Studies Series Occasional Paper No. 72, at 10, 15-20 (November 2000).

3. *Tracking*

Many school districts have engaged in discriminatory tracking—also known as "ability grouping"—in a manner that diverts Latino students into remedial or vocational classes, with the natural consequence of limiting opportunities for academic success. Though a more subtle form of discrimination than outright segregation, tracking of Latino students into lower-level curricula is not a new phenomenon. *See* Tijerina Expert Rpt. at 26-27 (noting that since the 1920s, Mexican American students were put into "developmental" classes, ostensibly because they needed special attention). Numerous studies also document contemporary evidence of improper tracking of Latino students. *See, e.g., Godina, supra*, at 399 (finding that most Mexican-American students were slotted into low-track classes in a segregated setting); Pamela Anne Quiroz, *The Silencing of the Lambs: How Latino Students Lose Their Voice in School*, Working Paper No. 31, at 9 (JSRI 1997) (noting the placement of Latino students into low ability tracks); U.S. Dept of

Education, *The Condition of Education* 11 (1995) (reporting that Latino students are significantly less likely than their white classmates to have taken the core college preparatory curriculum). In fact, one study of migrant Latino students in Michigan faulted the practice of tracking in that state as well. *See* Tatto *et al.*, *supra*, at 14. In addition, many believe that these practices contribute to the negative educational experience of Latino students, such that only the most resilient students survive the path and graduate. *See* Quiroz, *supra*, at 9; Godina, *supra*, at 399 (citing T. Falbo, *Latino Youth and High-School Graduation*, American Psychological Association (1996)).[21]

4. *Obstacles to Completion of Higher Education*

Those Latino students who successfully overcome school-administered obstacles to graduate high school face further hurdles on the path to higher education. Related to curriculum-based tracking, teachers and counselors disproportionately channel Latino students into two-year colleges, where they fall prey to the high attrition rates prevalent in those institutions. *See* David Erlach, *Hispanics and Higher Education: Multicultural Myopia*, 75 J. of Educ. for Bus. 283 (May-June 2000). Approximately half of Latino college enrollment is in two-year colleges (compared to just thirty percent of black and white undergraduates), and only twenty-seven percent of Latino students transfer from two-year to four-year schools. *See* Richard Fry, *Latinos in Higher Education: Many Enroll, Too Few Graduate*, at 6 (Pew Hispanic Center 2002); Michele N-K Collison, *For Hispanics, Demographic Imperative Drives Educational Mandate*, 16 Black Issues in Higher Educ. 56 (1999). As a result, with the exception of community colleges, Latinos are underrepresented at all levels of higher education,

21. The statistics are consistent with this observation, as the high school dropout rate for Latinos (27.8%) aged 16 to 24 far outpaces that of blacks (13.1%) and whites (6.9%). *See* U.S. Dept of Education, *The Condition of Education* 164 (2002) (citing U.S. Census Bureau, Current Population Survey (October 2000)).

including four-year colleges, masters' programs, professional degree programs, and Ph.D programs. *See* U.S. Dept of Education, National Center for Education Statistics, *Fall Enrollment in Colleges and Universities Survey* (Table 207) (2000) (in four-year colleges, only 6.6% of students are Latino,[22] while 11.0% are African American and 75.2% are white); U.S. Dept of Education, National Center for Education Statistics, *National Postsecondary Student Aid Study* (2000) (only 7.2% of master's degree students, 5.1% of first-professional degree students, and 6.4% of doctoral students are Latino). Thus, as a practical matter, there exists in the United States a two-tiered higher educational system in which Latino youth continue to be directed toward lower status community colleges.

Recent statewide measures limiting the use of race in college and graduate school admissions have only exacerbated this two-tiered system. In California, for example, there has been a measurable erosion of access to higher education for Latinos, especially at the more prestigious campuses in the system. The premier public schools of higher education in that state, U.C. Berkeley and UCLA, both experienced precipitous declines in new Latino enrollees, falling from 14.5% and 15.8% in 1997 to 7.5% and 11.0% in 1998, respectively. This "cascading" effect—the movement of less competitive eligible students to less sought-after campuses—has disproportionately impacted Latino students. *See* Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences*, The Civil Rights Project, Harvard University, at 50 (February 2003);[23] Gandara, *supra*.

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22. The disproportionate level of Latino representation is striking given that Latinos constitute fifteen percent of the total college-age population. *See* U.S. Census Bureau, *Current Population Survey* (March 2000) (Table 9).

23. As this study indicates, the percentage plans adopted by California, Texas and Florida have not been as effective as the race-conscious admissions policies previously used by those states in securing a critical mass of minority students at the most prestigious state universities. *See id.* at 45-50.

C. Latino Students Have Suffered and Continue to Suffer Discrimination at the University of Michigan

The most direct remedial justification for the University's current admissions program is the University's own role in discrimination against Latinos and other racial minorities. The long history of University-sanctioned discrimination against African-Americans by administrators and other students, resulting in the continued underrepresentation of such students, is well documented in the Intervenors' brief. We focus here on the more recent history of discrimination against Latinos at the University.

1. *Past and Present Discrimination on the University Campus*

In 1968, *after* the University instituted its "Opportunity Program" to increase enrollment of underrepresented minorities, there were still only thirty "Spanish" students out of 32,261 on campus, comprising a mere 0.1% of the University's student body. *See* Expert Report of James D. Anderson, at 15 (filed with district court). Thereafter, Latino enrollment, measured by Spanish-sounding surnames, rose only incrementally to 0.2% in 1970, to 0.6% in 1972, and to 1.7% in 1984. *See id.* at 25, 43. These low numbers reflect the fact that the University lacked the personnel, knowledge, and awareness to recruit Latino students. *See id.* at 17. According to the Chicano recruiter for the University's Opportunity Program, there were no Chicano staff persons in the University, and a lack of communication between the University and the Chicano community hampered recruitment efforts. *See id.* at 28. Furthermore, there were virtually no efforts to establish contacts with principals, counselors, teachers, and social workers who worked with large numbers of college-bound Latino students or to gather systematic data on Latino high school students to permit strategic recruitment. *See id.* Latinos were thus excluded from the University's concept of minority, such that "[b]rown people could have no place in [the University's] bi-racial universe."

Id. In fact, it was not until several years after implementation of the 1987 Michigan Mandate—the University's policy to address the issues affecting underrepresented minorities—that Latino enrollment climbed once again, reaching 4.6% by 1995. *See id.* at 74.

Despite recent gains in Latino enrollment, Latino students today continue to encounter discrimination on the University campus in various forms. In one particularly revealing episode, a white Spanish professor taught his class the racially offensive terms of "wetback" and "Mojado," which one Mexican-American student deemed "equivalent to the 'N' word for a black person." *See* Deposition of Diego Bernal ("Bernal Dep.") (LSA Class of 1999 and current graduate/law student at the University), at 20-21 (filed with district court). Even after being informed of its inappropriate usage and cultural meaning, the professor refused to apologize or even acknowledge the issue, and the student dropped the class. *See id.* Further, the University has subjected Latino student groups to greater levels of surveillance than predominantly white groups. *See* Michigan Daily On-Line, *A Discriminatory Union: Police Must Patrol All Events Equally* (Nov. 22, 1999) ("[E]vents targeting specifically black or Latino/a students have been monitored with a much stronger [University] police presence than those dominated by white students. In addition, these students are often subjected to wristband and ID verification and sometimes have to leave via the side door rather than the front."); Bernal Dep., at 26-27. Furthermore, the University has failed to prevent discrimination against Latinos by other students. Current Latino students and recent graduates have recorded incidents such as being subjected to racial slurs (e.g. "spic") and racist jokes by teammates and classmates; white students dressing up as "Mexican gangsters" for Halloween; and white students avoiding seats next to students of color. *See* Expert Report of Joe R. Feagin, at 18-22 (sharing results of student focus group sessions) (filed with district court); Bernal Dep., at 26. In sum,

the University has engaged in both active discrimination against Latinos through the conduct of its faculty and staff and passive discrimination against Latinos through its failure to mitigate the hostile racial climate on campus.

2. *Continued Discrimination in Admissions*

In addition to the discrimination described above, one cannot ignore that, absent the consideration of race as a plus factor, the University's current admissions policy would further discriminate against Latinos and other ethnic/racial minorities. Under the current policy, admissions counselors evaluate applicants based on their selection index score, which is determined by the number of points the applicant receives (up to a possible total of 150) based on academic and other factors. Thus, in addition to the points awarded an applicant for his or her high school grade point average ("GPA") and score on one of two standardized tests (ACT or SAT), the University assigns a number of points based on several "SCUGA" factors.[24] Four of the five "SCUGA" factors—"S," "C," "G" and "A"—have a clear and demonstrable discriminatory effect on Latino and other minority applicants to the University. Specifically, because each of these factors are far more likely to enhance the selection index point totals of white applicants than those of their Latino and African American counterparts, their use, unless balanced by the consideration of race as a plus factor, renders minority applicants less competitive in the admissions process.

As demonstrated by the University's own admissions data for the years 1995 through 1998, the "S" and "C" factors negatively affect the applications of a disproportionate number of Latino and other minority students.[25] For example, as a result

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24. The term "SCUGA" refers to the following factors employed in the admissions process: school ("S"), curriculum ("C"), unusual ("U"), geographic ("G") and alumni ("A").

25. The University assigns up to ten "S" factor points based on the number of Advanced Placement ("AP") or International Baccalaureate ("IB") courses offered by the school, the school's average

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of past and ongoing racial segregation in housing and education, Latino high school students are far more likely than their white counterparts to attend schools that do not offer AP or IB courses. *See* Preliminary Expert Witness Report of Dr. Trent ("Trent Expert Rpt.") at 8 (finding that 29% of Latino students in the Detroit area attend schools offering no AP/IB courses, whereas only 4% of white students in the same area attend such schools) (filed with district court). This disadvantages minority applicants in two ways. First, because the University rates secondary schools, in part, based on the number of AP or IB courses they offer, minority applicants receive less benefit from the "S" factor than their white counterparts. Expert Witness Report of Dr. Jacob Silver and Dr. James Rudolph ("Silver/Rudolph Expert Rpt.") at 13-14 (filed with district court). This discriminatory effect is then compounded by the fact that the same minority students also receive less benefit from the "C" factor, which is based, in part, on the number of AP or IB classes taken by the applicant. Trent Expert Rpt. at 6. Thus, simply as a result of the secondary schools they attend, and regardless of how they perform at those schools, Latino and other minority students are precluded from earning "S' and "C" points available to white applicants.

The "G" and "A" factors have a similarly severe discriminatory impact on Latino applicants.[26] The "G" factor awards extra points to students who come from one of forty-five northern Michigan counties that are under-represented at the University. These counties are overwhelmingly white. In fact, less than one percent of the residents of these counties

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SAT score and the percentage of the school's students that attend college. Joint Appendix filed by parties in Court of Appeals ("JA") at 1118, 1148-49. The "C" factor calls for an award of between negative four and positive eight points based on the strength of the curriculum taken by the applicant. *Id.*

26. The selection index allows for two, six, or ten points to be awarded for geographic residence ("G") and one or four points to be awarded for alumni relationships ("A"). JA at 1118, 1150-51.

are Latino or African American. Trent Expert Rpt. at 7; Silver/Rudolph Expert Rpt. at 14-15. Similarly, given that Latinos historically have had virtually no presence at the University, the "A" factor, which awards points to applicants related to graduates of the University, necessarily perpetuates low Latino representation on campus. Trent Expert Rpt. at 8. In fact, the record demonstrates that approximately seventy-five percent of the students admitted with alumni relationships were white, whereas only three percent of such students were Latino. Trent Expert Rpt., Table 6.[27]

The severe discriminatory effect produced by the factors discussed above is particularly troubling given that these considerations add little, if anything, to the ability of an admissions officer to determine which applicants are most deserving of admission. For example, it is not inherently true that an applicant from an under-represented northern Michigan

27. The discriminatory impact produced by the "SCUGA" factors is compounded by the University's reliance on standardized tests in determining admission. Statistics show that Latino and African American high school students do not perform as well on standardized tests as their white counterparts, and, in fact, the gap is widening. The College Board, *2001 College Board Seniors Are the Largest, Most Diverse Group in History*, Table 9, *available at* http://www.colegeboard.com/press/article/0,3183,10429,00.html; *ACT Average Composite Score Steady for Fifth Straight Year*, *available at* www.act.org/bews/releases/2001/08-15-01.html; *Schools Blamed for Racial Gap in SAT Scores*, August 28, 2001, *available at* http://www.cnn.com/2001/fyi/teachers.ednews/08/28/sat.scores/index.html. Moreover, despite their widespread use, several studies indicate that both the SAT and ACT are poor predictors of academic performance in college, especially for Latino students. *See, e.g.*, Jonathan Baron and M. Frank Norman, *SATs, Achievement Test, and High School Class Rank as Predictors of College Performance*, 52(4) Educational and Psychological Measurement 1047, 1049, 1054 (1992); Christina Perez, *"The Truth Behind the Hype: A Closer Look at the SAT,"* Paper Presentation, 2002 NEACAC Conference, Fairfield University; Barbara Z. Pearson, *Predictive Validity of the Scholastic Aptitude Test (SAT) for Hispanic Bilingual Students*, 15(3) Hispanic Journal of Behavioral Sciences 342 (1993).

county or one whose parents attended the University (both of whom are likely to be white) is more deserving of admission or will contribute more to the University than a minority applicant from inner-city Detroit whose parents did not attend college. In addition, although one can understand the University's desire to distinguish between applicants with similar grades from different schools, there is no evidence in the record that the "S" factor, as measured by the University, is a useful predictor of student performance in college.

Furthermore, it is difficult, if not impossible, to argue that Michigan was unaware of the discriminatory impact of these factors at the time it adopted its current admissions program in 1998. As discussed *supra*, the University's own admissions data for the years 1995 through 1998 demonstrated that the "S," "C," "G" and "A" factors combine to produce a significant discriminatory effect on Latino and other minority applicants. The University nonetheless found these factors to be important, indeed necessary, in selecting an incoming class. The University's concurrent decision to balance the discriminatory effect they produce through the consideration of race should thus be respected.

CONCLUSION

Both including the unique life experience of Latinos for the benefit of all students and remedying the continuing effects of the aforementioned discrimination present compelling reasons for the University's modest consideration of race in its admissions program. Depriving educational institutions of this essential tool will not only bring further harm to the Latino community, but will impede the efforts of the state to cope with the increasing educational gap between the majority and its largest minority.

Respectfully submitted,

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APPENDIX

APPENDIX — *AMICI* STATEMENTS OF INTEREST

American GI Forum of the United States

The AGIF is the only Hispanic congressionally chartered veterans family organization with more than 500 chapters in the United States and Puerto Rico. The AGIF has been actively involved with veterans' issues, education and civil rights since 1948. Our outreach and educational programs promote pride, Hispanic recognition and accomplishment; provide leadership, networking opportunities, scholarships and educational attainment, and employment training and advancement.

Association of Hispanic Health Care Executives

The Association of Hispanic Healthcare Executives (AHHE) is dedicated to promoting access to healthcare for the Hispanic community. With a mission of promoting the availability and development of healthcare executives dedicated to enhancing the quality of and access to healthcare for the Hispanic community in the United States, we also are a founding member of the Institute for Diversity in Health Management, a subsidiary of the American Hospital Association. The Association of Hispanic Healthcare Executives was founded in 1988 as a national voluntary organization seeking to foster programs and policies to increase the presence of Hispanics in health administration professions. You can view our programs and activities by visiting our website: www.AHHE.org.

Association of Latin American Law Students

The Association of Latin American Law Students is dedicated to fostering the involvement of Latin Americans in the legal profession, as well as advocating for the needs of Latin American law school students. This dedication is evident in our mission and in the other programs ALALS provides to the law school community.

Appendix

Chancellor's Committee on the Status of Latinos (CCSL), University of Illinois, Chicago

Our organization supports Affirmative Action and the brief. We are the main campus organization of faculty and staff with student representation that addresses issues of concern to the Latino community on campus, including issues of recruitment and retention of Latino students.

Cuban American National Council, Inc.

CNC is the largest U.S. non-profit Hispanic organization developing affordable housing for low-income seniors, and is a pioneer in providing alternative education to at-risk students. Other Council programs include daycare and developmental services for infants/toddlers of adolescent mothers, and employment and training services for unskilled, undereducated recent immigrants, and individuals who face an English language barrier.

We support the University of Michigan admission policy because it helps Latino & other minorities take advantage of education opportunities they could not otherwise.

This or similar policy(s) are necessary in the face of thousands of cases of discrimination against minorities in the United States, and the disadvantages of Latinos vis-à-vis other social groups regarding education, income, college graduate rates, and others.

Dominicans 2000, Inc.

Dominicans 2000 is a non-profit organization established to implement projects designed to address the advancement of Dominicans and the progress of Latinos and others in the United States. The means of providing such advancement includes, creating networks, organizing forums and forming committees to conduct research and implement programs.

Appendix

An affirmative action program creates opportunities for individuals who otherwise would not be able to attend college. As an organization that assists young Latinos through the application process for colleges and universities, D2000 supports the creation and implementation of affirmative action policies that truly create opportunities for youth of color.

Dominican-American National Roundtable

The Dominican-American National Roundtable (DANR) is a non-partisan, non-profit corporation seeking to bring together the different voices of all people of Dominican origin in the United States. DANR is a national forum for analysis, planning, and action to advance the educational, economic, legal, social, cultural, and political interests of Dominican Americans. DANR aims to ensure for U. S. Dominicans the full exercise of the rights and freedoms guaranteed in the Constitution of the United States of America. With those objectives in mind, DANR is committed to enriching the quality of life in the United States by highlighting the contributions of Dominicans to the larger American society.

Hands On New York

As requested, Hands On New York, Inc. was formed exclusively to provide services that will improve the quality of life for low-income individuals and families in New York City.

We strongly believe that Affirmative Action is one of the greatest plans created by mankind because it allows minorities the opportunities that otherwise would have never been given. Affirmative Action must be maintained "By Any Means Necessary." It's the future of millions of minorities.

Hispanic Association of Colleges & Universities (HACU)

The Hispanic Association of Colleges and Universities (HACU) has championed the higher education success of the nation's youngest and largest ethnic population. The formal mission of HACU is to promote the development of member colleges and universities; improve access to and the quality of postsecondary educational opportunities for Hispanic students; and, to meet the needs of business, industry and government through the development and sharing of resources, information and expertise.

A decision against college admissions policies in place since the landmark Supreme Court *Regents of the University of California v. Bakke* decision in 1978 would create an immediate crisis for Hispanics, who already suffer the lowest college entrance and completion rates among all major U.S. population groups. HACU supports the University of Michigan in promoting diversity in college admissions policies.

Labor Council for Latin American Advancement (LCLAA)

"The Labor Council for Latin American Advancement (LCLAA) is a national organization representing the interests of approximately 1.7 million Latinos trade unionists in the United States and Puerto Rico. Founded in 1973, LCLAA builds coalitions between the Latino community and Unions in order to advance the civil, economic and human rights of all Latinos.

Numerous surveys and studies show the most common occupations for Latinos as service workers, precision production, and transportation. Latinos continue to occupy the lowest sector jobs and non-management positions due to an inability to access the educational resources to improve

the lives of their families. Race, gender, language and ethnic discrimination coupled with an inability to access the necessary academic resources to improve their economic standing continue to act as a barrier to acquiring high skilled professional and management necessary to help their children access higher education. Our society's professional workforce should be reflective of the population it serves. As 13% of the U.S. population, Latinos should have a fair and equitable opportunity to serve society's needs in professional and management positions.

Labor Council for Latin American Advancement (LCLAA)-Massachusetts Chapter

LCLAA is an AFL-CIO constituency group that represents the interests of the Latino community to organized labor and to public officials. Affirmative action has and will be a direct benefit to our membership and families.

Latino Honor Society

The Latino Honor Society, a student association of the Borough of Manhattan Community College, is in support of the affirmative action policies currently in place protecting the rights of underprivileged individuals.

Latino Issues Forum

Latino Issues Forum is a non-profit public policy and advocacy institute committed to advancing the interests of Latinos, including Mexican-Americans, in higher education, economic development, health care, public policy planning, and consumer protections in telecommunications, energy and preventing insurance redlining, fraud and marketing abuse. Its Board of Directors represents a cross-section of the Latino community, including nationally recognized Latino leaders,

organizational presidents, legal and academic scholars, community leaders and private sector executives. Latino Issues Forum has a particular concern with this case because of its impact on diversity in institutions of higher education.

League of United Latin American Citizens (LULAC)

The League of United Latin American Citizens is the largest and oldest Hispanic membership organization in the United States. With over 115,000 members in virtually every state of the nation, LULAC advances the economic condition, educational attainment, political influence, health and civil rights of Hispanic Americans. For more than 73 years, LULAC's members have sought increased opportunities in higher education for Hispanic students through the desegregation of public schools, reaching parity in school funding, the provision of scholarships, educational counseling and strong affirmative action programs. We believe that affirmative action programs like those in place at the University of Michigan are essential to overcoming the tremendous obstacles that college-bound Latino students are faced with.

National Association for Bilingual Education (NABE)

NABE is a non-profit national membership organization founded in 1975 to promote educational excellence and equity for language minority students. NABE supports programs that teach children with limited English proficiency, English while helping them attain continued academic excellence.

National Association of Latino Elected and Appointed Officials

The National Association of Latino Elected and Appointed Officials was established in 1976 to promote the full

participation of Latinos in the civic life of the United States. NALEO is a national non-profit membership organization whose members include officials from all parties and levels of government and their supporters. NALEO is committed to ensuring that all Americans have the opportunity to realize their full potential, which requires unhindered access to education and employment.

NALEO believes that affirmative action, properly implemented, is neither a system of mandatory quotas or set-asides, or the granting of preferences to unqualified people. NALEO believes affirmative action is about opening up the system to all and providing a climate where all persons have a chance to succeed according to their efforts and abilities. Opening the system in this fashion often requires recruitment and training efforts, especially for those historically denied opportunity.

National Conference of Puerto Rican Women (NACOPRW)

NACOPRW as a non-profit/non partisan organization that promotes the full participation of Puerto Rican women and other Hispanics in the social, economic, political life in the U.S., we support this affirmative action amicus brief.

National Council of La Raza

The National Council of La Raza (NCLR) is a private, nonprofit, nonpartisan organization established in 1968 to reduce poverty and discrimination and improve life opportunities for Hispanic Americans. NCLR works toward this goal through two primary, complementary approaches: capacity-building assistance to support and strengthen Hispanic community-based organizations and applied research, policy analysis, and advocacy.

NCLR recognizes that if the University of Michigan's affirmative action admissions policies are found unconstitutional, the nation's minorities will be denied equal opportunities to institutions of higher education and consequently, lifelong opportunities. NCLR stands in support of Affirmative Action policies not only for the sake of minority communities, but also for the sake of a better United States.

National HEP-CAMP Association

The National HEP-CAMP Association represents the High School Equivalency Programs and College Assistance Migrant Programs across the country. HEP helps migrant students who have dropped out of high school get their GED. CAMP assists migrant students in their first year of college with academic, personal, and financial support. The Association recognizes the invaluable role that affirmative action has played in providing access to postsecondary education for the community that we serve. Our students are among the most educationally disadvantaged groups in the nation. Moving from school to school, state-to-state, migrant students are often unable to demonstrate the same academic credentials of their more advantaged peers. Nevertheless, as our programs demonstrate, given the access to education, migrant youth are capable of achieving to the highest levels. Outlawing affirmative action would place yet another barrier to a better future through education before our students. Percentage plans are a particularly poor option for migrants, as our youth change schools frequently, and thus, are unlikely to qualify for the top percentage spots in their schools.

National Hispanic Council on Aging

The NHCoA is a network of advocate organizations. It is a community-building network designed to improve the lives

of older Latinos, families & communities. Older Latinos education levels are extremely low therefore levels of poverty are extremely high. Education is the one avenue of opportunity to get out of the cycle of poverty, illiteracy and dependence. Education must begin early in life - affirmative action is crucial for our communities to get out of the "working poor" category.

National Hispanic Medical Association/ Hispanic-Serving Health Profession Schools

The National Hispanic Medical Association/ Hispanic-Serving Health Profession Schools' mission is to improve the health of Hispanics and other underserved groups. It chooses to support the affirmative action amicus briefs to continue to increase diversity in education and to increase opportunities for Hispanics to join the medical profession, which eventually leads to, expanded access to health care in the U.S. and to improved health of the nation.

National Puerto Rican Coalition, Inc.

NPRC is a national non-profit organization representing the interests of over 7 million Puerto Rican U. S. citizens on the mainland and in Puerto Rico. NPRC's mission is to systematically strengthen and enhance the social, political and economic well being of Puerto Ricans throughout the United States and in Puerto Rico, with a special focus on the most vulnerable.

NPRC is very concerned about the under-representation of Puerto Ricans/Latinos in colleges and universities in the U. S.

National Puerto Rican Form, Inc.

National Puerto Rican Forum Inc. is a 46 year-old Community Based Organization whose mission is to improve the socio-

economic condition of Latinos and other minorities through education and employment.

From our vantage point, we see and deal with the outcomes of the education system when it fails. We believe that affirmative action is an excellent tool to equip all people, especially minorities, with the skills necessary to overcome barriers to full participation in the great American enterprise.

Nosotros

The Latino arts organization NOSOTROS founded by actor Ricardo Montalban supports affirmative action in that college trained performing artist of color need to learn and develop their talents and have access to the arts institutions of higher education as a necessary part of their development.

PR Project, Inc.

PR Project, Inc. is a multimedia organization that leverages new media technologies for the benefit of the Latino community and its artists. We are interested in having our children enter schools that will provide them with the best education, skills and networking opportunities the finest schools in this country offer. It is in the interest of the United States as a whole to guarantee that all our young men and women are given opportunities to discover and develop their talents without regard to race, ethnicity, class, religion or gender. PR Project, Inc. is committed to affirmative action and the good results it historically has produced.

Puerto Rican Legal Defense and Education Fund (PRLDEF)

Through litigation, policy analysis and education, the Puerto Rican Legal Defense and Education Fund (PRLDEF) works to secure, promote and protect the civil and human rights of the Puerto Rican and wider Latino community.

Established in 1972, the Puerto Rican Legal Defense and Education Fund, a privately funded 501(c)(3) nonprofit and nonpartisan organization, accomplishes its work through its three program divisions: Litigation, Education and, as a result of our merger with the Institute for Puerto Rican Policy (IPR), the new Policy Division.

United States Hispanic Chamber of Commerce (USHCC)

The United States Hispanic Chamber of Commerce (USHCC) advocates, promotes and facilitates the success of Hispanic businesses throughout the United States and Puerto Rico. Being the leading proponent of Hispanic-owned businesses, the USHCC supports the position of the University of Michigan and to uphold its policies of affirmative action in both its undergraduate and graduate programs. The elimination of these programs will ultimately damage the future workforce of this country.

United States Hispanic Chamber of Commerce (USHCC) Foundation

The United States Hispanic Chamber of Commerce (USHCC) Foundation is committed to giving Latino youth alternatives for life preparation and life-long learning by developing and implementing initiatives and educational campaigns to awaken and nurture the entrepreneurial spirit of Latino youth. To fulfill this mission, the USHCC Foundation builds alliances, partnerships and collaborative efforts to link Latino youth to educational programs that will develop and enhance their critical thinking and entrepreneurship skills.

With the elimination of affirmative action programs in both undergraduate and graduate schools, fulfillment of the Foundation's mission will not be possible. This elimination will severely effect the educational attainment, advancement

and future success of our Latino youth and the economic prosperity of this nation. The USHCC Foundation strongly supports the position of The University of Michigan. national economic agenda.

Nos. 02-241 and 02-516

IN THE
Supreme Court of the United States

Supreme Court, U.S.
FILED
FEB 18 2003
OFFICE OF THE CLERK

BARBARA GRUTTER,
Petitioner,

v.

LEE BOLLINGER, *et al.*,
Respondents,

v.

KIMBERLY JAMES, *et. al.*,
Respondents.

JENNIFER GRATZ AND PATRICK HAMACHER,
Petitioners,

v.

LEE BOLLINGER, *et al.*,
Respondents,

v.

EBONY PATTERSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF HOWARD UNIVERSITY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF AUTHORITIES

FEDERAL CASES

Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) 6
Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969) 8
Board of Regents of University of Wisconsin v. Southworth, 120 S. Ct. 1346 (2000) 23
Brown v. Board of Education, 347 U.S. 483 (1954) 2, 21
Brown v. Board of Education, 349 U.S. 294 (1955) 7
Buchanan v. Warley, 245 U.S. 60 (1917) 13
City of Richmond v. Croson, 488 U.S.469 (1989) 3, 4, 17, 21, 24
Columbus Board of Education v. Penick, 443 U.S. 449 (1979) 8
Cooper v. Aaron, 358 U.S.1 (1958) 8
Corrigan v. Buckley, 271 U.S. 323 (1926) 13
Cumming v. Board of Education of Richmond County, 175 U.S. 528 (1899) 7
Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857) 5
Green v. County School Board of New Kent County, 391 U.S. 430 (1968) 8, 20
Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002) 29, 30
Hall v. Lowder Realty Co., 160 F. Supp. 2d 1299 (M.D. Ala. 2001) 14
Hopwood v. Texas, 999 F. Supp. 872 (W.D. Tex. 1998) 29
Keyishian v. Board of Regents, 385 U.S. 589 (1967) 23
Knight v. Alabama, 14 F.3d 1534 (11th Cir. 1994) 7
McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) 22
Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) 25

North Carolina State Board of Education v. Swann, 402 U.S. 43 (1971) 23, 25
Norwood v. Harrison, 413 U.S. 455 (1971) 18
Ohio Contractors Assn. v. Kiep, 713 F.2d 167 (6th Cir. 1983) 18
Paschal v. Flagstar Bank, 295 F.3d 565 (6th Cir. 2002) 14
Plessy v. Ferguson, 163 U.S. 537 (1896) 6
Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 21, 23, 24
Shelley v. Kraemer, 334 U.S. 1 (1948) 14
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 8
Sweatt v. Painter, 339 U.S. 629 (1950) 4, 21
Texas v. Lesage, 528 U.S. 18 (1999) 29
Tracy v. Board of Regents of the University System of Georgia, No. CV 497-45, 2000 WL 1123268 (S.D.Ga. June 16, 2000) 29
Tracy v. Board of Regents of the University System of Georgia, 59 F. Supp. 2d 1314 (S.D. Ga. 1999) 29
United Jewish Organizations v. Carey, 430 U.S. 144 (1977) 24
United States v. American Institute of Real Estate Appraisers, 442 F. Supp. 1072 (N.D. Ill. 1977), *appeal dismissed*, 590 F.2d 242 (7th Cir.1978) 15
United States v. Barnett, 330 F.2d 369 (5th Cir. 1963) 8
United States v. Barnett, 376 F.2d 681 (5th Cir. 1964) 8
United States v. Paradise, 480 U.S. 149 (1987) 5, 27
Washington v. Davis, 426 U.S. 229 (1976) 26
Women's Equity Action League v. Cavazos, 906 F.2d 742 (D.C. Cir. 1990) 6
Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) 29
Zuch v. Hussey, 394 F. Supp. 1028 (E.D. Mich. 1975), *aff'd*, 547 F.2d 1168 (6th Cir. 1977) 14

STATE CASES

Allen v. Oklahoma City, 175 Okla. 421, 52 P.2d 1054 (Okla. 1935) 13

DOCKETED CASES

U.S. v. Chevy Chase Federal Savings Bank, CV 94-1834-JG (consent decree of August 22, 1994) 15
U.S. v. American Family Mutual Insurance (E.D. Wisc.) 15

STATUTES AND REGULATORY MATERIALS

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d 10, 18
34 C.F.R. § 100.3(b)(6)(ii) 18
38 Fed. Reg. 17920 (July 5, 1973) 19
Notice of the Application of *Fordice*, 59 Fed. Reg. 4272 (1994) 10

LAW REVIEWS

Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, 72 Minn. L. Rev. 29 (1987) 7
Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 Mich. L. Rev. 1045 (2002) 30
powell, *Segregation and Educational Inadequacy in Twin Cities Public Schools*, 17 Hamline J.Pub.L. & Pol'y 337 (1996) 9

Power, *Apartheid Baltimore Style: The Residential Segregation Ordinance of 1910-1913*, 42 Md. L. Rev. 289 (1983) 13
Rosen, *The Color-Blind Court*, 45 Am. U. L. Rev. 791 (1996) 19
Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427 (1997) 19
Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753 (1985) 19

BOOKS, REPORTS & ARTICLES

Anderson, *The Education of Blacks in the South, 1865-1935* (1988) 7
Abrams, *Forbidden Neighbors* (1955) 13, 14, 15
Belkin, *Show Me a Hero: A Tale of Murder, Suicide, Race and Redemption* (1999) 8
Bell, *Race, Racism and American Law* (3d ed. 1992) 13
Bond, *Negro Education in Alabama: A Study in Cotton and Steel* (reprint 1994 University of Alabama Press) (1969) 7
Bowen and Rudenstine, *Race-Sensitive Admissions: Back to Basics*, The Chronicle of Higher Education (February 7, 2003) 28
Branch, *Parting the Waters, America in the King Years 1954-63* (1988) 8
Carnevale and Fry, Educational Testing Service, *Crossing the Great Divide: Can We Achieve Equity When Generation Y Goes to College?* (2000) 23
Carpenter, *Sword and Olive Branch: Oliver Otis Howard* (1964) 2
Cose, *The Rage of a Privileged Class* (1993) 28

Du Bois, *Black Reconstruction in America 1860-1880* (1935) 6
Education Week, *Quality Counts 98* (1998) 9, 10
Foner, *Reconstruction, America's Unfinished Revolution: 1863-1877 (1988)* 10
Frankenberg et al., Harvard Civil Rights Project, A *Multiracial Society with Segregated Schools: Are We Losing the Dream?* (2003) 9
Franklin, *From Slavery to Freedom* (1947) 6
Grissmer et al., Rand, *Student Achievement and the Changing American Family* (1994) 11
Hacker, *Two Nations: Black and White, Separate, Hostile and Unequal* (1992) 28
Hirsch, *Searching for a "Sound Negro Policy": A Racial Agenda for the Housing Acts of 1949 and 1954,* Vol. 11, Issue 2, Housing Policy Debate 393 (2000) 15
Howard, *Autobiography of Oliver Otis Howard: Major General United States Army* (reprint 1971) (1907) 1
Jackson, *Crabgrass Frontier: The Suburbanization of the United States* (1985) 14
Kane, *The Price of Admission: Rethinking How Americans Pay for College* (1999) 11
Klugar, *Simple Justice* (1976) 2, 7
Kozol, *Savage Inequalities, Children in America's Schools* (1991) 9
Lemann, *The Promised Land: The Great Black Migration and How it Changed America* (1991) 5
Liu, *The Myth & Math of Affirmative Action*, The Washington Post, (April 14, 2002) 30
Logan, *Howard University: The First Hundred Years - 1867-1967* (1969) 1
Lukas, *Common Ground: A Turbulent Decade in the Lives of Three American Families* (1985) 8

Massey and Denton, *American Apartheid: Segregation and the Making of the Underclass* (1993) .. 12, 13, 16
McNeil, *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights* (1983) 2
Myrdal, *An American Dilemma* (1944) 6
Oliver and Shapiro, *Black Wealth White Wealth: A New Perspective on Racial Inequality* (1995) 16
Orfield and Eaton, the Harvard Project on School Desegregation, *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education* (1996) 8
Pratt, *We Shall Not Be Moved: The Desegregation of the University of Georgia* (2002) 8
Puma et al., Department of Education, *Prospects: Student Outcomes Final Report* (1997) 10
Southern Education Foundation, *Miles to Go* (1998) 10
Southern Education Foundation, *Redeeming the American Promise* (1995) 10
Smith, *Emancipation: The Making of the Black Lawyer* (1993) 3
Trueheart, *The Consequences of Federal and State Resource Allocation and Development Policies for Traditionally Black Land-Grant Institutions: 1862-1954* (University Microfilms International, Ann Arbor, Michigan) (1979) 7
West, *Race Matters* (2001) 28
Wilson, *The Truly Disadvantaged: The Innercity, The Underclass, and Public Policy* (1987) 16
Wilson, *When Work Disappears* (1996) 16
Woodward, *The Strange Career of Jim Crow* (1974) 6, 8

GOVERNMENT STUDIES & REPORTS

Equal Educational Opportunity: Hearings before the Select Committee on Equal Educational Opportunity, 91st Cong. 2755 (1971) 14
Goering et al., Department of Housing and Urban Development, *The Location and Racial Composition of Public Housing in the United States* (1994) 15
National Center for Educational Statistics, *Educational Achievement and Black/White Inequality* (2001) 11
Turner et al., Department of Housing and Urban Development, *Discrimination in Metropolitan Housing Markets: National Results from Phase I HDS 2000* (2002) 15
U.S. Census Bureau, *Racial and Ethnic Residential Segregation in the United States: 1980 - 2000* (2002) 12
U.S. Census Bureau, *Percent of High School and College Graduates of the Population 15 Years and Over, by Age, Sex, Race and Hispanic Origin: March 2000* 11

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<www.umich.edu.> 12
<www.usdoj.gov/crt/housing/caselist.htm> 15
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INTEREST OF HOWARD UNIVERSITY AS *AMICUS CURIAE*[1]

Founded two years after the conclusion of the Civil War in March of 1867, Howard University is among the oldest and most comprehensive institutions of higher learning within the group of historically black colleges and universities. The University was founded by a group of men committed to the idea of preparing the freed people for responsible citizenship and inclusion in a free America. Two hundred and fifty years of involuntary servitude had rendered the former slaves bereft of many of the basic rights of humanity, including, due to compulsory illiteracy, even a rudimentary educational experience.[2]

General Oliver Otis Howard, Commissioner of the Freedmen's Bureau, and the men who secured the Howard charter realized that sustained progress and inclusion in the society on an equal footing for black people would necessitate access to institutions of higher education that would prepare "good teachers, professional men, and leaders to the rising generation of freedmen."[3] Their aims ran counter to the prevailing wisdom of the day that the freed people lacked the intellectual capacity for training at the "higher grade."

Thus, General Howard and his colleagues settled upon a plan for a university that would provide an education in the

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[1] The parties in this case have granted general consents for the filing of amicus briefs, which are filed with the Court. Pursuant to Supreme Court Rule 37.6, counsel represents that this brief was authored by the attorneys listed on the cover with the assistance of Howard University faculty members. Other than the support of the amicus party, there were no monetary contributions made by any person or entity for the filing of the brief.

[2] *See* Rayford Logan, *Howard University: The First Hundred Years – 1867-1967* vii, 21 (1969).

[3] Oliver Otis Howard, *Autobiography of Oliver Otis Howard: Major General United States Army* 395 (reprint 1971) (1907).

liberal arts and sciences and that, while pursuing its special mission to educate the freed men and women, would be inclusive in that it set no racial or gender limitations.[4] Indeed, the first students to enroll were young white women, presumably the daughters of members of the Board of Trustees. Significantly, then, at its beginning, Howard University embraced the idea of black and white students and men and women attending school together.[5]

The Reconstruction Period that brought about the establishment of the University, however, was short lived, and the freed men and women found themselves facing the harsh yoke of Jim Crow practices that brutalized them, relegated them to the status of second-class citizens, and purposefully denied them education in order to maintain their subjugation. This would endure for decades, but early in the new century, the University's leadership decided that it would embark on a long and arduous journey -- training lawyers and social scientists who would eventually challenge the prevailing racial social order in the courts. The University's efforts culminated in this Court's landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954).[6]

Howard's seminal role in the civil rights movement – changing the course of this nation's history – unquestionably demonstrates the critical function of higher education in the advancement of our society and the primacy of the goal of creating a society marked not by its divisions but by its ability to bring people of all races, ethnic groups, and nationalities

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[4] Logan, *supra* note 2, at 20, 25; *see also* John Alcott Carpenter, *Sword and Olive Branch: Oliver Otis Howard* 170-71 (1964).

[5] Logan, *supra* note 2, at 34, 67.

[6] *See* Richard Klugar, *Simple Justice* 126-32 (1976); Genna Rae McNeil, *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights* 60-127 (1983).

together to learn, to work, and to live productively and peacefully.

Howard University's long-term commitment and significant contributions to the achievement of this goal by providing leadership for the nation and the global community makes it uniquely interested in the case now before the Court.[7]

SUMMARY OF THE ARGUMENT

These cases are of tremendous importance. Their outcome will shape our Nation for many years to come. Thus, like *Dred Scott, Plessy, Brown, and Bakke* – they present a door to the future. This Court will determine if that door is open or closed.

I. In *City of Richmond v. Croson*, 488 U.S. 469, 503 (1989), the Court held that states can take race-conscious action to avoid participating in or perpetuating discrimination. The record in this case demonstrates that the state and national pools from which the University of Michigan selects its students are affected by past and present discrimination. To

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[7] The life's work of the University's graduates, who are a diverse group of persons of different racial, ethnic, and national origins, stands as proof of its success in pursuing these goals. Howard's alumni include, for example, Justice Thurgood Marshall; former United States Senators Edward Brooke and Harris Wofford; former United States Ambassador to the United Nations, Andrew Young; Pulitzer Prize winner Toni Morrison; the first woman admitted to the bar of the District of Columbia, Charlotte Ray; founder and former Dean of the Washington College of Law (American University School of Law) and the first woman admitted to the American Bar Association, Emma Gillett; internationally acclaimed opera singer Jessye Norman; former Governor of Virginia, L. Douglas Wilder; President of the International Criminal Tribunal for the Former Yugoslavia, The Hague, Judge Gabrielle Kirk McDonald; and local leaders in its home city such as current and former At-Large Members of the District of Columbia City Council, Linda Cropp and the late David A. Clarke respectively. *See also* J. Clay Smith, *Emancipation: The Making of the Black Lawyer* (1993).

wit, federal, state and local officials acting in concert with private parties caused rigid residential segregation resulting in racially isolated schools serving dense concentrations of poor students whose educational opportunities are, at once, separate and profoundly unequal. Under the precedent in *Croson*, the University may properly take race-conscious actions to avoid participating in or perpetuating the effects of this discrimination.

II. Creating racially and ethnically diverse educational environments is a compelling governmental interest in a pluralistic and democratic nation. The critical role of higher education in training the next generation to function in multi-cultural national and global environments, and negotiate group differences in contexts of commerce, politics, war and peace, cannot be gainsaid. A unanimous Supreme Court in *Sweatt v. Painter*, 339 U.S. 629 (1950), emphasized, in a higher education context, the importance of learning through intergroup exposure to the quality of the educational experience. The record evidence in this case empirically demonstrates the correctness of the Court's judgment.

The programs at issue in these cases are radically different and distinguishable from the type stricken by the Court as odious to a civil society and violative of the Fourteenth Amendment. Moreover, the Court's recognition of a university's First Amendment interests in selecting a student body that creates an environment for a high quality educational experience and the appropriate deference due in that regard give further warrant for this Court's approval of the actions of the University of Michigan.

III. The Court has said that narrow-tailoring does not mean fatal; thus, its application to reasonable and necessary race-conscious admissions programs ought not be so rigid that colleges and universities effectively are prohibited from exercising affirmative action in admissions. Application of the

narrow-tailoring standard of strict scrutiny review in these cases reveals that race-consciousness is necessary for the University to accomplish its goals and that the burden of these programs on third parties is demonstrably diffuse and minimal. *See United States v. Paradise*, 480 U.S. 149 (1987).

FACTUAL CONTEXT

Missing from the analyses of most courts and many of the parties addressing the questions at issue here is the factual context which drove the adoption of the Reconstruction Era Amendments to the Constitution, namely America's racial caste system based upon a belief in the superiority of the white race. This racial hierarchy permeated every aspect of life for persons of African descent, whether free or slave, as documented in great detail in the Court's now infamous decision in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), which held that blacks were not intended by the framers of the Constitution to be "citizens" because they were universally considered to be "a subordinate and inferior class of beings." *Id.* at 402.

A. Racial Caste in the United States

1. School Segregation

From emancipation through the mid 1900's, the vast majority of African Americans lived in the southern part of the United States.[8] With the rise of Jim Crow, supported by law under the so-called separate but equal doctrine and upheld by

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[8] Nicolas Lemann, *The Promised Land: The Great Black Migration and How it Changed America* 6 (1991) ("In 1940, 77 percent of black Americans still lived in the South.").

the Court in *Plessy v. Ferguson*, 163 U.S. 537 (1896),[9] most blacks either had no schooling or segregated and inferior education compared to that available to whites.[10] The United States Court of Appeals for the Eleventh Circuit captured the purpose and structure of the dual system in the following quote, which relates specifically to Alabama but is descriptive generally of the 17 southern and border states that operated the de jure segregated systems under which most blacks lived.[11]

> In very broad terms, for more than a century following its admission to the Union in 1819, Alabama denied blacks access to college-level public higher education and did so for the purpose of maintaining the social, economic and political subordination of black people in the state. . . . Until Reconstruction, all education of enslaved blacks was criminalized in Alabama. Following Reconstruction, blacks were excluded from the universities attended by

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[9] The *Brown* plaintiffs viewed the separate but equal doctrine as an instrument of "defiant nullification" of the Fourteenth Amendment:

> [T]he history of segregation laws reveals that their main purpose was to organize the community upon the basis of a superior white and inferior Negro caste. These laws were conceived in a belief in the inherent inferiority of Negroes, a concept taken from slavery.

Brown v. Board of Education, Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument at 50 (1953).

[10] *See generally*, W.E.B. Du Bois, *Black Reconstruction in America 1860-1880* (1935); Eric Foner, *Reconstruction, America's Unfinished Revolution: 1863-1877* (1988); John Hope Franklin, *From Slavery to Freedom* (8th ed. 2000); Gunnar Myrdal, *An American Dilemma* (1944); C. Vann Woodward, *The Strange Career of Jim Crow* (1974).

[11] *See Women's Equity Action League v. Cavazos*, 906 F.2d 742, 744 (D.C. Cir. 1990); *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc).

> whites, relegated instead to only vastly inferior institutions . . . . Although they were upgraded somewhat beginning in the 1940's, the institutions to which blacks were restricted by state law continued to be allocated a radically disproportionately small share of the resources devoted by the state to public higher education.[12]

Education at the elementary and secondary level was also rigidly segregated and grossly unequal.[13] The Court's decisions in *Brown* in 1954 and 1955[14] striking the separate but equal doctrine in education and requiring the dismantling of racially dual school systems faced massive resistance by the states bringing the first return of federal troops to the South since Reconstruction. Resolutions of "Interposition" and "Nullification" were adopted by states to thwart the effect of the *Brown* decision, and state officials were openly defiant and

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[12] *Knight v. Alabama*, 14 F.3d 1534, 1538 (11th Cir. 1994); *see also generally*, Gil Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, 72 Minn. L. Rev. 29 (1987); W.E. Trueheart, *The Consequences of Federal and State Resource Allocation and Development Policies for Traditionally Black Land-Grant Institutions: 1862-1954* (University Microfilms International, Ann Arbor, Michigan) (1979).

[13] *See generally* James Anderson, *The Education of Blacks in the South, 1865–1935* (1988); Horace Mann Bond, *Negro Education in Alabama: A Study in Cotton and Steel* (reprint 1994 University of Alabama Press) (1969); Kluger *supra* note 6. The separate but equal doctrine was a ruse from the beginning. Separate schools were not required to be equal. *See Cumming v. Board of Education of Richmond County*, 175 U.S. 528 (1899).

[14] *Brown v. Board of Education*, 349 U.S. 294 (1955).

encouraged violations of the law.[15] Northern schools also were rigidly segregated and opposition to desegregation was often strong and violent.[16]

The Court's desegregation cases implementing *Brown* through the late 1970's recognized the physical separation of the races as a central component of America's racial caste system and required affirmative steps to end it.[17] Significant desegregation at the elementary and secondary level began to occur in the late 1960's and continued into the late 1980's until federal courts began routinely to dismantle desegregation plans. Many school systems were never significantly desegregated and others for only a very short time.[18]

In 2000, more black students attended 90-100% minority schools than in 1980. The South, which went from the most segregated to the most desegregated region in the country, is now at its lowest level of desegregation since 1968. Increasing school segregation is occurring in every region of

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[15] Taylor Branch, *Parting the Waters, America in the King Years 1954-63* (1988); Robert A. Pratt, *We Shall Not Be Moved: The Desegregation of the University of Georgia* (2002); Woodward, *supra* note 10; *see e.g., Cooper v. Aaron*, 358 U.S. 1 (1958); *United States v. Barnett*, 376 F.2d 681, 686 (5th Cir. 1964); *United States v. Barnett*, 330 F.2d 369 (5th Cir. 1963) (en banc).

[16] *See e.g.*, Lisa Belkin, *Show Me a Hero: A Tale of Murder, Suicide, Race and Redemption* (1999) (Yonkers, New York); J. Anthony Lukas, *Common Ground: A Turbulent Decade in the Lives of Three American Families* (1985) (Boston, Massachusetts).

[17] *See Green v. County School Board of New Kent County*, 391 U.S. 430 (1968); *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979).

[18] Gary Orfield, Susan Eaton and the Harvard Project on School Desegregation, *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education* (1996).

the country in part due to demographic change, but a significant factor is the loss of desegregation measures. In the Northeast, more than half of black students attend 90-100% minority schools, and one quarter of black students in the Northeast and Midwest attend hyper-segregated 99-100% minority schools. In the three regions of the country with the smallest proportion of black students, the Northeast, Midwest, and West, at least two thirds of the black students attend predominately minority schools.[19] These heavily minority elementary and secondary schools also have another salient feature – they are often islands of deeply concentrated poverty.[20] Students in these schools face circumstances that academically speaking are starkly different from those in majority white schools in terms of funding, teacher quality, school facilities, and resources.[21]

A comprehensive 50-state review of education by Education Week and the Pew Charitable Trusts concluded that "[t]he biggest challenge facing U.S. cities and their school systems is concentrated poverty . . . [which] is an overwhelmingly urban phenomenon, and one that afflicts far more black children than any other racial or ethnic group."[22] The review found that poor students who attended middle-class schools performed significantly better. In urban schools where most of the students are poor, two thirds or more of the children

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[19] Erica Frankenberg et al., Harvard Civil Rights Project, A *Multiracial Society with Segregated Schools: Are We Losing the Dream?* 38-40 (2003).

[20] *Id.* at 35.

[21] *See, e.g., Id.*, Jonathan Kozol, *Savage Inequalities, Children in America's Schools* (1991); john powell, *Segregation and Educational Inadequacy in Twin Cities Public Schools*, 17 Hamline J.Pub.L. & Pol'y 337, 341 (1996) ("The concentration of racialized poverty extant in American schools has devastating consequences for education."); *Quality Counts '98*, Education Week (1998).

[22] *Quality Counts '98*, *supra* note 21.

fail to reach even "basic" levels on national tests. These findings are corroborated by the four-year, congressionally mandated study of educational achievement for disadvantaged students. It found that school poverty depresses the test scores of all students where at least half of the students are eligible for subsidized lunch, and that it seriously depresses the scores when more than 75 percent of the students live in low-income households.[23]

Educational opportunities for blacks at the higher education level continue to be restricted, particularly with respect to access to historically white institutions. Despite a start on desegregating former segregated state systems of higher education in the late 1970's, the government abandoned most of its efforts in the late 1980's and early 1990's and began releasing states from their desegregation obligations.[24] A 1998 review of 12 southern states that had been undergoing desegregation found that, while showing improvement from the period of absolute exclusion, not one of the 12 could demonstrate real success in desegregating its higher education system.[25] Historically black colleges continued to be major points of entry for black students. "[W]ithout them, the limited access to higher education for black students would be drastically reduced."[26]

The intergenerational and cumulative effects of the educational discrimination suffered by African Americans are

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[23] *Id.* (quoting Michael Puma et al., Department of Education, *Prospects: Student Outcomes Final Report* (1997)).

[24] The states were released under a standard inconsistent with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. *See* Notice of the Application of *Fordice*, 59 Fed. Reg. 4272 (1994).

[25] Southern Education Foundation, *Miles to Go* (1998).

[26] Southern Education Foundation, *Redeeming the American Promise* xxi (1995).

evident in today's population. While the gap in achievement between blacks and whites narrowed significantly during the period between 1970 and 1990 when desegregation and other educational opportunity programs reached their peaks, those gains have stagnated and the achievement gap remaining is significant.[27] The black/white gap in college going and completion rates remains wide as well. Data from the 2000 Census show a high school graduation rate for whites ages 25-29 of 94% compared to 86% for blacks. Thirty-four percent of whites in the 25-29 age group held a college degree compared to 18% of blacks.[28] These gaps in educational achievement and attainment translate into significant income and wealth effects.

> During the past fifteen years the labor market has distributed ever larger rewards to workers who have college educations. In 1980 the average 25- to 34-year-old male college graduate earned 19 percent more than a male high school graduate of the same age. By 1995 the difference had widened to 52 percent.[29]

2. Residential Segregation

As a result of an unbroken chain of massive past discrimination followed by ongoing and substantial current discrimination in housing, African Americans currently experience the highest degree of residential segregation of any

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[27] David Grissmer et al., Rand, *Student Achievement and the Changing American Family* (1994); National Center for Educational Statistics, *Educational Achievement and Black/White Inequality* vi (2001).

[28] U.S. Census Bureau, *Percent of High School and College Graduates of the Population 15 Years and Over, by Age, Sex, Race and Hispanic Origin: March 2000.*

[29] Thomas J. Kane, *The Price of Admission: Rethinking How Americans Pay for College* 1 (1999).

racial or ethnic group in the country.[30] Expert evidence in this case, supported by a strong body of research, demonstrates that this phenomenon is not the product of free choice or happenstance. As blacks moved from the rural south to cities in the north and west they found neighborhoods rigidly restricted by race. Black "ghettos" – neighborhoods inhabited exclusively by blacks regardless of the income or class composition of the neighborhood or the individuals – were the only places they could live. This physical restriction on black housing opportunities resulted from the actions of federal, state and local governmental officials working in concert with the members of the private real estate industry to keep neighborhoods racially homogeneous.[31]

> The urban ghetto, constructed during the first half of the twentieth century and successively reinforced thereafter, represents the key institutional arrangement ensuring the continued subordination of blacks in the United States.[32]

Residential Segregation is a key component of school segregation and the concentration of poverty.[33]

While the South was home to the great majority of blacks prior to the 1940's, discrimination and its adverse effects

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[30] U.S. Census Bureau, *Racial and Ethnic Residential Segregation in the United States: 1980 - 2000* 4 (2002); see *infra* notes 41-43.

[31] Expert Report of Thomas J. Sugrue, Expert Report of Eric Foner, and trial testimony in *Grutter v. Bollinger* of Gary Orfield. Hereinafter the reports of expert witnesses in these cases are cited as "Expert Report of _____," and abbreviated as "_____ Report." Many of the expert reports are available at <www.umich.edu>. Page citations included herein are from "The Compelling Need for Diversity in Higher Education" available on that site.

[32] Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* 18 (1993).

[33] *Id.* at 118-125.

were never limited to points south of the Mason-Dixon line.[34] Between 1910 and the 1960's approximately 4.7 million African Americans left the South heading for points north and west -- typically cities.[35] The arrival of a large, readily identifiable, non-white population bearing the burdens of oppression and seeking work drew hostility from northern whites like no other immigrants had.[36]

Violent opposition to the black influx was followed by organized efforts to bar blacks physically from residing in white neighborhoods.[37] Cities enacted residential segregation ordinances,[38] and neighborhood organizations developed racially restrictive covenants, approved in *Corrigan v. Buckley*, 271 U.S. 323 (1926). Restrictive covenants were found to be a powerful and effective tool for the institution and maintenance of residential segregation, and were used extensively throughout the United States between 1910 and 1948, when the Court ruled that they were unenforceable in

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[34] Racial prejudice in the North and its effects are seen early on in the struggle over separate schools in Boston, Massachusetts; *see* Derrick Bell, *Race, Racism and American Law* 530-537 (3rd ed. 1992).

[35] Charles Abrams, *Forbidden Neighbors*, 24 (1955) (1910-1940 figures); Massey and Denton, *supra* note 32, at 45 (1950's and 1960's figures).

[36] Massey and Denton, *supra* note 32, at 32-33.

[37] Abrams, *supra* note 35, at 81-90 (1955); *see also id.* at 91-102 (Detroit and Dearborn, Michigan).

[38] Massey and Denton, *supra* note 32, at 41; *see e.g.* Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinance of 1910-1913*, 42 Md. L. Rev. 289 (1983). The Court prohibited these ordinances in *Buchanan v. Warley*, 245 U.S. 60 (1917), but some jurisdictions adopted them anyway. *See, e.g., Allen v. Oklahoma City*, 175 Okla. 421, 52 P.2d 1054 (Okla. 1935) (ordinance in effect from 1922 to 1936).

Shelley v. Kraemer, 334 U.S. 1 (1948). But the racial geography of urban America already had gained a solid footing.

Operating through federal agencies starting in the 1930's and 1940's, the federal government became a central and controlling figure in mortgage lending. As a proponent of redlining, racial steering, and restrictive covenants, it drove the creation of racially restricted neighborhoods. Federal agencies developed a real estate appraisal system that "redlined" neighborhoods where black people lived and those in proximity to black people and rated them as least desirable for investment, while white homogeneous neighborhoods were rated as most desirable. Every city in the nation would eventually be rated, and federal agencies and private lending institutions utilized those ratings to impose a rigid racial structure on communities nationwide.[39]

In 1970, then Secretary of the United States Department of Housing and Urban Development, George Romney, admitted that the federal government had not stopped practicing redlining in housing until 1965 and that it would take some time before changes in "embedded" practices like redlining would take effect.[40] National organizations of real estate appraisers as well as real estate agents and others followed these practices well into the 1970's and beyond.[41]

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[39] *See* Sugrue Report at 31-32; Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States* 190-218 (1985); Abrams, *supra* note 35, at 227-243.

[40] *Equal Educational Opportunity: Hearings before the Select Committee on Equal Educational Opportunity*, 91st Cong. 2755, 2771 (1971).

[41] *See, e.g., Paschal v. Flagstar Bank*, 295 F.3d 565 (6th Cir. 2002) (mortgage lending); *Zuch v. Hussey*, 394 F. Supp. 1028 (E.D. Mich. 1975), *aff'd*, 547 F.2d 1168 (6th Cir. 1977) (racial steering); *see also Hall v. Lowder Realty Co.*, 160 F. Supp. 2d 1299 (M.D.Ala. 2001); *United States* (continued...)

In addition to the segregation in the private housing market, public housing jointly funded by federal and local governments was also openly and starkly segregated by race. Today, African American public housing residents are concentrated in projects in severely poor neighborhoods.[42]

A recent study of housing markets in the United States using paired testers confirms that although housing discrimination has declined since 1989, African Americans and Hispanics still face significant discrimination in both the housing rental and sales markets.[43] Redlining in the mortgage lending and home insurance markets are also continuing problems.[44] The continuing effects of these discriminatory practices adopted, perfected, and promoted by the government and the private real estate industry are experienced in today's housing market in the form of extensive residential

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[41](...continued)
v. American Institute of Real Estate Appraisers, 442 F. Supp. 1072 (N.D. Ill. 1977), *appeal dismissed*, 590 F.2d 242 (7th Cir. 1978).

[42] John Goering et al., Department of Housing and Urban Development, *The Location and Racial Composition of Public Housing in the United States* 7 (1994); *see also Abrams, supra* note 35, at 306-319; Arnold R. Hirsch, *Searching for a "Sound Negro Policy": A Racial Agenda for the Housing Acts of 1949 and 1954*, Vol. 11, Issue 2, Housing Policy Debate 393 (2000).

[43] Margery Austin Turner et al., Department of Housing and Urban Development, *Discrimination in Metropolitan Housing Markets: National Results from Phase I HDS 2000* iii-iv (2002).

[44] *See, e.g., U.S. v. Chevy Chase Federal Savings Bank*, CV 94-1834-JG (consent decree of August 22, 1994); *U.S. v. American Family Mutual Insurance* (E.D. Wisc.) (Consent decree included $14.5 million in damages to victims of illegal discrimination in home owners insurance) available at <www.usdoj.gov/crt/housing/caselist.htm> along with descriptions of a significant number of other housing discrimination cases.

segregation.[45] Residential segregation concentrates poverty[46] and adversely affects access to jobs, financial capital, health care and education.[47]

B. Michigan: The Effects of Race, Poverty and Segregation

The University of Michigan draws nearly two-thirds of its students from the State of Michigan and over half from the Detroit Metropolitan Area. Sugrue Report at 18. "Three of the ten most segregated metropolitan areas in the United States are in Michigan. . . . Detroit is the second most segregated metropolitan area in the country. . . ." *Id.* The record shows that this residential segregation in Michigan is the product of discrimination by both governmental and private actors. It is not a naturally occurring phenomenon, *id.* at 31-34, and it is ongoing, *id.* This stark residential segregation causes a concentration of poverty, educational segregation and disadvantage, racial isolation, and racial stereotyping. *Id.* at 38-

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[45] Massey and Denton, *supra* note 32, at 74-78 (describing "hypersegregation" of African Americans). Residential segregation is so extensive that the states of Texas, Florida and California rely on it as the basis for undergraduate admissions programs designed to produce racially and ethnically diverse student bodies. *See* Brief of the United States as Amicus Curiae Supporting Petitioner in *Grutter v. Bollinger*, No. 02-241 at 17-22 (describing programs).

[46] Massey and Denton, *supra* note 32, at 118-125, 180. "Concentrated poverty is created by a pernicious interaction between a group's overall rate of poverty and its degree of segregation in society." *Id.* at 118.

[47] Sugrue Report at 34; *see generally* Melvin L. Oliver and Thomas M. Shapiro, *Black Wealth White Wealth: A New Perspective on Racial Inequality* (1995); William Julius Wilson, *When Work Disappears* (1996); William Julius Wilson, *The Truly Disadvantaged: The Innercity, The Underclass, and Public Policy* (1987).

45. Strikingly, far more students in Michigan are likely to attend racially segregated schools than in Louisiana, Mississippi, Georgia and other southern states. *Id.* at 36.

Michigan's residential segregation is educationally significant because Latino and African American students are in segregated schools that are characterized by a concentration of poverty. These schools fail to offer equal educational opportunities in that they have few or no Advanced Placement (AP) or International Baccalaureate (IB) courses – critical to the academic preparation needed for a competitive university. Thirty-eight percent of all African American students are in schools with no IB/AP courses, while only 4% of white students are in such schools. Expert Report of William Trent in *Gratz* at 6. These same segregated schools have low college going rates and low average SAT scores. *Id.* As a result, minority students in Michigan make up a disproportionately small percentage of the pool of qualified applicants for the University of Michigan, Expert Report of Wayne Camara in *Gratz* at 10-12, 15, and are underrepresented in the number of students admitted and enrolled at the University.

ARGUMENT

I. The Fourteenth Amendment and Title VI Allow Race-Conscious Measures To Avoid Participation in and Perpetuation of Discrimination

In *City of Richmond v. Croson*, 488 U.S. 469 (1989), the Court held that state actors may take race-conscious actions when their own practices are exacerbating a pattern of prior discrimination. This theory applies with particular force in these cases. It is initially described in *Croson* as the "passive participant" theory in Section II of the opinion, joined by three Justices:

> [I]f the city could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.

Id. at 492 (O'Connor, J., joined by Rehnquist, C.J., and White, J.). Subsequently, in Section III-B of the opinion, five Justices agreed that

> [In a proper case], a city would have a compelling interest in preventing its tax dollars from assisting these organizations in maintaining a racially segregated construction market. See *Norwood* [*v. Harrison*, 413 U.S. 455 (1971)] at 465; *Ohio Contractors* [*Assn. v. Kiep*, 713 F.2d 167 (6th Cir. 1983)], *supra*, at 171 (upholding minority set aside based in part on earlier District Court finding that "the state had become a 'joint participant' with private industry and certain craft unions in a pattern of racially discriminatory conduct which excluded black laborers from work on public construction contracts").

Id. at 503, 504.

Regulations promulgated under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, for the United States Department of Education also expressly approve of race-conscious action for this purpose in 34 C.F.R. § 100.3(b)(6)(ii):

> Even in the absence of such prior discrimination [by the recipient of federal funds], a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

President Nixon approved the adoption of this regulation by 21 Federal agencies in 1973, 38 Fed. Reg. 17920 (July 5, 1973).

The exercise of race-conscious measures to avoid participation in and perpetuation of discrimination is wholly consistent with the original intent of the framers of the Fourteenth Amendment. *See* Jed Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427, 429-30 (1997). The Thirty-Ninth Congress which adopted the Fourteenth Amendment in June of 1866 also adopted race-conscious remedial legislation for the specific purpose of addressing the conditions of blacks, free and slave, following the Civil War. *Id.* The legislative record of debates from that Congress regarding the 1866 Freedmen's Bureau Act also shows that the unsuccessful opponents of the bill, including President Andrew Johnson who vetoed it, voiced essentially the same color-blindness arguments that are advanced in the cases now before the Court.[48] Opponents argued that the Freedmen's Bureau Act made "a distinction on account of color between the two races," and that it was impermissible "class legislation – legislation for a particular class of the blacks to the exclusion of all whites . . . ."[49] "Others argued that the bill would actually harm blacks either by increasing their dependence or by provoking white

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[48] *See* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753 (1985), *criticized* in Jeffrey Rosen, *The Color-Blind Court*, 45 Am. U.L. Rev. 791, 795 (1996); *but see* Rubenfeld, *supra*, at 431, n.23.

[49] Schnapper, *supra note* 48, at 763.

resentment."[50] Nonetheless, the Thirty-Ninth Congress passed the Act. Thus, these arguments rejected by the same Congress that passed the Fourteenth Amendment cannot fairly be asserted as the constitutional principles undergirding it. Instead, the guiding principle is that the purpose of the Amendment was to remove the badges of slavery burdening blacks and to put them on an equal footing with all citizens regardless of race. The holding in *Croson* that race-conscious action can be taken to avoid state participation in or perpetuation of discrimination rests solidly on the original intent of Congress in adopting the Fourteenth Amendment.[51]

The University of Michigan may properly seek to avoid participation in or perpetuation of the effects of the extreme racial segregation in its state caused by federal, state, and local actors working in concert with private parties, the record of which is documented in these cases. Sugrue Report. The limited pipeline of minority applicants from Michigan's segregated and unequal elementary and secondary schools justifies the University's race-conscious admissions programs which admit a small number of well-qualified minorities to the State's flagship institution supported by the tax dollars of all of its citizens, and without which the minority presence at the institution will rapidly and substantially decline. Expert Reports of Stephen W. Raudenbush. The University, which is also supported by federal tax dollars and governed by Title VI, draws a significant number of students from a national pool that is also depressed by the effects of past and present school and housing segregation caused by federal, state and private actors, as documented in the record of these cases. Expert Reports and

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[50] *Id.* at 764.

[51] Indeed, state actors have an affirmative duty to avoid actions that would make them complicit in racial discrimination or that would perpetuate such discrimination. *See, e.g., Green v. County School Board of New Kent County*, 391 U.S. 430 (1968).

testimony of Eric Foner, Gary Orfield, John Hope Franklin, and Joseph Feagin. Thus, the judgment of the Court of Appeals in *Grutter* and of the District Court in *Gratz* should be affirmed as supported by a finding that the University's actions were legally justifiable means of avoiding participation in and perpetuation of discrimination. *Croson*, 488 U.S. at 503-04.

II. Racial and Ethnic Diversity in Higher Education Is a Compelling and Necessary Governmental Interest

A. Racially and Ethnically Diverse Educational Environments for Learning are Critical in Preparing Citizens for Service to a Country that is Pluralistic, Democratic, and a Leader Among Nations

The Court's statement in *Brown* regarding the importance of elementary and secondary education is as compelling today with respect to higher education as it was in 1954 with respect to a high school diploma:

> Today, education is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.

Brown, 347 U.S. at 492-93. Moreover, as Justice Powell recognized in *Regents of the University of California v. Bakke*, 438 U.S. 265, 313-14 (1978) (Powell, J.), this Court has previously emphasized, unanimously, that learning from others who are different in terms of social power and social relationships, of which race is a powerful determinant, is important and necessary to a high quality educational experience. *Sweatt v. Painter, 339 U.S. 629* (1950).

> Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. The law school to which Texas is willing to admit petitioner excludes from his student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that he would receive if admitted to the University of Texas Law School.

Id. at 634; *accord McLaurin v. Oklahoma State Regents,* 339 U.S. 637 (1950).[52]

Group difference and conflict are the history of America – indeed the world – and our colleges and universities have a special mission to help train the coming generations to negotiate and successfully manage these differences. A pluralistic democracy demands this and, as the record demonstrates, through diversity on college campuses, we are much better able to achieve it. Expert Reports of William Bowen and Patricia Gurin. Technology brings us much closer to our global

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[52] "The admission of colored and white men and women to Howard University was an act of defiance to this determination [i.e. "to keep the Negro in his place"] and a commitment to the belief that a desegregated coeducational institution of higher learning was consistent with the Nation's ideal of potential human equality." Logan, *supra* note 2, at 67. Howard's leadership in the journey to *Brown* proves the founders to have been correct.

neighbors and as a nation we are becoming more racially and ethnically diverse.[53] We are also increasingly dependent on other nations for natural resources and an international interdependency exists with respect to peace and security. In this context, it is unimaginable that our institutions of higher learning, the gate keepers of access to knowledge and power, would lose the ability to create racially and ethnically diverse educational environments. Diversity in higher education is indeed a compelling governmental interest.[54]

The Court has valued and respected a university's "academic freedom" to determine how best to educate its students by giving special deference to its judgments as to its academic mission and the composition of its student body. S*ee Bakke,* 438 U.S. at 312 (Powell, J.); *Board of Regents of University of Wisconsin v. Southworth,* 120 S.Ct. 1346 (2000); *Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967). Indeed, given the special First Amendment interests involved in a university's decision to seek student diversity and the values served by the exercise of those interests, the Court's own teachings support the exercise of deference to university officials pursuing these goals. Accordingly, in *North Carolina State Board of Education v. Swann,* 402 U.S. 43 (1971), the Court held that "[s]chool authorities have wide discretion in formulating school policy, and [ ] as a matter of educational policy may well conclude that some kind of racial balance in schools is desirable quite apart from constitutional

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[53] By the year 2005, minorities will make up almost 28 percent of the U.S. workforce. Anthony P. Carnevale and Richard Fry, Educational Testing Service, *Crossing the Great Divide: Can We Achieve Equity When Generation Y Goes to College?* 39 (2000).

[54] *See also* Brief of Amici Hillary Browne et al., and Students of Howard University Law School Supporting Respondents in *Grutter v. Bollinger, No. 02-241,* for a detailed student perspective on the important value of diversity in higher education.

requirements." *Id.* at 45. In the higher education context, five Justices agreed in *Bakke* that "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." 438 U.S. at 320.

B. Race-conscious Measures Designed to Promote Diversity and to Avoid the Perpetuation of Discrimination are Constitutionally Distinct from Invidious Discrimination

Under this Court's precedents, strict scrutiny is applied to race-conscious actions for the purpose of distinguishing racial classifications that are benign from those that are the product of illegitimate discrimination or stereotypes.

> [S]trict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

See, e.g., *Croson*, 488 U.S. at 493 (O'Connor, J.). The Court has recognized that state actors can take race into account where their motives are the avoidance of racial or ethnic inequity, *see United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) (New York could permissibly take race into account in redistricting in order to minimize the consequences of racial discrimination in the electoral process), or to provide integrated student bodies, without regard to a history of de jure

discrimination, *North Carolina State Board of Education,* 402 U.S. at 45.

Neither the Petitioners nor the United States, which has filed briefs on their behalf, has argued that the University of Michigan adopted the challenged programs with a purpose to discriminate against, oppress or subjugate whites or others. Petitioners contend instead that the diversity rationale relied upon by the University is a crude stereotype which presumes that "[i]ndividuals of unfavored racial and ethnic backgrounds are unlikely to possess the unique experiences and backgrounds that contribute to viewpoint diversity." Brief for Petitioner Grutter at 38, citing *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 618 (1990) (O'Connor, J. dissenting).

But the diversity concept is really quite different. Its premise is that where there are, for example, only white people in a discussion, then the viewpoints, as seen through the eyes of persons of a different racial or ethnic background -- meaning those aspects of difference or sameness from a person who has experienced life as a black person or as a Latino or as a disabled person, no matter how varied from black person to black person or Latino to Latino, will in fact be missing. This is true without regard to the diversity on other, non-racial or ethnic grounds, of the group. University officials seeking to create a rigorous intellectual environment as well as prepare students for leadership in a multi-racial world, determined that the one-race dimension that so many students get in their segregated elementary and secondary classrooms did not serve this purpose. Admissions programs to promote diversity recognize the salience of race and ethnicity without making any assumptions about the cohesiveness or sameness of viewpoint among members of any group. In fact, the more varied the viewpoint of those persons typically absent from the conversation, the better, which is why a critical mass of minority students is needed – to prevent the stereotyping that

would be likely to occur if there were only a token number of minorities at the school.

Importantly, however, Petitioners' argument that the University's quest for diversity is based on flawed and impermissible stereotypes cannot be squared with the position of the Gratz Petitioners at trial, conceding that "valuable" benefits flow from educational diversity and agreeing not to dispute this proposition,[55] or that of the United States which asserts its belief in the importance of the goals being pursued. "Ensuring that public institutions, especially educational institutions, are open and accessible to a broad and diverse array of individuals, including individuals of all races and ethnicities, is an important and entirely legitimate government objective." Brief for the United States as Amicus Curiae Supporting Petitioner, *Grutter v. Bollinger*, No. 02-241 at 9. Surely, these acknowledged benefits of diversity in education preclude the argument that the programs were borne out of flawed stereotypes.

Thus, if invidious intent is the touchstone of a violation of the Fourteenth Amendment, as the Court has held, *Washington v. Davis*, 426 U.S. 229 (1976), then the record in these cases demonstrates that the programs are amply justified by intentions wholly consistent with the Equal Protection Clause.

III. Meaningful Application of the Narrow Tailoring Standard Must Not Be So Rigid as to Preclude All Reasonable Race-conscious Admissions Measures

The narrow tailoring requirement of the Court's strict scrutiny analysis seeks to determine whether race-conscious

[55]Joint Appendix filed in *Gratz v. Bollinger* the United States Court of Appeals for the Sixth Circuit, JA-4157.

action is unacceptably burdensome to third parties. *United States v. Paradise*, 480 U.S. 149 (1987) (plurality opinion). In *Paradise*, the Court approved, under strict scrutiny standards, an appropriately tailored affirmative action program in hiring despite the presence of a burden on third parties. In doing so, the Court considered the need for race-conscious action and the nature and extent of the burden on third parties in order to determine if the program met constitutional standards. *See id.* at 166, 171, 186. The record here demonstrates that race-conscious action in admissions is necessary and that the burden on third parties is diffuse and minimal.

Petitioners argue that the notion of the competitive consideration of race in admissions is just not workable. Their view that diversity is not a compelling interest ultimately drives their conclusion that no program serving that purpose could ever be narrowly tailed. *See, e.g.*, Brief for Petitioner in *Grutter*, at 36 ("the interest in diversity is inherently unsuited to "narrowly-tailored means"). They also attack the particular means selected by the University as too burdensome for a variety of reasons including their contention that the University places too much emphasis on race and that the consideration of race is more automatic than flexible.[56] Petitioners' exceedingly strict application of the narrow tailoring requirement would likely bar all affirmative action measures in college admissions. The Constitution, however, permits reasonable race-conscious means of achieving compelling goals such the promotion of diversity and the avoidance of perpetuating discrimination where, as here, race-conscious action is necessary to accomplish the goal, and the burden on third parties is diffuse and minimal.

[56] The so-called race-neutral options proposed by the United States are simply not race neutral because they rely on residential segregation to produce meaningful numbers of minority admittees. Moreover, they are inapplicable to admissions at the graduate and professional levels.

The University of Michigan considers race because race is a salient feature of our history and social structure as a nation. "It is morally wrong and historically indefensible to think of race as just another dimension of diversity."[57] Because of the nation's history, race is treated like virtually no other issue as it is a unique and significant factor of difference, affecting life's experiences for blacks in ways that are independent of one's income, wealth or social status.[58] This is not an argument that all blacks are alike or think alike or that the University's programs makes these assumptions, because they do not. Rather, the point is that race impacts most people profoundly regardless of political or social viewpoint,[59] and that it is the very overarching nature of its impact that makes race matter so significantly.[60] The fact that the University gives considerable weight to race and ethnicity in the admissions process in order to achieve diversity and ameliorate the effects of discrimination is both necessary, if it is to be a real factor, and unsurprising given the profound and intergenerational effects of two hundred and fifty years of slavery, followed by a century of Jim Crow, followed by slow progress in the face of continuing discrimination.[61]

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[57] William G. Bowen and Neil L. Rudenstine, *Race-Sensitive Admissions: Back to Basics*, The Chronicle of Higher Education (February 7, 2003) at B7.

[58] Ellis Cose, *The Rage of a Privileged Class* (1993).

[59] Andrew Hacker, *Two Nations: Black and White, Separate, Hostile and Unequal* 31-50 (1992).

[60] Cornell West, *Race Matters* (2001).

[61] In his comments about these cases, President Bush acknowledged that racial discrimination is a current and ongoing problem. Remarks by the President on the Michigan Affirmative Action Case, January 15, 2003, <http://whitehouse.gov/news/releases/2003/01/20030115-7.html>. The President's assertion that racial segregation is behind us, *id.*, however, is an unfortunate reflection of a common, but palpably false, sense

(continued...)

In addition to the demonstrated need to consider race in the admissions process, the record shows that the burden on the interests of third parties is a diffuse and, by the very nature of the admissions process, uncertain one. This is not an instance of disturbing settled expectations. It is undisputed that even absent the affirmative action programs the Petitioners were still unlikely to be granted admission. For example, in *Gratz*, over 1,500 students with grade point averages and SAT scores *lower* than Jennifer Gratz -- who were *not* beneficiaries of affirmative action -- were granted admission to the University. Expert Report of Jacob Silver and James Rudolph in *Gratz* at 9. This is not an uncommon phenomenon in college admissions cases. *See Texas v. Lesage*, 528 U.S. 18 (1999) (per curiam); *Hopwood v. Texas*, 999 F. Supp. 872 (W.D. Tex. 1998); *Tracy v. Board of Regents of the University System of Georgia*, No. CV 497-45, 2000 WL 1123268 (S.D.Ga. June 16, 2000); *Tracy v. Board of Regents of the University System of Georgia*, 59 F. Supp. 2d 1314 (S.D. Ga. 1999). These cases collectively establish that the burden imposed by affirmative action admissions programs is a diffuse one, related to a benefit the receipt of which is far from certain. *See Wygant v. Jackson Board of Education*, 476 U.S. 267, 283 (1986) (plurality opinion) (distinguishing layoffs in the employment context which "disrupt settled expectations" from general hiring goals which impose a "diffuse burden").

The effect of affirmative action on Petitioners and similarly situated persons is also, statistically speaking, minimal. In *Grutter v. Bollinger*, 288 F.3d 732, 758 (6th Cir. 2002) (Clay, J. concurring), Judge Eric Clay describes the minimal impact of affirmative action programs on persons like

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[61](...continued)
of the national reality regarding the spatial organization of our communities based on race. *See infra* at 11-16.

the Petitioners in these cases. Judge Clay relies on a statistical analysis of the issue that found the improved odds of admission for white applicants in the absence of affirmative action to be in the range of 1-3%. *Id.* at 766-768, *citing* Goodwin Liu, *The Myth & Math of Affirmative Action*, The Washington Post, (April 14, 2002) at B1; *see also* Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 Mich. L. Rev. 1045 (2002).

CONCLUSION

The judgment of the Court of Appeals in *Grutter v. Bollinger* and the district court in *Gratz v. Bollinger* should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, *et al.*,

Respondent.

JENNIFER GRATZ AND PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* MASSACHUSETTS INSTITUTE OF TECHNOLOGY, LELAND STANFORD JUNIOR UNIVERSITY, E.I. DU PONT DE NEMOURS AND COMPANY, INTERNATIONAL BUSINESS MACHINES CORP., NATIONAL ACADEMY OF SCIENCES, NATIONAL ACADEMY OF ENGINEERING, NATIONAL ACTION COUNCIL FOR MINORITIES IN ENGINEERING, INC., IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Case No. 02-241

1. Does the University of Michigan Law School's use of racial preferences in student admissions violate the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), or 42 U.S.C. § 1981?

2. Should an appellate court required to apply strict scrutiny to governmental race-based preferences review *de novo* the district court's findings because the fact issues are "constitutional"?

Case No. 02-516

1. Does the University of Michigan's use of racial preferences in undergraduate admissions violate the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), or 42 U.S.C. § 1981?

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Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214 (1985)..... 24, 25
Shelton v. Tucker, 364 U.S. 479 (1960)..... 25
Sweezy v. New Hampshire, 354 U.S. 234 (1957)..... 25

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ANTHONY LISING ANTONIO ET AL., THE EFFECTS OF RACIAL DIVERSITY ON COGNITIVE COMPLEXITY IN COLLEGE STUDENTS (2003), *available at* http://www.stanford.edu/group/diversity..... 10
T.K. BIKSON & S.A. LAW, RAND REPORT ON GLOBAL PREPAREDNESS AND HUMAN RESOURCES: COLLEGE AND CORPORATE PERSPECTIVES (1994)..... 10, 11
Derek Bok, *The Uncertain Future of Race-Sensitive Admissions* (forthcoming article) *available at* http://www.nacua.org/documents/Unceratin_Future_of_Race_Sensitive_Admissions_Revised.pdf..... 19

M. Bordonaro et al., *Land of Plenty: Diversity as America's Competitive Edge in Science, Engineering, and Technology*, REPORT OF THE CONGRESSIONAL COMMISSION ON THE ADVANCEMENT OF WOMEN AND MINORITIES IN SCIENCE, ENGINEERING, AND TECHNOLOGY DEVELOPMENT, OPPORTUNITIES IN SCIENCE AND ENGINEERING (2000) 17

WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (2d ed. 2000).... 10, 11, 13, 25, 26, 27, 28, 29

William G. Bowen & Neil L. Rudenstine, *Race-Sensitive Admissions: Back to Basics*, THE CHRON. OF HIGHER EDUC., Feb. 7, 2003 ..... 27, 29

CALIFORNIA DEPARTMENT OF EDUCATION, EDUCATIONAL DEMOGRAPHICS UNIT, *available at* http://data1.cde.ca.gov/dataquest/Cbeds1.asp?Enroll=on&PctBlack=on&PctAm=on&PctAsian=on&PctFil=onPctHisp=on&PctPac=on&PctWhite=on&PctMult=on&Grads=on&cChoice+StatProfl&cYear=2001-02&cLevel=State&submit1=Submit..... 16

P.B CAMPBELL ET AL., UPPING THE NUMBERS: USING RESEARCH-BASED DECISION MAKING TO INCREASE DIVERSITY IN THE QUANTITATIVE DISCIPLINES – A REPORT COMMISSIONED BY THE GE FUND (2002)..... 17

LEE CRONBACH, A VALEDICTORY: REFLECTIONS ON 60 YEARS IN EDUCATIONAL TESTING (1995) 21

DUPONT: DIVERSE AND GLOBAL, *available at* http://www1.dupont.com/dupontglobal/corp/careers/working_diversity.html 19

Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARVARD EDUC. REV. 330 (2002) 11

Charles O. Holliday, Jr., *DuPont Celebrates its Employees Transforming a Science Company Through Diversity, available at* http://www.mcca.com/site/data/magazine/coverstory/DuPont1102.htm;..... 14, 20

IBM – DIVERSITY AS A "STRATEGIC IMPERATIVE," *available at* http://www.diversityatwork.com/articles/IBM-Diversity.htm..... 19

SHIRLEY ANN JACKSON, THE QUIET CRISIS: FALLING SHORT IN PRODUCING AMERICAN SCIENTIFIC AND TECHNICAL TALENT (Building Engineering and Science Talent, 2002), *available at* http://bestworkforce.org..... 18

Neal Lane, *Increasing Diversity in the Engineering Workforce*, 29 THE BRIDGE, No. 2, Summer 1999 13

Helen Lippman, *Variety is the spice of a great workforce*, BUS. AND HEALTH ARCHIVE, May 1, 2000 ..... 14, 20

Glenn C. Loury, *Foreword* to WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (2d ed. 2000)..... 29

Gary S. May & Daryl E. Chubin, *A Retrospective on Undergraduate Engineering Success for Underrepresented Minority Students*, 92 J. OF ENG'G EDUC., Jan. 2003 18

MASSACHUSETTS INSTITUTE OF TECHNOLOGY, IN THE PUBLIC INTEREST: REPORT OF THE AD HOC FACULTY COMMITTEE ON ACCESS TO AND DISCLOSURE OF SCIENTIFIC INFORMATION..... 12, 15

MIT's Mission Statement, *available at* http://web.mit.edu/facts/ mission.html) 2

NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY PRESS, ABILITY TESTING OF HANDICAPPED PEOPLE: DILEMMA FOR GOVERNMENT, SCIENCE, AND THE PUBLIC (1982)..... 21

NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY PRESS, ABILITY TESTING: USES, CONSEQUENCES, AND CONTROVERSIES (1982) 21
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NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY PRESS, EMBEDDING QUESTIONS (1999) 21
NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY PRESS, EVALUATING AND IMPROVING UNDERGRADUATE TEACHING IN SCIENCE, TECHNOLOGY, ENGINEERING, AND MATHEMATICS (2003) 21
NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY PRESS, FAIRNESS IN EMPLOYMENT TESTING (1989) 21
NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY PRESS, GRADING THE NATION'S REPORT CARD (1999) 21
NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY PRESS, HIGH STAKES: TESTING FOR TRACKING, PROMOTION, AND GRADUATION (1999) 21
NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY PRESS, KNOWING WHAT STUDENTS KNOW (2001) 21
NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY PRESS, MYTHS AND TRADEOFFS: THE ROLE OF TESTS IN UNDERGRADUATE ADMISSIONS (1999) 21
NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY PRESS, PERFORMANCE ASSESSMENT FOR THE WORKPLACE (1991) 21
NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY PRESS, SCIENTIFIC RESEARCH IN EDUCATION (2002) 21
NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY PRESS, TESTING, TEACHING, AND LEARNING (1999) 21

NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY PRESS, UNCOMMON MEASURES (1999) 21
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NATIONAL SCIENCE FOUNDATION, 2 SCIENCE AND ENGINEERING INDICATORS 2002 (2002) (Appendix Tables) 16, 17
NATIONAL SCIENCE FOUNDATION, WOMEN, MINORITIES AND PERSONS WITH DISABILITIES IN SCIENCE AND ENGINEERING: 2000 (2000) 13, 16, 17
Charlan J. Nemeth, *Differential Contributions of Majority and Minority Influence*, 93 PSYCH. REV. 23 (1986) 13
Note, An Evidentiary Framework for Diversity As a Compelling Interest in Higher Education, 109 HARV. L. REV. 1357 (1996) 10
JOHN BROOKS SLAUGHTER & DARYL E. CHUBIN, NACME, ENGINEERING, AND "GENERATION NEXT," *presented at the Pan-Organizational Summit on the U.S. Science and Engineering Workforce, Government-University-Industry-Research-Roundtable, Washington, D.C., Nov. 11-12 2002* 8, 17
Jane Stanford, 1902 speech, *quoted in* Gerhard Casper, Statement on Affirmative Action at Stanford University (Oct. 4, 1995), *available at* http://stanford.edu/dept/ pres-provost/president/ speeches/951004affaction.html 3
STANFORD UNIVERSITY, SCHOOL OF ENGINEERING, 2000-2001 ANNUAL REPORT, *available at* http://soe.stanford.edu/AR00-01/letter_ dean.html 12
Claude M. Steele & J. Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. OF PERSONALITY & SOCIAL PSYCHOL. 797 (1995) 27

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STATEMENT OF INTEREST[1]

Amici include two leading institutions of higher education in the fields of science and engineering, two of America's largest industrial companies, which are major employers of scientists and engineers, the National Academy of Sciences, the National Academy of Engineering, and the National Action Council for Minorities in Engineering, Inc. These parties submit this brief to address (1) the important role that diversity, including racial and ethnic diversity, plays in achieving the broad educational missions of institutions of higher education, with particular focus on the fields of science and engineering; and (2) why consideration of race and ethnic origin as one among many factors in recruiting and admission of students to selective programs in science and engineering is essential if the important goal of diversity is to be achieved.

A. MIT

The Massachusetts Institute of Technology was founded in 1861 by natural scientist William Barton Rogers to be a new kind of private educational institution relevant to an increasingly industrialized America. Rogers, who pioneered the development of the teaching laboratory, believed that professional competence is best fostered by focusing attention on real-world problems. He envisioned an institution that would exist for the betterment of humankind and would provide for "the intelligent guidance of enterprise and labor . . . step by step, with the advances of scientific and practical discovery."[2] In keeping with Rogers' vision, MIT

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[1] Counsel for all parties have filed standing consents with the Clerk of Court to the filing of *amicus* briefs by any party. Sup. Ct. R. 37.3. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amicus* or its counsel, made a monetary contribution to this brief's preparation or submission. Sup. Ct. R. 37.6

[2] THE COMMITTEE OF ASSOCIATED INSTITUTIONS OF SCIENCE AND ARTS, OBJECTS AND PLAN OF AN INSTITUTION OF TECHNOLOGY 5 (2d ed. 1861).

remains committed to bringing "knowledge to bear on the world's great challenges."[3]

MIT enrolls over 10,000 undergraduate and graduate students, in 27 academic departments within five schools, with many interdepartmental programs, laboratories, and centers whose work extends beyond traditional departmental boundaries. Though the university is widely known for its strength in science, engineering, and technology, MIT also offers degrees in the humanities, business administration, city planning, and other fields. Its undergraduate admissions process is highly competitive, and the school receives applications from many more qualified students than it can accommodate. From the well-qualified applicants among this group, MIT seeks to identify individuals with creative talent and high motivation, whose achievements indicate that they not only will succeed at MIT, but also will contribute to the educational experience of all students at MIT and will likely contribute to the betterment of humankind in their careers.

In making this assessment, MIT does not and cannot rely on grades and test scores as the only factors in its admissions decisions. MIT regularly denies admission to individuals with very high grades and scores who lack the other distinctive qualities it seeks. MIT considers all aspects of each candidate's background, including racial and ethnic factors among many others, in the belief that such an individual assessment of each applicant within context is the best way to evaluate a candidate's talent and potential. In selecting the students who will be admitted, MIT does not use any quotas, targets, or mathematical formulas. The educational value MIT offers includes the "intellectual stimulation of a diverse campus community,"[4] and MIT

[3] *See* MIT's Mission Statement, *available at* http://web.mit.edu/facts/mission.html.

[4] *See id.*

believes that a diverse student body is essential to its mission. That mission is to serve the nation and prepare its graduates to address challenges in a diverse world that is increasingly driven by science, engineering and technology – creative fields that require effective collaboration among individuals of many races, national origins and backgrounds.

B. Stanford

The Leland Stanford Junior University was founded in 1891 by Leland and Jane Stanford, in memory of their son. In the words of Jane Stanford, the moving spirit of the founders was the "love of humanity and a desire to render the greatest possible service to mankind."[5] The founders conceived that "[t]he public at large, and not alone the comparatively few students who can attend the University, are the chief and ultimate beneficiaries of the foundation." The University's "chief object" was "the instruction of students with a view to producing leaders and educators in every field of science and industry." Consistent with that purpose, Stanford early on adopted inclusive admissions policies, including the admission of women, and, for many years, a policy of charging no tuition, to "keep[] open an avenue whereby the deserving and exceptional may rise through their own efforts from the lowest to the highest station in life."

Today, Stanford has almost 14,000 students, who are divided nearly equally between the undergraduate, and the graduate and professional schools, and study in virtually all areas of the liberal arts and sciences. Approximately 30 to 40% of undergraduate degrees and 45 to 50% of graduate degrees are awarded in the fields of engineering, earth sciences, and the natural sciences.

[5] The quotations in this paragraph are from a 1902 speech by Jane Stanford, *quoted in* Gerhard Casper, Statement on Affirmative Action at Stanford University (Oct. 4, 1995), *available at* http://stanford.edu/dept/pres-provost/president/speeches/951004affaction.html.

Admission to Stanford is highly selective, and only students who are well-qualified for the challenges of its curriculum are admitted. In selecting among the well-qualified, Stanford engages in a highly individualized and subjective process that strives to consider each candidate as a complete person. It uses no quotas, targets, or mathematical formulas of any kind. In considering the full range of each candidate's background and accomplishments, Stanford is strongly of the view that race and national origin should no more be entirely ignored than that they should be regarded as dispositive. In context, these factors, among numerous others, may sometimes shed light on the critical questions of a candidate's ability to deal with adversity and make the most of the opportunities that the University offers. Sometimes, too, they may bear on what the candidate will bring to the educational experience of others in the academic community. In addition, Stanford remains highly attentive, as it has been for more than a century, to the roles that its graduates will play in the world. For many reasons, Stanford's mission of pursuing "the betterment of mankind" demands that it reach out to train leaders from all backgrounds and races, and this is equally true in the fields of science and engineering.

C. DuPont

DuPont is an industrial, science and engineering-based company that operates in 70 countries worldwide. It has 135 manufacturing plants and approximately 79,000 employees – half of whom work outside the United States. It was founded by E.I. du Pont in 1802 as a gunpowder manufacturer; a hundred years later, its focus shifted to global chemicals, materials, and energy. Today DuPont applies science to real-life problems to make life safer, more comfortable, and more efficient.

DuPont believes that diversity is one of its greatest assets and considers it a core value of the company. DuPont has found that the insights and cultural sensitivities of a diverse

workforce lead to new customer bases and market opportunities by offering greater understanding of customers who, themselves, represent many races, cultures, countries and experiences. Its success in its third century of business is dependent on cultivating a workforce that understands the many needs that DuPont's products serve. DuPont is heavily dependent on American institutions of higher education to train the future generations of diverse scientists and engineers who are essential if DuPont is to fulfill its mission of recognizing and meeting real needs throughout the world.

D. IBM

With business in 164 countries worldwide, the International Business Machines Corporation ("IBM") is the world's largest information technology company, and also the world leader in business and technology services consulting, hardware, and I/T financing. IBM has a long history of embracing workforce diversity as a competitive strategy and continues to make diversity of all types a priority of its corporate culture. IBM has found workforce diversity to be a strategic imperative.

Business globalization and growing diversity in the United States means that IBM customers reflect a variety of racial, ethnic, and other backgrounds. It is an imperative for IBM to understand and relate to the values of its customers. A diverse workforce brings perspectives and ideas that a homogenous workforce might miss. IBM's success is a direct result of its diverse and talented workforce. Moreover, a diverse workforce enables IBM to attract and retain employees that better serve the needs of its customers. For these reasons, IBM has found that diversity is a business imperative.

IBM depends upon American institutions of higher education to train the scientists and engineers whom it employs, and its ability to identify and hire well-qualified candidates to meet its needs is critical to its success. IBM relies on these institutions to provide a diverse pool of

technical talent. IBM believes that precluding selective private and public universities from considering race as one of many factors in the admissions process will decrease the availability of minority scientists and engineers, and will impede the ability of America's businesses to maintain the diverse workforce necessary to meet the needs of an increasingly diverse and global customer base.

E. National Academy of Sciences; National Academy of Engineering

The National Academy of Sciences ("NAS") and the National Academy of Engineering ("NAE") are part of an umbrella organization of non-profit honorific national societies that work outside the framework of government to ensure independent advice on matters of science, technology and medicine. Since their inception, the National Academies have been called upon many times by the federal government to inquire into and report upon scientific issues of great moment. They have advised the Army and the Navy on science-related defense issues, served as key scientific advisers throughout the history of the US space program, and coordinated development of new national science standards for kindergarten through grade 12, along with many other projects.

NAS was created by an act of Congress in 1863, with a mission to "investigate, examine, experiment, and report upon any subject of science or art" "whenever called upon by any department or agency of the government." Today it has 2,280 members from 31 scientific disciplines and 39 foreign countries. NAS publishes a scholarly journal, *Proceedings of the National Academy of Sciences*, organizes symposia and convenes meetings on issues of national importance and urgency, and participates in the Committee on International Security and Arms Control and the Committee on Human Rights.

NAE was founded in 1964 and operates under the charter of the National Academy of Sciences. NAE has over 2,000

peer-elected members and foreign associates – senior professionals in business, academia, and government. These leaders provide guidance for over 100 projects each year that address issues related to engineering, technology, and quality of life. In 1999, NAE began a "Diversity in Engineering" initiative whose mission is to increase the diversity of the U.S. engineering workforce by developing a strong domestic talent pool. In addressing this goal, NAE has sought to act as a facilitator, organizer, and catalyst for change by gathering stakeholders, convening summits, and establishing taskforces. NAE believes that encouraging and sustaining a diverse population of engineers is one of the major challenges facing the profession today.

F. National Action Council for Minorities in Engineering, Inc.

The National Action Council for Minorities in Engineering, Inc. ("NACME"), was established in 1974 by a group of concerned business leaders to develop strategies for increasing the participation of under-represented minorities[6] in engineering, technology, and math and science-based careers. Since 1974, NACME has provided leadership and support for the national effort to increase the representation of successful African Americans, Native Americans, and Latinos in these fields. NACME is the nation's largest private source of scholarships for minorities in engineering. Since 1980, more than 17,000 students (nearly 15 percent of all minority engineering graduates) have received NACME support. NACME also conducts research and analyzes educational trends in engineering enrollment, degree completion, and workforce participation; advances policies and practices that support the development of a diverse corps of world-class technology professionals; and delivers a range of professional development programs to educators and

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[6]For convenience, *amici* use the term "minorities" to include African Americans, Hispanics, and Native Americans.

practitioners to ensure that students receive the quality learning and work experiences they need.

Leadership in the global economy depends upon an ever growing, more diverse cadre of world-class engineers, scientists, and technologists. At present, minorities make up only ten percent of engineering majors, even though they make up one third of the college-age population.[7] NACME believes that consideration of all factors, including race and national origin, in the admissions process is critical to fostering a diverse technical workforce. Moreover, it finds that over-emphasis on standardized test scores poses a special danger to this goal. Misuse of standardized tests – though intended for good – has benefited those already advantaged in the college admission process, while preserving barriers to students from groups historically under-participating in higher education. As growth in the minority population continues to outpace that of the non-minority population, there exists a critical talent pool from which to draw many of tomorrow's technology leaders. NACME believes that it is in America's collective interest to examine candidates for university admission in such a way as to maximize our ability to identify these potential future participants in the engineering and technology enterprise.

[7] JOHN BROOKS SLAUGHTER & DARYL E. CHUBIN, NACME, ENGINEERING, AND "GENERATION NEXT," *presented at the Pan-Organizational Summit on the U.S. Science and Engineering Workforce, Government-University-Industry-Research-Roundtable, Washington, D.C., Nov. 11-12 2002.*

ARGUMENT

I. The Educational Benefits Of Achieving A Diverse Population Of Students In The Fields Of Science And Engineering Are Compelling

MIT and Stanford share the views of other colleges and universities, public and private, about the need for diversity in teaching the humanities and liberal arts and in professional schools. *See* Br. of Harvard Univ., *et al.*. Likewise, DuPont and IBM, as major international corporations, concur with other such businesses concerning the general need for diversity in education in order to prepare future business and technical leaders to deal in a shrinking and diverse world. *See* Br. of 38 Leading American Businesses.

But *Amici* chose to file this brief, instead of joining another, more general one, in order to make a complementary but additional point that is sometimes overlooked. *Amici* hope to dispel the view that diversity in science and engineering education is any less important than in the humanities and liberal arts. *Amici* assert that diversity (broadly defined and including racial and ethnic diversity) is in fact absolutely essential to the advancement of science and engineering – in part for the same reasons that it is important for higher education generally, but also for a host of other reasons peculiarly related to these fields, and to their critical world role. And minorities are even more under-represented in science and engineering fields than in others.[8]

A. Many Justifications Commonly Offered For A Broadly Diverse Student Body Are No Less Applicable To Study In The Areas Of Science And Engineering

Much of what students learn in college comes from experiences studying, living, and working with other

[8] *See* NATIONAL SCIENCE FOUNDATION, 1 SCIENCE AND ENGINEERING INDICATORS 2002 3-13 (2002).

students, faculty, and administrators in an academic community that extends beyond the classroom.[9] This is true in all disciplines, including science and engineering. For that reason, in the spirit of Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), many academic institutions, including Stanford and MIT, regard a diverse student body – broadly defined to include consideration of race, national origin, and gender as well as other demographic characteristics such as geographic background and socioeconomic disadvantage – to be an important aspect of the education they provide their students, and believe that such diversity greatly enhances the experience of all students.

A diverse academic community stimulates critical, reflective, and complex thinking, enhancing students' problem-solving abilities.[10] Moreover, racial and ethnic diversity in higher education significantly contributes to students' ability to live and work together, and to communicate across racial boundaries – skills of great importance in our increasingly heterogeneous world.[11] The

[9]MIT's students pay substantial tuition for the full academic experience on campus, even though MIT has recently decided to offer the substantive content of most of its courses free of charge over the internet in its OpenCourseWare program, *available at* http://ocw.mit.edu/index.html. *See also* http://ocw.mit.edu/global/faq.html#FAQ17; WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 24 (2d ed. 2000).

[10]*See* ANTHONY LISING ANTONIO ET AL., THE EFFECTS OF RACIAL DIVERSITY ON COGNITIVE COMPLEXITY IN COLLEGE STUDENTS (2003), *available at* http://www.stanford.edu/group/diversity (experiment with 357 college students indicated correlation between exposure to racial diversity in group discussion and more complex thought processes); T.K. BIKSON & S.A. LAW, RAND REPORT ON GLOBAL PREPAREDNESS AND HUMAN RESOURCES: COLLEGE AND CORPORATE PERSPECTIVES 15-19 (1994) (conclusion in text based on case studies of 16 corporations and 16 academic institutions).

[11]*See* Note, *An Evidentiary Framework for Diversity As a Compelling Interest in Higher Education*, 109 HARV. L. REV. 1357, 1373 (1996)

ability to work effectively and live harmoniously with diverse individuals is significantly more likely to be acquired in multi-cultural and multi-racial academic settings.[12] As one MIT graduate, Kofi A. Annan (SM 1972 (management)), put it:

> I would hope that in the education we give to the young – because we are preparing the leaders of the twenty-first century, they are our future – they will come to understand that the world today is an interdependent world, a global village. No one . . . can afford to think in purely local terms. If you do, you are going to be a loser down the line.[13]

B. In A Number Of Critical Respects, The Importance Of Diversity Is Heightened In The Fields Of Science And Engineering

(discussing ALEXANDER W. ASTIN, WHAT MATTERS IN COLLEGE?: FOUR YEARS REVISITED 429 (1993), a study of 25,000 students at 217 institutions who entered college in 1985, which concluded that racial and ethnic diversity teaches students to get along with people of different races and enriches the academic experience with a greater diversity of perspectives); SHAPE OF THE RIVER, *supra* note 9, at 267 (concluding from study of 30,000 former students of a wide range of selective colleges that both white and black respondents "felt that their undergraduate experience made a significant contribution to their ability to work with and get along well with members of other races"), *id.* at 267-68 (concluding from study of 27,000 students attending a wide range of selective colleges that racial diversity "increase[s] the mutual understanding of whites and minority students, enhancing their ability to live and work together successfully").

[12]*See* BIKSON, *supra* note 10, at 15-19; Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARVARD EDUC. REV. 330, 330-36 (2002) (concluding based on data from University of Michigan and the Cooperative Institutional Research Program, which collectively surveyed 12,965 students from 185 institutions, that interaction with diverse peers significantly enhances the education of all students).

[13]CLARENCE G. WILLIAMS, TECHNOLOGY AND THE DREAM: REFLECTIONS ON THE BLACK EXPERIENCE AT MIT, 1941-1999 512 (2001).

1. Collaboration with diverse individuals is a critical part of science and engineering

The advancement of science has become an increasingly collaborative enterprise,[14] and science and engineering have increasingly become global enterprises that cannot be limited by boundaries, backgrounds, races or cultures. "There is no national science just as there is no national multiplication table."[15] "The common laws of nature cross political boundaries, and the international movement of people and knowledge made science global long before 'globalization' became a label for the increasing interconnections among the world's economies."[16]

As the United States becomes both more racially and ethnically diverse, and increasingly connected with the other nations and peoples of the world, the need for scientists and engineers to work with individuals of other races and ethnicities becomes an inescapable reality.[17] Consequently,

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[14] *See* THE EVOLVING MIT CAMPUS: STUDENT LIFE AND LEARNING, *available at* http://web.mit.edu/evolving/student. html and THE EVOLVING MIT CAMPUS: SHAPING THE FUTURE, *available at* http://web.mit.edu/evolving/shaping.html (discussing MIT's "reinvented academic village," with buildings designed solely to "inspire teamwork, communication, and collaboration at all levels of campus life"); STANFORD UNIVERSITY, SCHOOL OF ENGINEERING, 2000-2001 ANNUAL REPORT, *available at* http://soe.stanford.edu/AR00-01/letter_dean.html ("Collaboration helps us leverage our resources and fosters the atmosphere of bold thinking for which the school is world renowned.").

[15] Anton Chekhov, *quoted in* 1 SCIENCE AND ENGINEERING INDICATORS, *supra* note 8, at 3-27.

[16] 1 SCIENCE AND ENGINEERING INDICATORS, *supra* note 8, at 3-27 to 3-29; MASSACHUSETTS INSTITUTE OF TECHNOLOGY, IN THE PUBLIC INTEREST: REPORT OF THE AD HOC FACULTY COMMITTEE ON ACCESS TO AND DISCLOSURE OF SCIENTIFIC INFORMATION 15 (2002) ("MIT REPORT OF THE AD HOC FACULTY COMMITTEE") ("competence in science and technology has grown throughout the world so that access to research and knowledge outside the United States is critical to our own progress"); http://www.mit. edu/newsoffice/nr/2002/publicinterest.html.

[17] *See* MIT REPORT OF THE AD HOC FACULTY COMMITTEE, *supra* note 16, at i-ii, 1-6; 1 SCIENCE AND ENGINEERING INDICATORS, *supra* note 8,

the National Science Foundation's 1997-to-2003 strategic plan requires the agency "to strive for a diverse, globally oriented workforce of scientists and engineers."[18] Collaboration, both nationally and internationally, with people of other races, cultures and ethnic backgrounds, has increased significantly[19] and is of vital importance.[20]

2. Diversity leads to increased creativity, productivity, and success in the science and engineering fields

Because science and engineering are inherently creative professions, ideas and innovations in these fields are affected by the life experiences of the people involved in their creation.[21] Diverse work teams create better and more innovative products and ideas than homogeneous teams.[22]

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at 3-27 to 3-31, 5-24 to 5-26, 5-37 to 5-38, 5-43 to 5-49. *See also* SHAPE OF THE RIVER, *supra* note 9, at 223.

[18] *See* NATIONAL SCIENCE FOUNDATION, WOMEN, MINORITIES AND PERSONS WITH DISABILITIES IN SCIENCE AND ENGINEERING: 2000 1 (2000).

[19] International scientific collaboration has increased significantly in the last two decades, as measured by numbers of articles co-authored across national borders, due to: (1) advances in information technology; (2) economic growth; (3) the growing scale, cost, and complexity of scientific research; (4) new political ties following the end of the cold war; and (5) the advanced education of students outside their native countries. *See* 1 SCIENCE AND ENGINEERING INDICATORS, *supra* note 8, at 5-43 to 5-44.

[20] *See id.* at 3-27 to 3-28 (The United States "gains from new knowledge discovered abroad and from increases in foreign economic development. U.S. industry also increasingly relies on R&D performed abroad."); *id.* at 2-36 ("The United States needs to devise effective forms of collaboration and information exchange to benefit from, and link to, the expanding scientific capabilities of other countries and regions.").

[21] *See* William A. Wulf, *Diversity in Engineering*, 28 THE BRIDGE, No. 4, Winter 1998 (NAE).

[22] *See* Neal Lane, *Increasing Diversity in the Engineering Workforce*, 29 The Bridge, No. 2, Summer 1999; Charlan J. Nemeth, *Differential*

Indeed, multifaceted diversity in a company, including racial and ethnic, as well as gender[23] and other kinds of diversity, "consistently correlates to superior corporate performance."[24] As William Wulf, President of the National Academy of Engineering, noted in 1998, there is "a real economic cost" that flows from an absence of racial and cultural diversity in the field of engineering:

> [T]he range of design options considered in a team lacking diversity will be smaller. . . . [T]he constraints on the design will not be properly interpreted. . . . [T]he product that serves a broader international customer base, or a segment of this nation's melting pot, or our handicapped, may not be found. . . . [T]he most elegant solution may never be pursued. . . . [This cost] is measured in design options not considered, in needs unsatisfied and hence unfulfilled. It is measured in 'might have beens,' and those kinds of costs are very hard to measure. That doesn't change the fact that they are very real and very important.[25]

3. Diversity within science and engineering is vital to this country's economic growth

Contributions of Majority and Minority Influence, 93 PSYCH. REV. 23, 23-32 (1986).

[23]It is worth noting in passing that the issue of gender diversity is also important in the fields of science and engineering, an issue that was the subject of a conference held at MIT on January 23, 2001. *See, e.g.*, http://www.mit.edu/newsoffice/nr/2001/gender.html; http://www.stanford.edu/dept/legal/Worddocs/mitconf.pdf.

[24]Helen Lippman, *Variety is the spice of a great workforce*, BUS. AND HEALTH ARCHIVE, May 1, 2000 (discussing 1998 American Management Association survey of 1,100 companies).

[25]Wulf, *supra* note 21. *See also* Charles O. Holliday, Jr., *DuPont Celebrates its Employees Transforming a Science Company through Diversity*, *available at* http://www.mcca.com/site/data/magazine/coverstory/DuPont1102.htm.

"[T]he national and world economies, as well as our national security, increasingly are driven by science, engineering and technology."[26] These fields increase productivity and are the sources of discoveries and inventions that enhance everyone's well-being. For decades, the United States has enjoyed a leadership role in the development and implementation of cutting-edge research and technology. As a result, this country has benefited many times over by its investment in science and engineering research in industry, universities, and government laboratories. It is no exaggeration to say that "[n]ational security, the health of our nation, and the strength of our economy depend heavily on the advancement of science and technology."[27]

Only a well-educated workforce comprised of people who have learned to work productively and creatively with individuals from a multitude of races and backgrounds can maintain America's leadership and competitiveness in the increasingly diverse and interconnected world economy. The increasing racial and ethnic diversity of our population

[26]MIT REPORT OF THE AD HOC FACULTY COMMITTEE, *supra* note 16, at 1-6. The National Science Foundation ("NSF") has found that "scientists and engineers contribute enormously to technological innovation and economic growth," far exceeding in economic impact the less than 5% of the U.S. civilian workforce that they represent. Scientists and engineers, even those with only bachelor's degrees, spend a significant portion of their time doing research and development. 1 SCIENCE AND ENGINEERING INDICATORS, *supra* note 8, at 3-4, 3-10 to 3-11. Technology "is increasingly recognized as a key determinant of economic growth by most nations. . . ." *Id.* at 5-44. Consequently, the demand for scientists and engineers is projected to significantly exceed that of other occupations this decade. *Id.* at 3-27. The NSF thus has concluded that "[s]cience is a global enterprise [and has been so] long before 'globalization' [and that the] nation's international economic competitiveness . . . depends on the U.S. labor force's innovation and productivity." *Id.* at 3-27 to 3-28.

[27]MIT REPORT OF THE AD HOC FACULTY COMMITTEE, *supra* note 16, at 15.

magnifies the importance of educating more minority scientists and engineers.

Demographic studies make this fact undeniable. Over the next 30 years, the numbers of minorities in this country will grow from their current number (approximately one-fourth of the population) to constitute over one-third of the U.S. population, while the white population will decrease.[28] African Americans, Hispanics and Native Americans already constitute 30% of the college age population today, and by 2025, the National Science Foundation estimates that they will comprise 38% of the college age population.[29] It is anticipated that the minority population will actually surpass the non-minority population shortly after 2050.[30]

While their representation in the population is substantial and increasing, African-Americans, Hispanics, and Native Americans are currently significantly under-represented in the study and practice of science and engineering.[31] Of the approximately 18% of all bachelor's degrees that have

[28] *See* U.S. DEPARTMENT OF COMMERCE, MINORITY BUSINESS DEVELOPMENT AGENCY, MINORITY POPULATION GROWTH: 1995 TO 2050 1 (1999); WOMEN, MINORITIES AND PERSONS WITH DISABILITIES IN SCIENCE AND ENGINEERING, *supra* note 18, at 1.

[29] *See* NATIONAL SCIENCE FOUNDATION, 2 SCIENCE AND ENGINEERING INDICATORS 2002 Table 2-2 (2002) (Appendix Tables).

[30] U.S. CENSUS BUREAU, DYNAMIC DIVERSITY: PROJECTED CHANGES IN U.S. RACE AND ETHNIC COMPOSITION 1995 TO 2050 1 (1999); U.S. DEPARTMENT OF COMMERCE, *supra* note 28, at 3. Indeed, in California – from which Stanford admits 40% of its students – under-represented minorities constituted more than 55% of the public school population in 2001-2002. *See* CALIFORNIA DEPARTMENT OF EDUCATION, EDUCATIONAL DEMOGRAPHICS UNIT, *available at* http://data1.cde.ca.gov/dataquest/Cbeds1.asp?Enroll=on&PctBlack=on&PctAm=on&PctAsian=on&PctFil=onPctHisp=on&PctPac=on&PctWhite=on&PctMult=on&Grads=on&cChoice+StatProfl&cYear=2001-02&cLevel=State&submit1=Submit.

[31] *See, e.g.*, 1 SCIENCE AND ENGINEERING INDICATORS, *supra* note 8, at 3-15, 5-29 to 5-30; WOMEN, MINORITIES AND PERSONS WITH DISABILITIES, *supra* note 18, at 19-21.

historically been earned in the natural and physical sciences, mathematics, and engineering fields,[32] these minority groups, who make up 30% of the college population, together account for only 13%.[33] Unsurprisingly, the low representation of these groups in science and engineering academic programs has led to disproportionately low numbers of minorities in science and engineering occupations.[34] As minority representation in the population steadily increases, their underrepresentation in science and engineering fields becomes ever more consequential to the ability of American businesses to meet the demands of the marketplace.[35]

[32] *See* WOMEN, MINORITIES AND PERSONS WITH DISABILITIES, *supra* note 18, at 19; 2 SCIENCE AND ENGINEERING INDICATORS, *supra* note 29, at Table 2-17.

[33] *See* 2 SCIENCE AND ENGINEERING INDICATORS, *supra* note 29, at Table 2-17; SLAUGHTER & CHUBIN, *supra* note 7 (noting that engineering institutions have only graduated 116,000 minority engineers since 1971 and that such institutions would need to graduate more than 250,000 minority engineers in the coming decade to reflect the ethnic and racial composition of the general population); P.B. CAMPBELL ET AL., UPPING THE NUMBERS: USING RESEARCH-BASED DECISION MAKING TO INCREASE DIVERSITY IN THE QUANTITATIVE DISCIPLINES – A REPORT COMMISSIONED BY THE GE FUND 2 (2002) (same).

[34] 1 SCIENCE AND ENGINEERING INDICATORS, *supra* note 8, at 3-15 (stating that "Blacks, Hispanics, and American Indians as a group constituted 24 percent of the U.S. population but only 7 percent of the total [science and engineering] workforce in 1999"); *see also* WOMEN, MINORITIES AND PERSONS WITH DISABILITIES, *supra* note 18, at 52 (noting that African-Americans and Hispanics were each about 3%, and Native Americans were 0.3%, of the country's scientists and engineers in 1997).

[35] *See* 1 SCIENCE AND ENGINEERING INDICATORS, *supra* note 8, at 3-27 ("During the 2000-2010 period, employment in [science and engineering] occupations is expected to increase about three times faster than the rate for all occupations."); *see also* Bordonaro, M., *et al.*, *Land of Plenty: Diversity as America's Competitive Edge in Science, Engineering, and Technology*, REPORT OF THE CONGRESSIONAL COMMISSION ON THE ADVANCEMENT OF WOMEN AND MINORITIES IN SCIENCE, ENGINEERING, AND TECHNOLOGY DEVELOPMENT, OPPORTUNITIES IN SCIENCE AND ENGINEERING (2000) (noting that, in some areas, particularly in computer

To the extent that the need for technology leadership cannot be met by American business, such leadership will shift to countries with higher "research capacity, scientific output, and innovative capacity."[36] Enrollment of students in science and engineering programs in other countries is high and growing relative to the United States.[37] The American pool of science and engineering students and researchers must be deepened by cultivating the scientific and technical talents of all its citizens, not just those groups that have traditionally worked in science, technology, and engineering fields.[38]

4. American businesses operating in the areas of science and engineering depend on institutions of higher education to produce a diverse pool of scientists and engineers

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and information technology, business leaders are warning of a critical shortage in skilled domestic workers that is threatening their ability to compete in the global marketplace); SHIRLEY ANN JACKSON, THE QUIET CRISIS: FALLING SHORT IN PRODUCING AMERICAN SCIENTIFIC AND TECHNICAL TALENT (Building Engineering and Science Talent, 2002), *available at* http://bestworkforce.org (noting that minority underrepresentation in science and engineering fields is problematic in light of demographic shift and increasing need for scientists and engineers).

[36]*See* 1 SCIENCE AND ENGINEERING INDICATORS, *supra* note 8, at 2-36 (The current shift in science and engineering degrees earned within and without the United States "may eventually translate into a corresponding shift in research capacity, scientific output and innovative capacity.").

[37]*See* 1 SCIENCE AND ENGINEERING INDICATORS, *supra* note 8, at 2-36 to 2-43 (discussing the proportional shift of science and engineering degrees earned from the United States to other countries – the number of such degrees earned in the U.S. has remained stable or declined in the 1990's, while the number of degrees earned in Asia and Europe has *increased*).

[38]*See* Gary S. May & Daryl E. Chubin, *A Retrospective on Undergraduate Engineering Success for Underrepresented Minority Students*, 92 J. OF ENG'G EDUC., Jan. 2003, at 1-13; *see also* 1 SCIENCE AND ENGINEERING INDICATORS, *supra* note 8, at 2-3 ("These trends offer a challenge to the United States to educate students who have been traditionally underrepresented in [science and engineering].").

In seeking to increase the racial and ethnic diversity of their science and engineering programs, selective private universities, such as MIT and Stanford, as well as public ones, define their educational missions broadly to include service of the nation to meet the great challenges of the times. Thus, they are motivated in part by the needs of the important professions and occupations in which their students will find employment.[39] Employers of scientists and engineers seek diverse candidates, and they rely on colleges and universities to provide them with employees who possess the skills necessary to succeed in today's global and collaborative scientific and technological environment.

The business *amici* illustrate this need. DuPont and IBM believe that having a racially and ethnically diverse workforce is critical to their strength and success. "From Dupont's perspective, to continue to be globally competitive our company must have an employee base that is as diverse as the customers who buy our products, the shareholders who buy our stock, the vendors who supply us with goods and services, and the communities in which we operate."[40] Likewise, diversifying its workforce is part of IBM's "competitive strategy," which "has become more important than ever in the face of today's changing demographics and the rapid globalization of business."[41] Not only are diverse

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[39]*See, e.g.*, Derek Bok, *The Uncertain Future of Race-Sensitive Admissions* (forthcoming article) (manuscript at 3-13), *available at* http://www.nacua.org/documents/Unceratin_Future_of_Race_Sensitive_Admissions_Revised.pdf.

[40]Holliday, *supra* note 25 (article written about DuPont by its Chairman and CEO); *see also* DUPONT: DIVERSE AND GLOBAL, *available at* http://www1.dupont.com/dupontglobal/corp/careers/working_diversity.html (stating that DuPont's diverse employees "lead to new market opportunities by offering greater understanding of our customers who, themselves, represent many races, cultures, countries and experiences").

[41]IBM – DIVERSITY AS A "STRATEGIC IMPERATIVE," *available at* http://www.diversityatwork.com/articles/IBM-Diversity.htm; TOGETHER: AT IBM, DIVERSITY IS JUST GOOD BUSINESS, *available at* http://www.ibm.com/news/ls/2000/01/diversity_intro.phtml.

work teams more innovative and creative, but they actually are proven to "yield better business solutions – and better bottom-line results."[42] These companies, and countless others like them, therefore support the race-conscious admissions processes of selective private and public schools like MIT and Stanford.

II. Race-Conscious Recruiting And Selection Processes Are Essential To Achieve Racial Diversity At Selective Colleges And Universities, Especially In The Fields Of Science And Engineering

A. Selective Universities, Such As Stanford And MIT, Consider Race As One Of Many Factors In Their Admissions Processes

For many reasons, MIT, Stanford, and most other competitive universities have long concluded that neither test scores, grades, nor any other single indicator offers a simple solution to the complex question of who should be admitted from a large pool of qualified applicants. While such indicators provide some measure of ability and/or performance within a particular frame of reference, standing alone they provide a poor basis for making admissions decisions. Overwhelming empirical evidence supported by over a century of scientific research unrelated to concerns over racial diversity indicates that a university's complex educational goals and institutional mission cannot be achieved solely by relying on objective criteria such as standardized test scores.[43] This research, including studies

[42] Holliday, *supra* note 25; *see also* Lippman, *supra* note 24 (discussing survey results indicating that diversity "consistently correlates to superior corporate performance").

[43] Indeed, such reliance would violate the educational and psychological testing professions' standards. *See* AMERICAN EDUCATION RESEARCH ASSOCIATION & AMERICAN PSYCHOLOGICAL ASSOCIATION, NATIONAL COUNCIL FOR MEASUREMENT IN EDUCATION, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTS (1999).

by the National Research Council,[44] has revealed that the use of standardized-test scores as the sole measure of merit is scientifically indefensible and that the claim that a higher score should guarantee one student admission over another is not justifiable on empirical grounds.[45] Thus, selective private colleges and universities, as well as many public ones, generally seek to advance their objectives by employing admissions processes that take into account a multitude of individual factors.

[44] The National Research Council's work in the area of testing began during the First World War, when the National Academy of Sciences prepared a comprehensive study of the results of the Army testing program. More recent studies include: ABILITY TESTING: USES, CONSEQUENCES, AND CONTROVERSIES (1982); ABILITY TESTING OF HANDICAPPED PEOPLE: DILEMMA FOR GOVERNMENT, SCIENCE, AND THE PUBLIC (1982); FAIRNESS IN EMPLOYMENT TESTING (1989); PERFORMANCE ASSESSMENT FOR THE WORKPLACE (1991); LEE CRONBACH, A VALEDICTORY: REFLECTIONS ON 60 YEARS IN EDUCATIONAL TESTING (1995); EDUCATING ONE AND ALL (1997); HIGH STAKES: TESTING FOR TRACKING, PROMOTION, AND GRADUATION (1999); UNCOMMON MEASURES (1999); TESTING, TEACHING, AND LEARNING (1999); EMBEDDING QUESTIONS (1999); GRADING THE NATION'S REPORT CARD (1999); KNOWING WHAT STUDENTS KNOW (2001); SCIENTIFIC RESEARCH IN EDUCATION (2002); EVALUATING AND IMPROVING UNDERGRADUATE TEACHING IN SCIENCE, TECHNOLOGY, ENGINEERING, AND MATHEMATICS (2003).

[45] *See* NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY PRESS, MYTHS AND TRADEOFFS: THE ROLE OF TESTS IN UNDERGRADUATE ADMISSIONS 17-24, 30 (1999) ("MYTHS AND TRADEOFFS") (concluding, *inter alia*, that (i) "the claim that a higher [test] score should guarantee one student preference over another is not justifiable"; (ii) standardized tests should be used only as part of a comprehensive program of screening, selection, and admissions because they "were not designed to provide information about all of the factors that influence success in college," and were not "designed to make fine distinctions at any point on their scales"; (iii) tests "are most useful . . . for sorting an applicant pool into broad categories: those who are quite likely to succeed academically at a particular institution [and] those who are quite unlikely to do so . . ."; and (iv) "because of the gap between majority and minority students' test scores, a greater proportion of minorities are rejected despite their capacity to succeed").

While no two admissions processes are precisely identical, many institutions utilize a highly individualized and subjective process similar to those employed by MIT and Stanford. Such processes are very different from the percentage plans used by Texas, California, and Florida, which condition admission on a single criterion, and which, in any event, are utterly useless to national, selective universities. Omitting many specifics of procedure, sequence, and terminology in which they differ, MIT and Stanford have in common (with each other and many other institutions) the following elements:

Both MIT and Stanford confine in-depth consideration to candidates likely to have strong prospects for academic success at these institutions by first setting a high threshold level of intellectual ability and achievement. Both schools discern this required minimum level of qualification from a number of indicators, which include grades and test scores and do not include race. These are the students who, based on these indicators, demonstrate a high level of qualification and the ability to succeed academically.

Of the large pool of capable candidates, MIT and Stanford have the capacity to admit only a small fraction.[46] Defining qualification of this capable pool in much broader terms than just grades and test scores, and rejecting many candidates who have very high scores but lack other important qualities, MIT and Stanford employ a subjective process to consider each candidate's full range of accomplishments, experiences, and potential. Most fundamentally, in addition to academic achievement and intellectual vitality, experienced admissions officers in both schools search for indicators of a candidate's talent, creativity, problem-solving orientation, dedication, and determination. These qualities and others are evaluated in the context of a candidate's experiences, including culture,

[46]Stanford admitted approximately 13% and MIT approximately 16% of applicants for the 2002 freshman class.

advantages enjoyed, disadvantages overcome, potential realized, "distance traveled," and all other relevant information.

Race, national origin, and ethnicity, along with other considerations, are sometimes relevant in this assessment of an individual because they can provide a social and cultural context in which to understand an individual's accomplishments and life experience. They allow a candidate's achievements to be viewed through the lens of the culture and community in which they were realized.[47] Arbitrary elimination of race or national origin from the many factors that create the context in which an individual's talent and motivation can be understood would compromise the integrity of the process and would impair the ability of MIT and Stanford to identify the most promising applicants – that is those applicants who would profit most from and contribute most to an MIT or Stanford education.

Additionally, this individualized assessment of each candidate is guided by critical considerations relating to the universities' missions. First, both MIT and Stanford define their missions broadly to embrace the education of their student bodies and service to the nation, by, as Jane Stanford expressed it, "render[ing] the greatest possible service to mankind," and, as MIT Founder William Barton Rogers put it, "secur[ing] . . . great public benefits." Thus, they train future leaders for work in critical areas, including – primarily, for MIT, and importantly, for Stanford – science and engineering. Neither MIT nor Stanford makes admission decisions to compensate for past wrongs. Instead, they seek diversity in part because in order for these science

[47]Thus, to take a real life example, the design and construction of a solar-powered chili roaster by an applicant to meet the need of his community of migrant farm workers in the Texas panhandle to cook chilis for lunch in the fields, may tell as much about his creative engineering drive and motivation to be of service, as a national science medal does for another applicant.

and technology leaders to develop products and services to improve the lives of people in our diverse world, they must be trained in a heterogeneous environment and be responsive to the needs of each segment of the population. Leaders of science and engineering industry, including DuPont and IBM, confirm what is obvious from the census data – that the global competitiveness of U.S. industry, and the health of the national and world economies, depend on increasing the number of qualified minority engineers and scientists. MIT and Stanford thus believe that in order to most effectively advance their broader educational purposes, it is essential to be cognizant of many of an applicant's personal factors, including race and national origin.

Second, MIT and Stanford also pay attention to diversity read broadly, in the make-up of the academic community because such diversity provides important educational benefits. Both universities recognize that much learning goes on between and among students, faculty, and administrators, often outside the classroom, and that the learning experience for all students is enhanced by the presence of students offering different cultures, life experiences, and areas of accomplishment. We must not pretend that racial discrimination against minorities is no longer an issue in the United States. Although one's race does not dictate one's views – and this is part of what diversity on campus teaches – race, ethnicity, and national origin do contribute to one's experiences and opportunities in life, adding relevant perspectives.[48]

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[48] A university's determination and pursuit of its educational mission has significant First Amendment implications. *Bakke*, 438 U.S. at 312 ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."); *see also Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985) (expressing the Court's "reluctance to trench on the prerogatives of state and local educational institutions and [its] responsibility to safeguard their academic freedom"); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.") (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)). And "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body." *Bakke*, 438 U.S. at 312. *See also Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (noting "the four essential freedoms of a university -- to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study"); *Ewing*, 474 U.S. at 226 n.12 (counting "[d]iscretion to determine, on academic grounds, who may be admitted to study" among the essential freedoms of a university) (quoting *Bakke*).

B. Minorities Would Be Even More Under-Represented In The Fields Of Science And Engineering If Race And National Origin Were Not Considered In The Admissions Process

In the selection process used by MIT and Stanford, which first identifies a group of well-qualified and highly capable applicants and then admits a much smaller number from among them, based on broad evaluation of each individual, consideration of race along with many other factors in making the final decisions is both necessary and entirely appropriate.[49] To require otherwise would both impair their ability to identify the most promising candidates and produce a less diverse educational environment.

Science and engineering are demanding fields that require a significant measure of pre-college preparation in science

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[49] The suggestion of some that the concern for diversity would be better or more justly served by focusing instead on economic diversity, or disadvantage, is unsupportable on two levels. First, economic position does not offer any sort of a useful proxy for race or ethnic origin, and thus does not offer a racially neutral means of achieving the goal of racial or cultural diversity. Simply put, in the population of students from low socio-economic groups who also have high enough test scores to qualify for consideration by highly selective schools, white students outnumber African-American students six-to-one. *See* SHAPE OF THE RIVER, *supra* note 9, at 51. Second, the great majority of successful minority candidates come from middle and upper middle class backgrounds. *See, e.g., id.* at 271.

and mathematics, and an atmosphere that nurtures such professional aspirations. It is a shameful but true fact that minorities tend disproportionately to attend lower quality schools, where both the encouragement and the opportunity to prepare oneself for these areas of study are less accessible.[50] Also, the current, predominantly non-minority make-up of the science and engineering professions means that minorities have few role models and mentors to help guide them to study and pursue careers in these fields.[51] In addition, nationally, African-Americans have a 50% lower likelihood than Caucasians of graduating in the top 10% of their high school class, and have a 40% lower likelihood of having an A average.[52] And, according to the College Board, on the SAT test, minorities not only score on average roughly 10% below the mean of all test takers,[53] but they also constitute a disproportionately small segment of those scoring in the top quartile on those tests. Among all test takers in 2002, scores of 700 or higher were achieved by roughly 5% of those taking the verbal, and 6% of those taking the math portion of the test; for minorities, those

[50] *See* 1 SCIENCE AND ENGINEERING INDICATORS, *supra* note 8, at 1-22 to 1-30.

[51] *See id.* at 5-29 to 5-30 (noting "the importance of role models and mentoring to student success in mathematics, science, and engineering, especially for women and minorities" but stating that these groups are under-represented on college campuses, in science and engineering Ph.D programs, and the science and engineering labor market); WILLIAMS, *supra* note 13, at 774-75 (discussing study at MIT noting need for minority faculty due to harmful effects of lack of minority faculty and mentors in guiding minority students).

[52] SHAPE OF THE RIVER, *supra* note 9, at 272 (citing STEPHEN THERNSTROM & ABIGAIL THERNSTROM, AMERICAN IN BLACK AND WHITE: ONE NATION INDIVISIBLE 402 (1997)).

[53] For the more than 1.2 million SAT test takers in 2002, the average scores were 505 verbal and 513 math; for the more than 218,000 minorities (including African-Americans and Hispanics) who took the test, the averages were 439 verbal and 440 math. Statistics provided by The College Board, 2002 Staff Data Research Software.

respective percentages are around one percent – or fewer than 750 African Americans and 1500 Hispanics nationwide. Scores above 600 were achieved by 21% of those taking the verbal, and 24% of those taking the math; for African Americans the corresponding percentage is just over 5% on both tests, and for Hispanics, it is about 9% on the verbal and almost 10% on the math.[54] For these reasons, the pool of minority students who have high enough scores and grades to be seriously considered on a more individualized basis for admission to selective science and engineering programs is disproportionately small.

MIT's and Stanford's ultimate selection of students for admission, from the large group of applicants initially determined to be well qualified and highly capable, is not based only on grades and test scores. If it were, minorities would be even more significantly under-represented than they already are in the fields of science and engineering.[55] And this would be profoundly unfair to the individuals

[54] *Id.* There is good evidence that the "stereotype effect" – the fear of doing something that would confirm a negative stereotype – is at least one reason for the lower SAT test scores for non-Asian minorities. *See* Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613, 613-19 (1997); Claude M. Steele & J. Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. OF PERSONALITY & SOCIAL PSYCHOL. 797, 797-811 (1995).

[55] Bowen and Bok report that, regardless of field of study, the overall numbers of black students on campus at highly selective colleges and professional schools would drop to less than 2% of all matriculants under a race-neutral standard, and would decrease further to less than 1% at the most selective schools of law and medicine. *See* SHAPE OF THE RIVER, *supra* note 9, at 281, 282. Given the highly selective nature of science and engineering admissions programs and the already low application and participation rates, these paltry numbers would be similar in those fields. *See also* William G. Bowen & Neil L. Rudenstine, *Race-Sensitive Admissions: Back to Basics*, THE CHRON. OF HIGHER EDUC., Feb. 7, 2003, at B7 (noting that both public and private universities would become significantly less diverse if they could not take race into account in admissions decisions, in part because every alternative category includes large numbers of competitive non-minorities).

affected and deprive the nation of talented graduates who reflect the diversity of America.[56]

C. The Use Of Race As One Of Many Factors In The Admissions Process Has Been Successful At Increasing The Diversity In Science And Engineering Academic Programs

By considering race as one of many factors in the admissions process,[57] MIT has been able to increase minority undergraduate enrollment in a gradual but steady manner – from less than 1% in 1968 to 8% in 1980, 15% in 1990, and 19% in 2000.[58] At Stanford, while diversity in the overall undergraduate student body has increased significantly during this period, undergraduate degrees from the School of Engineering for traditionally underrepresented minorities have increased only slightly. As Glenn C. Loury wrote in his forward to *Shape of the River*, race-conscious admissions "must continue if the gains are to be maintained, and ... administrators at selective colleges and universities, acting as

[56]Some contend that considering race in admissions must mean that a student whose admission was influenced by his or her race was less qualified than others in the pool. But that contention ignores the fact that these institutions make all admissions from the pool of candidates who are first determined to be well-qualified and highly capable. Once the first measure of qualification is met, the meaning of "qualified" expands to include consideration of the many attributes of each individual (such as athletic ability, musical talent, race, and others), in the context of the university's broader goals to train future leaders in an academic setting bringing together varied experiences and backgrounds.

[57]In addition to their consideration of race as a factor in their admissions processes, MIT and Stanford have undertaken outreach and bridging programs to enhance the prospects of enrolling a diverse group of students able to effectively pursue the demanding science and engineering curricula. These programs have the effect of identifying and expanding the talent-pool of those interested in and capable of pursuing and succeeding in demanding science and engineering undergraduate programs – including under-represented minorities.

[58]While African Americans comprised less than 1% of MIT's class of 1967-68, *see* WILLIAMS, *supra* note 13, at 16, the class of 2001-02 consisted of 6% African Americans.

just and responsible stewards, can do no less than stay the course."[59] Although progress has been made, the national demographics and limited pool of qualified minority candidates available to MIT and Stanford indicate that more, not less, is needed.

Moreover, the weight of the evidence and the experience of MIT and Stanford demonstrate that attendance at selective universities provides substantial benefits to all students.[60] Students from selective schools have many opportunities after graduation.[61] Graduation rates for both minority and majority students from MIT and Stanford, and from highly selective schools generally, are very high when compared with national averages and with minority graduation rates at less selective schools.[62] And most science and engineering graduates, including minority graduates, are finding jobs in their fields.[63] It has been the experience of MIT and

[59]Glenn C. Loury, *Foreword* to SHAPE OF THE RIVER, at xxi.

[60]*See* SHAPE OF THE RIVER, *supra* note 9, at 129-31.

[61]*See* SHAPE OF THE RIVER, *supra* note 9, at 129-31; Bowen & Rudenstine, *supra* note 55, at B7.

[62]

Six-Year Graduation Rates*							
Race	MIT	Stanford	Highly Selective	Selective	Moderately Selective	Less Selective	All Institutions
Black	80.3%	89.8%	55.2%	38.6%	34.4%	29.9%	39.0%
Hispanic (Stanford/ Mexican American)	76.2%	88.5%	61.5%	41.8%	35.2%	29.4%	42.7%
Asian	95.3%	96.4%	73.2%	49.5%	41.3%	38.7%	60.2%
Native American	80.0%	79.3%	50.7%	28.1%	27.4%	27.1%	34.3%
White	94.5%	94.1%	68.5%	57.6%	45.3%	38.1%	57.0%

* The national data was collected by The Consortium for Student Retention Data Exchange ("CSRDE"). CSRDE was established in 1994 and has a current membership of 420 public and private colleges and universities from the USA, Canada and Ireland.

[63]*See* 1 SCIENCE AND ENGINEERING INDICATORS, *supra* note 8, at 3-6 (noting that science and engineering jobs increased by 159% between

Stanford, borne out by yield data, that candidates – both minority and non-minority – when given the choice between attending a highly selective school and a less selective one, overwhelmingly choose the more selective alternative.

Respectfully submitted,

1980 and 2000, representing 4.9% annual growth compared to 1.1% annual growth for the entire labor force).

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BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, et al.,

Respondents.

JENNIFER GRATZ and PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF JOHN CONYERS, JR., MEMBER OF CONGRESS; JOHN D. DINGELL, MEMBER OF CONGRESS; CHARLES B. RANGEL, MEMBER OF CONGRESS; FORTNEY PETE STARK, MEMBER OF CONGRESS; EDWARD J. MARKEY, MEMBER OF CONGRESS; GEORGE MILLER, MEMBER OF CONGRESS; DALE E. KILDEE, MEMBER OF CONGRESS; MARTIN FROST, MEMBER OF CONGRESS; ROBERT T. MATSUI, MEMBER OF CONGRESS; MARTIN OLAV SABO, MEMBER OF CONGRESS; BARNEY FRANK, MEMBER OF CONGRESS; STENY H. HOYER, MEMBER OF CONGRESS; ET AL., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Patricia Gurin, *Expert Reports: Reports Submitted on Behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education*, 5 MICH. J. RACE & L. 363 (1999) 6

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English Language Fluency Act, H.R. 3892, 105th Cong. (1998) 27

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Kenneth L. Karst & Harold W. Horowitz, *The* Bakke *Opinions and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. L. REV. 7 (1979).....14

Patricia Marin & Edgar K. Lee, *Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida* (Feb. 7, 2003).....22

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INTEREST OF *AMICI CURIAE*[1]

Amici are Members, Delegates and a Resident Commissioner of the United States House of Representatives, and the Mayor of the City of Detroit, Michigan.[2] As elected representatives, *amici* are keenly aware that the promise of participation is one of the central tenets of our democracy. As legislators and policymakers, *amici* have worked to enhance political, economic and educational participation by members of racial minority groups. Encouraging such participation is in the public interest, and will be preserved by permitting the race-conscious decision making necessary to ensure that important public institutions are being made available to all. Under the standard announced in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), the Court's decision in this case will apply with equal force to public officials at federal, state and local levels, and will affect the legislative and policy options available to *amici* to address the needs and concerns of their constituents.

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[1] This brief is filed with the written consent of all parties. Consent letters are on file with the Clerk of Court. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

[2] *Amici* submit this brief in their individual and private capacities and not on behalf of any local, state or federal legislature or executive agency.

SUMMARY OF ARGUMENT

The race-conscious admissions policies of the University of Michigan (the "University") and the University of Michigan Law School (the "Law School") represent a constitutionally appropriate exercise of the authority and flexibility accorded to university admissions officials. Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) established the constitutionality of using race as one factor in higher education admissions. In Justice Powell's view, a state university's constitutional authority to consider race was not limited to instances of remedying identified discrimination. Rather, he located one source of that authority in the university's academic freedom under the First Amendment, and the substantial contributions that a diverse class of students makes to the educational mission of institutions of higher education and the political participation and representation that lie at the foundation of American society and governmental institutions. Under *Bakke*, the educational and political benefits that result from a diverse student body are sufficiently compelling interests to justify race-conscious governmental action.

The reasoning underlying Justice Powell's decision in *Bakke* has become part of the fabric of the Court's subsequent equal protection jurisprudence. Relying on the Court's jurisprudence, government officials, including those in Congress and the executive branch, have established numerous programs that require decision makers to take race into account to address matters ranging from research to road construction to entrepreneurship to management of federal educational assistance. Sustaining the view that the Equal Protection Clause permits limited race-conscious decision making will preserve the flexibility

that governmental decision makers need to address problems defined by their impact on particular racial groups, while limiting the range of constitutionally acceptable solutions to those that do not involve using race as the predominant factor in the decision making. *See Miller v. Johnson*, 515 U.S. 900, 915 (1995). By contrast, eliminating race-conscious decision making as a tool in state higher education admissions would create a constitutional conflict with a state university's academic freedom under the First Amendment, threaten broad access to government resources and services, and put at risk the full and complete political and economic participation for citizens of all racial backgrounds.

To preserve the significant political, social and economic gains for all Americans that result from the current role of race in higher education admissions, the Court should (1) hold that the educational and political benefits that flow from achieving diversity in the context of higher education constitute a sufficiently compelling governmental interest to support race-conscious state decision making under the Equal Protection Clause; (2) uphold the consideration of race as one factor in governmental decision making so long as race is not the predominant criterion or goal; and (3) reaffirm that the role of race in governmental decision making is not limited to remedying specific instances of identified discrimination.

ARGUMENT

I. RACIAL DIVERSITY IN HIGHER EDUCATION FURTHERS COMPELLING GOVERNMENTAL INTERESTS THAT STRENGTHEN AMERICAN DEMOCRACY

Contrary to what Petitioners and their *amici* imply, "race is a factor in our society."[3] It is a life-defining experience for most in the same way as whether one is male or female, grows up rich or poor, is raised in an urban, suburban or rural setting or hails from Montana or Georgia. The issue before the Court is whether the Equal Protection Clause permits state educators to consider race, together with these other factors, in higher education admissions. For the past twenty-five years, the Court's equal protection jurisprudence regarding consideration of race has been guided by Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). There is no question that Justice Powell's opinion in *Bakke* squarely permits colleges and law schools, including those at the University of Michigan, to consider race as one of several factors in its admissions process to obtain the benefits of educational diversity. These benefits include the enhanced economic, social and political participation of racial minorities.

In a democratic system, a group of citizens must be able to obtain their government's assistance in preserving access to the "transactions and endeavors that constitute life in a free society." *Cf. Romer v. Evans*, 517 U.S. 620,

[3] *Meet the Press* (NBC television broadcast, Jan. 19, 2003) (comments of Condoleezza Rice).

633 (1996) (striking down ban on protections against discrimination for persons of gay, lesbian or bisexual orientation on grounds that the ban infringed those persons' fundamental right to participate in the political process). Thus, core democratic values are enhanced by the exposure and interactions that flow from a class containing a critical mass of students from diverse backgrounds, which strengthens the fabric of American democracy.

The Court's equal protection jurisprudence permits government officials to take race into account as one of many factors to promote universal access to government programs and services, so long as it does not dominate the process or control the outcome. *See Miller v. Johnson*, 515 U.S. 900, 913 (1995). The flexibility that the Court has allowed government decision makers preserves the core democratic values of full and fair political participation and responsive government for minority citizens. The need for flexibility and the exercise of discretion is especially compelling in the educational context. State educational institutions are among the most important tools available to the states to aid in the creation of model citizens. Moreover, educational decisions are accorded First Amendment protection as an exercise of academic freedom.

A. Considering Race As One Factor In Admissions Is Constitutional

This Court has acknowledged that education is critical to "the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests." *Ambach v. Norwich*, 441 U.S. 68, 76

(1979). Research has shown that for racial minorities, education at highly selective schools is associated with higher levels of civic and political participation. *See* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: THE LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 119-54, 173-74 (1998) (describing higher political participation and civic involvement of African Americans who attended selective schools compared with those who have not attended such schools). Including a critical mass of students who are members of racial minority groups as part of a diverse class of university or law school students both fosters levels of participation necessary to sustain an effective democracy and improves the quality of political representation.

Higher education provides a singular opportunity for citizens to meet, live with, learn about, and learn from people of other backgrounds. Exposing all students to a broad range of ideas, practices and experiences, and the interactions among the students that occur as a result, eventually permits the state to draw on enhanced political participation and representation. *Amici*'s experience accords with studies showing that heightened exposure to and engagement with peoples of different races and cultures foster an increased sense of commonality across racial and cultural lines and an elevated ability to understand the perspectives of others. *See* Patricia Gurin, *Expert Reports: Reports Submitted on Behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education*, 5 MICH. J. RACE & L. 363, 399-401 (1999). A sense of commonality and receptivity is necessary for representatives such as *amici* to build support in political institutions for initiatives critical to protect the

interests of their constituents. As Justice Powell noted in *Bakke*, the "nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this nation of many peoples." 438 U.S. at 313 (Opinion of Powell, J.) (internal quotation marks omitted).

Justice Powell's conclusion reflects the role race often plays as a defining experience that shapes people's ideas and mores. Consequently, Justice Powell and four other justices agreed that a state institution of higher education could consider race as "one element . . . in the selection process" for creating such a class, so long as that process was not shown to be the functional equivalent of a quota system. *Id.* at 318-20 (Opinion of Powell, J.).

Relying on Justice Powell's opinion in *Bakke*, Michigan educators, along with many others throughout the United States, have adopted race-conscious admissions programs that seek to include racial minorities while preserving the role of many other important factors. The diversity created through these efforts redounds educational and political benefits to society. It is these educational and political benefits that flow from diversity among students in higher education, rather than the fact of the diversity itself, that *amici* ask the Court to affirm as state interests sufficiently compelling to justify considering race as a factor in the admissions process. *See Bakke*, 438 U.S. at 307, 315 (Opinion of Powell, J.).

B. Non-Remedial Justifications Can Support Race-Conscious Governmental Action

For the past quarter century, Justice Powell's opinion in *Bakke* has been the cornerstone of this Court's framework for evaluating challenges to governmental uses of

race. In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the Court adopted the view, expressed by Justice Powell in *Bakke*, that strict scrutiny should apply to facially race-based governmental classifications regardless of whether those classifications benefited members of a group that historically had been the subject of discrimination. *Croson*, 488 U.S. at 493-94 (citing *Bakke*, 438 U.S. at 289-90 (Opinion of Powell, J.)). Under strict scrutiny, governmental uses of race must be narrowly tailored to accomplish a compelling state interest. *Croson*, 488 U.S. at 506. States have a compelling state interest in remedying identified past or present discrimination. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (citing *United States v. Paradise*, 480 U.S. 149, 167 (1987) (Opinion of Brennan, J.); *id.* at 190 (Stevens, J., concurring); *id.* at 196 (O'Connor, J., dissenting)). *Accord Bakke*, 438 U.S. at 307 (Opinion of Powell, J.).

Remedial measures, however, comprise just one part of the permissible universe of compelling state interests that may justify governmental use of race in decision making. For example, in recent redistricting decisions, a majority of justices have recognized that states have a sufficiently compelling interest in avoiding violations of federal anti-discrimination law to permit the use of race as a factor in redistricting. *See Bush v. Vera*, 517 U.S. 952, 977-78 (1996); *id.* at 994 (O'Connor, J., concurring); *id.* at 1034-35 (Stevens, J., dissenting); *id.* at 1065 (Souter, J., dissenting). The Court's recognition of a state legislature's compelling interest in avoiding liability under federal anti-discrimination law when engaged in redistricting resonates with the decisions of all nine justices who participated in the *Bakke* decision.

The issue here is whether the benefits that flow from educational diversity are sufficiently compelling non-remedial justifications to justify Michigan's race-conscious admission policies. The educational and political benefits that result from a diverse student body were among the non-remedial compelling state interests that Justice Powell envisioned supporting appropriate race-conscious programs and policies implemented through the democratic process that would pass strict scrutiny. *Bakke*, 438 U.S. at 299, 311-12 (Opinion of Powell, J.). Affirming that these political and educational benefits provide a compelling governmental interest to support a race-conscious admissions plan would accord with this Court's recent equal protection decisions.

C. Eliminating Educational Diversity As A Compelling State Interest Will Have Negative Consequences For The Ideal Of The Rule Of Law

This Court has relied on Justice Powell's opinion in *Bakke* as a foundation for developing an adjudicative framework for evaluating challenges to governmental uses of race. This case presents this Court's first opportunity since *Bakke* to revisit the application of the Equal Protection Clause to consideration of race as a factor in the context of higher education admissions. To repudiate Justice Powell's recognition of educational diversity as a compelling state interest in the very context in which so many of the Court's other equal protection principles were first articulated would seriously undermine the integrity of the juridical approach this Court has adopted for interpreting governmental uses of race under the Equal Protection Clause, and tear at the fabric of the law.

The doctrine of *stare decisis* informs the Court's judgment when reconsidering prior constitutional decisions. "[E]ven in constitutional cases, the doctrine carries such persuasive force that [the Court] ha[s] always required a departure from precedent to be supported by some 'special justification.'" *Dickerson v. United States*, 530 U.S. 428, 443 (2000). Whether or not the current membership expresses doubts about the correctness of an earlier decision, the Court considers the costs of repudiating that decision to the rule of law. *Id.* In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Court described four considerations "designed to test the consistency of overruling a prior decision with ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." *Id.* at 854-55. In the context of affirmative action in higher education, these considerations show that this case does not present the "special justification" required for overturning *Bakke*. In the broader context of the Court's equal protection jurisprudence, the *stare decisis* analysis illuminates the foundational position *Bakke* has assumed in the Court's equal protection jurisprudence and that of the lower courts, and the damage that would be done to that jurisprudence should *Bakke* be overturned.

Although the Court has further clarified the requirements of the Equal Protection Clause since *Bakke*, the Court's jurisprudence has not "developed so as to have left the old rule no more than a remnant of an abandoned doctrine." *Casey*, 505 U.S. at 855. Rather, the coherence of the current state of the Court's equal protection jurisprudence, which relies heavily on *Bakke*, is reflected in the

lower court's capable administration of the principles announced in *Bakke* and its progeny. *See Casey*, 505 U.S. at 854 ("[W]e may ask whether the rule has proven to be intolerable simply in defying practical workability."). Consistent with this jurisprudence, lower courts weigh whether proffered non-remedial justifications for race-conscious decision making rise to the level of a compelling interest. *Compare Wittmer v. Peters*, 87 F.3d 916, 919-20 (7th Cir. 1996) (permitting juvenile boot camp guards to be selected partially on basis of race) *and Martin v. Sch. Dist. of Phila.*, 1995 WL 564344, *2 (E.D. Pa. Sept. 21, 1995) ("[T]here can be little doubt that the state's interest in ensuring equal educational opportunities across race lines is a compelling one.") *with Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354-56 (D.C. Cir. 1998) (holding that ensuring racially diverse radio programming is not a compelling interest). Lower courts that accept *Bakke* as controlling on questions of affirmative action in public education strike down those admissions programs which use racial quotas, *e.g., Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 378 (W.D. Ky. 2000), and uphold those programs in which race is used as one of many diversity factors. *E.g., Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1201 (9th Cir. 2000). These decisions indicate that the lower courts are capably following the rules announced in *Bakke* and that the required determinations "fall within judicial competence." *Casey*, 505 U.S. at 855.

The factual circumstances underlying Justice Powell's opinion in *Bakke* remain the same, and are viewed the same, today. The state of public higher education today does not present the situation where "facts have so changed, or come to be seen so differently, as to have

robbed the old rule of significant application or justification." *Casey*, 505 U.S. at 855. Justice Powell explained that admitting a diverse student body is necessary to universities' missions to enhance the marketplace of ideas and is within the universities' First Amendment academic freedom. *Bakke*, 438 U.S. at 311-14 (Opinion of Powell, J.). Neither the Court's nor the country's views on the importance of universities' academic freedom has changed since 1978. And as Professor Patricia Gurin's large scale longitudinal study shows, educational benefits flowing from diverse student bodies continue to benefit all students. Gurin at 364-65. Our view that diversity is an integral part of the "robust exchange of ideas" remains the same today as Justice Powell's view in *Bakke*.

Finally, the Court should consider the cost of repudiating *Bakke* "as it would fall on those who have relied reasonably on the rule's continued application." *Casey*, 505 U.S. at 854-56, 864-69. Repudiation of *Bakke* would fall heavily upon public educators. Nearly every public institution of higher education in the country has adopted a race-conscious admissions program crafted on *Bakke*. BOWEN & BOK at 7. Overturning *Bakke* would result in a national upheaval of admissions policies and confusion for those admissions officers at public universities and professional schools. More importantly, it would weaken the ability of public universities to assemble diverse student bodies necessary to ensure the "robust exchange of ideas."

Briefing of certain *amici* suggest that *Bakke* can be affirmed consistent with holding the University and Law School admissions practices unconstitutional. That result cannot with intellectual honesty be sustained. *Bakke* stands expressly for the right of educators to exercise discretion in exactly the way Michigan educators have.

Moreover, denying educators the tools Michigan employs would substantially undermine the ability to achieve the benefits *Bakke* sought to advance. Public educators in those states that prohibit race-conscious admissions policies have struggled with how best to ensure a diverse exchange of viewpoints, and have been forced to substitute imprecise proxies for diversity. *See infra* Part II.B. Their struggles have often been unsuccessful, especially in the most elite public institutions. *Id.* Moreover, their struggles often result in abandoning or reducing the importance of other important factors in the admissions process. Forcing selective state schools to employ admissions methodologies that limit their ability to craft a class of individuals with a broad range of characteristics would infringe upon public universities' First Amendment freedom "to provide that atmosphere which is most conducive to speculation, experiment and creation." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

The cost of overturning *Bakke* would also weigh upon state and federal legislators. Lawmakers need clear guidance form the Court to square potential legislation with the Equal Protection Clause. *Cf. Romer*, 517 U.S. at 632 ("The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance to the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority.") That guidance is now provided by *Bakke*, the Court's subsequent equal protection decisions building on *Bakke*, and rulings from the lower courts. Permitting race-conscious decision making in the context of a multi-factor process provides guidance and discipline to elected officials regarding the types of policies

and legislation they can implement to address the concerns of their constituents. This in turn maintains the ability of identifiable groups of constituents to obtain the assistance of government to address their problems. Overturning *Bakke* would destabilize equal protection law and muddy the waters for legislators – a result counter to the purpose of *stare decisis*.

Bakke resolved "an intensely divisive controversy," *Casey*, 505 U.S. at 866, and has "become part of the national culture." *Dickerson*, 530 U.S. at 443. In these circumstances, overruling the earlier precedent could undermine public confidence in the judiciary and weaken the rule of law. *Casey*, 505 U.S. at 866-69. *Bakke* settled the national controversy about affirmative action in 1978, a debate that is no less divisive today.[4] *Cf. Casey*, 505 U.S. at 869 (noting that public pressure to overrule *Roe v. Wade*, 410 U.S. 113 (1973) was more intense then than shortly after *Roe* was decided). After *Bakke*, public schools around the country maintained their race-conscious admissions programs, modeling the programs after Justice Powell's opinion. *See* Kenneth L. Karst & Harold W. Horowitz, *The* Bakke *Opinions and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. L. REV. 7, 7 (1979) (noting that *Bakke* provides a "how-to-do-it manual for the admission of minority applicants to professional schools"). Vacillating on the meaning of the Equal Protection Clause

[4] A January 2003 Westlaw search of the journals and law reviews database ("JLR") resulted in 2,458 pieces published in 2000 or after including both "affirmative action" and words beginning with "constitution". By comparison, replacing "affirmative action" with "abortion" yielded 635 hits. A January 2003 Google search for "affirmative action" and "constitution" yielded approximately 121,000 hits; "abortion" and "constitution" yielded approximately 174,000 hits.

in the context of higher education could cause the harms to the Court and the country emphasized in *Casey*.

II. THIS COURT'S FRAMEWORK FOR DISTINGUISHING LEGITIMATE RACE-CONSCIOUS DECISIONS FROM UNLAWFUL QUOTAS PRESERVES THE EFFICACY OF OUR FEDERAL SYSTEM

The "unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995). In their role as public officials, *amici* must address practices and problems defined by their impact on one or more groups of individuals who share a common racial background. The Court has developed a standard for adjudicating race-conscious governmental decision making that recognizes the "intrusive potential of judicial intervention in the legislative realm." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). This standard provides the necessary flexibility to enable public officials to meet their responsibilities in these situations.

A. Race May Be Considered as One of Many Factors in Governmental Decision Making In Some Circumstances

The Equal Protection Clause does not mandate race-neutral decision making in all contexts. *See Shaw v. Reno*, 509 U.S. 630, 642 (1993) ("This Court never has held that race-conscious decision making is impermissible in all circumstances."). The Court regularly distinguishes

between three types of governmental decision making: (1) race-determinative,[5] (2) race-conscious,[6] and (3) race-neutral.[7] Governmental awareness of race does not implicate the Equal Protection Clause unless it has a substantive effect on the outcome of the government's decision-making process. *See Bush v. Vera*, 517 U.S. 952, 968 (1995) (O'Connor, J., principal opinion) ("If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify. . . ."). *Cf. Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 306 (1978) (Opinion of Powell, J.) (stating that to extent race was considered only to correct for inaccuracies in predicting academic performance "it might be argued that there is no 'preference' at all"). Over the past twenty-five years, the Court has developed and followed distinct but consistent approaches to assessing governmental action involving race-conscious

[5] "Race-determinative" decision making occurs where an individual's race determines or controls (a) the outcome of a decision-making process with respect to that individual; or (b) that individual's ability to access a service or resource made available by the government.

[6] "Race-conscious" decision making occurs where (a) a governmental actor takes an individual's race into account; and (b) where the consideration of that individual's race either (i) has some effect on the outcome of a decision-making process but does not control or determine the outcome with respect to that individual; or (ii) affects the individual's chances of accessing a service or resource provided by the government, without affecting his or her eligibility for that service or resource. Where an individual's race predominates in the decision, it becomes race-determinative.

[7] "Race-neutral" decision making occurs where an individual's race has no effect on either (a) the outcome of a governmental decision-making process with respect to that individual; or (b) the individual's ability to access government-supplied resources or services.

decision making, and has scrutinized that decision making in a way that preserves the discretion and flexibility for legislators and policy makers that is an integral part of our federal system.

Where race controls the outcome of government decision making, it can only be justified where it is narrowly tailored to a compelling state interest and race-neutral alternatives will not accomplish the same goal. *Adarand*, 515 U.S. at 237. Thus, absent a compelling state interest, neither Richmond, Virginia in *Croson* nor the University of California, Davis Medical School in *Bakke* could rigidly reserve for minorities a portion of those programs' available opportunities. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989); *Bakke*, 438 U.S. at 299, 305 (Opinion of Powell, J.).

By contrast, where a state takes race into account to influence, rather than determine, the outcome of a decision-making process, this Court has taken a different approach. Drawing on the distinction that Justice Powell established in *Bakke* between a legitimate race-conscious decision-making process and a process that is functionally race-determinative, this Court has held that a state may engage in race-conscious decision making so long as individuals' race is not the predominant factor motivating the decision. *Miller*, 515 U.S. at 915. As the Court has noted, Justice Powell never stated that applying strict scrutiny to all racial classifications would inhibit the "rough compromise" of the democratic process from implementing such classifications where they are appropriate. *Adarand*, 515 U.S. at 224 (quoting *Bakke*, 438 U.S. at 299 (Opinion of Powell, J.)). Recent redistricting decisions offer substantial guidance as to how and under what

circumstances government actors may take race into account in decision making.

The Court's most recent application of its race-consciousness standard is a prime example. In *Easley v. Cromartie*, 532 U.S. 234 (2001), the Court held that the North Carolina legislature constitutionally considered race in crafting a minority opportunity district for its reapportionment plan where the district boundaries could be explained equally by race or political behavior. *Id.* at 257-58. By focusing on whether North Carolina had used race in a way that overshadowed other permissible aspects of the redistricting process, the Court's approach reflects a tolerance for the use of race in governmental decision making that varies with the context of the decision-making process, and the amount of influence an individual's race has on the final outcome of that process. As a decision-making process involving a number of factors in a context of historical judicial deference, redistricting suggests the circumstances in which the Court's race-consciousness standard provides the most appropriate means of assessing whether a particular use of race is constitutional.

The non-remedial considerations and need for freedom from judicial interference that led to this Court's adoption of the predominant motivating factor test to evaluate race-conscious decision making in *Miller* are also present in the educational context. Institutions of higher education long have received significant latitude from this Court in the area of academic freedom. Within constitutional constraints, an institution of higher education may "determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire*, 354 U.S.

234, 263 (1957) (Frankfurter, J., concurring). *Accord, Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) (requiring restrained judicial review of academic decisions). Recognizing this tradition in his opinion in *Bakke*, Justice Powell determined that an institution of higher education was entitled to discretion in fashioning its admissions decisions unless its policy represented the "functional equivalent of a quota system." *Bakke*, 438 U.S. at 318 (Opinion of Powell, J.).

Critics erroneously decry the University and the Law School's admission of a "critical mass" of minority students as a "quota". This rhetoric does not demonstrate that race determines the outcome of the admissions process. *See Miller*, 515 U.S. at 916 ("Plaintiff must prove that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations."). Indeed, if the mere establishment of a goal relating to a certain level of participation results in a constitutional violation, numerous federal programs that provide for equitable access to government contracting markets or other resources may be at risk. For example, Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), establishes a program designed to enhance the economic competitiveness of disadvantaged small businesses (including those owned or controlled by members of certain specified racial minority groups) and provide access to the federal procurement market. In implementing this program, the Small Business Administration uses a benchmarking method to determine the number and types of firms that will participate in the program. *See* 13 C.F.R. § 124.103-.105, .1002. Similarly, minimum participation goals for disadvantaged businesses, historically black colleges and universities and other minority institutions, and other colleges and universities with a

student body where a particular racial minority group exceeds a specific threshold are to be implemented where practicable under the Energy Policy Act of 1992, 42 U.S.C. § 13556, and the Clean Air Act Amendments of 1990, 42 U.S.C. § 7601.

The government also sets and enforces race-conscious participation goals in providing access to educational resources. The No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301 *et seq.*, was enacted to "ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education" and, among other things, to "clos[e] the achievement gap . . . between minority and non-minority children." *Id.* § 6301. It requires public schools to create performance based standards and implement testing to measure students' progress towards those goals at various grade levels. *Id.* § 6311. Under the racial accountability standards of the Act, schools must break down test results by race and ethnicity. *Id.* § 6311(b)(3)(C)(xiii). To avoid sanctions such as staff reorganization, reduced federal funding, or privatization, schools must demonstrate that each major racial and ethnic group is adequately progressing towards performance standards. *Id.* § 6311(b)(2)(B), (C)(v)(II)(bb). Those schools in which any subgroup falls below the minimum testing level will be designated for improvement and subject to sanctions. *Id.*

These federal programs consider race as one of several factors in providing access to government resources and services for disadvantaged individuals. No less than the Michigan admissions programs, these federal programs must seek enough participation to achieve their intended purposes. Both sets of programs should receive the deference of the kind described by Justice Powell in *Bakke* and

traditionally provided by this Court in reviewing academic and political decisions. Being honest and straightforward about the minimum participation needed to achieve otherwise constitutionally permissible goals should not be punished. There is a constitutionally significant difference between a quorum and a quota.

Preserving the ability of governmental actors to engage in race-conscious decision making will maintain the flexibility this Court has traditionally granted to political and academic actors. As public officials responsible for ensuring effective access to government resources and institutions by all citizens, *amici* have found that racial accountability provisions have a significant ability to preserve access to such resources. In order for such statutes to be effective, those governmental decision makers responsible for implementing the rules must be able to incorporate race into their implementation and corrective action efforts where warranted. Application of this Court's race-consciousness standards will preserve the flexibility that governmental decision makers need to address problems with racial contours, while limiting the scope of permissible solutions to those that do not involve using race as the predominant factor in decision making.

B. Sustaining Limited Race-Conscious Decision Making Preserves Necessary Flexibility for Governmental Actors

Detractors of the University and Law School's policies would find both plans unconstitutional based on the purportedly race-neutral admissions policies in place in California, Florida and Texas. *See, e.g., Grutter v. Bollinger*, 288 F.3d 732, 806-08 (6th Cir. 2002) (Boggs, J., dissenting); Brief of *Amicus Curiae* the United States in

Support of Petitioner in *Grutter v. Bollinger*, at 13-21; Brief of *Amicus Curiae* the United States in Support of Petitioner in *Gratz v. Bollinger*, at 13-15, 18; Brief of *Amicus Curiae* the State of Florida, at 8-10. They assert that results of the admissions policies adopted by these states show that race-neutral decision making is a viable alternative for ensuring minority representation. The assumptions and data underlying this argument do not bear scrutiny.

Upon closer examination, the overall admissions schemes of California, Florida and Texas universities are not race-neutral. Rather, they rely heavily on other race-conscious actions, such as race-targeted scholarships, financial aid, and recruitment and retention efforts. *See* Patricia Marin & Edgar K. Lee, *Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida* 32-37, *at* http://www.civilrightsproject.harvard.edu/research/affirmativeaction/florida.pdf (Feb. 7, 2003); Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* 51-58, *at* http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf (Feb. 7, 2003). These components show that far from being race-neutral, California, Texas and Florida admissions officers have just shifted their race-consciousness to a different stage within the admissions process.[8]

[8] The persistence of poor minority enrollment results at the Berkeley and Los Angeles campuses of the University of California caused the University of California Regents to reverse their decision to ban any consideration of race for admissions purposes by the state's

(Continued on following page)

Further, the enrollment data offered to show that the new policies provide adequate minority representation are misleading. These data focus on the enrollment of minority students system-wide, rather than in individual schools, particularly the most selective schools. Minority applications and enrollment at Florida, California and Texas flagship institutions have significantly declined. *See* Horn & Flores at 45-51; Marin & Lee at 27-36. The reduction of diversity at the most selective campuses demonstrates that these plans do not offer any meaningful alternatives to the University and Law School's consideration of race in admissions.

Although searching analysis seriously undermines the argument that there are effective race-neutral alternatives to the Law School's consideration of race, there is a more compelling reason not to mandate such alternatives in place of race-conscious decision making. Mandating admissions programs of the type adopted in California, Florida and Texas would create a conflict with the constitutionally protected discretion of University officials. These alternative admissions plans largely provide for mandatory admission to a state university campus for students who place within a certain percentage at the top of their high school graduating class. By requiring schools to admit individuals purely on the basis of their academic achievement in high school, such policies eliminate the discretion that past decisions of this Court have granted to institutions of higher education. Without meaningful

colleges and universities. *See* Cathy Cockrell, *UC Regents Rescind SP-1, SP-2*, BERKELYAN, May 17, 2001.

control over the make up of their student bodies, admissions officials can not create the substantive diversity that Justice Powell sought to preserve in *Bakke*. This is not just a matter of racial diversity. Admissions officials' discretion with regard to economic diversity, gender diversity, geographic diversity, individual's life experiences and admitting legacies would also be threatened. A decision by this Court that the Equal Protection Clause requires state universities to adopt admissions policies of the type described by the United States, rather than allowing educators to choose a race-conscious admissions policy, will create a constitutional conflict with the universities' rights under the First Amendment. Such a decision could also restrict the ability of elected representatives to provide broad access to government resources and services and to promote full and complete political and economic participation.

C. Congress and The Executive Branch Have Continuously Endorsed Race-Conscious Decision Making as a Constitutional Means Of Promoting Full and Complete Political and Economic Participation For All Americans.

Congress' commitment to ensuring access to higher education for racial minorities is at least as old as the Fourteenth Amendment itself. In 1866, Congress passed the Fourteenth Amendment to eliminate any possibility of a constitutional challenge to the Civil Rights Act and the expansion of the Freedmen's Bureau powers enacted that same year. *See* ERIC FONER, THE STORY OF AMERICAN FREEDOM 104-07 (1998); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth*

Amendment, 71 VA. L. REV. 753, 784 (1985). As with the Fourteenth Amendment, the original purpose and function of the Freedman's Bureau was to provide various forms of aid to African Americans in the South during the Reconstruction era. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 243 (1988). Among the many areas in which the Bureau exerted its efforts on behalf of African Americans, none has endured so well or so fruitfully as education. Howard University, along with the many other historically black colleges and universities, has played a substantial role in educating black Americans who have contributed to the development and improvement of American democratic systems.

Following this Court's decisions in such cases as *Brown v. Board of Education*, 347 U.S. 483 (1954), Congress enacted the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq*. Title VI of the Civil Rights Act, 42 U.S.C. § 2000(d), requires recipients of federal funding to avoid taking any action that would discriminate against or exclude any person on racial grounds. Responsibility for enforcing Title VI in the educational arena falls to the U.S. Department of Education. The Department's regulations implement Congress' desire that recipients of federal funds be accountable for providing access to their programs. This responsibility requires an awareness of race and may require action to correct practices that exclude or disadvantage racial minorities. Specifically, the Department has established regulations that permit recipients of federal funds to "take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color or national origin . . . even in the absence of prior discrimination." 34 C.F.R. § 100.3(b)(6)(ii).

In overseeing the Department's activities, Congress has commended the Department's recognition "that diversity is a legally acceptable form of affirmative action." H.R. REP. NO. 102-1086, at 211 (1992). These statutes and regulations reflect a determination by both Congress and the executive branch that the Constitution permits state educators and other governmental officials to engage in race-conscious decision making to comply with federal laws promoting racial equality. This position is consistent with the views of a majority of this Court's justices. *Vera*, 517 U.S. at 977-78 (O'Connor, J., principal opinion); *id.* at 994-95 (O'Connor, J., concurring); *id.* at 1034-35 (Stevens, J., dissenting); *id.* at 1065 (Souter, J., dissenting). Reaffirming this principle in the area of education will facilitate Congress' historic commitment to providing broad access to educational activities financed with federal funds, and will preserve Congress' ability to address the persistence of both the fact and the effects of racial inequality.

For over a decade, Congress has consistently reaffirmed its determination that race-conscious action is constitutional. Numerous recent enactments provide for the consideration of race in the distribution of scholarship funds. *See, e.g.*, 42 U.S.C. § 1862n-1(c)(2) (requiring that consideration be given to "the goal of promoting the participation" of students from disadvantaged backgrounds, including racial minorities, in awarding grants for math, science and engineering students); H.R. REP. NO. 107-229, at 18 (2001) (promoting "nursing workforce diversity" by providing funding for increased nursing education opportunities for racial and ethnic minorities and other disadvantaged students); H.R. REP. NO. 106-645, at 23, 116 (2000) (providing funding to "increase the

number of minority students who pursue advanced degrees and careers" in science and encouraging the development of specific numerical goals for the program). These enactments continue a long-standing trend in congressional activity requiring consideration of race as a factor in decision making. *See, e.g.*, 20 U.S.C. § 1136 (establishing Thurgood Marshall Legal Opportunity Program to assist "low-income, minority, or disadvantaged college students" with access to legal education); 20 U.S.C. § 1131 (creating Minority Foreign Service Professional Development Program to "significantly increase the number of African American and other underrepresented minorities in the international service").

In addition to crafting legislation that relies on limited consideration of race by those charged with the law's administration, Congress has consistently rejected bills introduced to eliminate or prohibit race-conscious decision making needed to promote access to government resources and benefits. With the benefit of this Court's decision in *Adarand*, Congress has reached a considered decision to preserve race as one factor in providing access to the benefits of federal programs and initiatives. For example, the 105th Congress rejected the "Riggs Amendment," which would have prohibited "discrimination and preferential treatment in connection with admissions to institutions of higher education" under the Higher Education Act of 1965. *See* English Language Fluency Act, H.R. 3892, 105th Cong. (1998). Likewise, in 1997, a bipartisan majority of the House Judiciary Committee voted to table H.R. 1909, a bill sponsored by Representative Canady that would have prohibited the consideration of race or gender in any federal program or initiative. *See* Civil Rights Act of

1997, H.R. 1909, 105th Cong. (1997). Elected representatives of both parties have joined together to preserve race-conscious decision making as a tool for fulfilling Congress' constitutional charge to eradicate the legacy of inequality that results from this nation's long history of racial discrimination by providing broad access to the programs, opportunities, and resources sponsored by the federal government.

By contrast, this nation's history demonstrates that resistance to access to public resources for racial minorities develops where the federal government has shown leniency rather than leadership. A decision by this Court mandating purportedly race-neutral policies whose indicia of success measure access to government resources at a general rather than specific program level would frustrate Congress's efforts to combat the effects of discrimination. Such policies may permit a state to avoid its compliance obligations under federal law. Under such a standard, states potentially could use otherwise facially neutral standards, such as different admission indexes or awarding extra points for courses not offered in schools that serve minority individuals, to institute or reinstitute a dual university system in which there was very little diversity on any campus. In reviewing whether the University of Mississippi had dismantled its dual structure in *Ayers v. Fordice*, 505 U.S. 717 (1992), this Court concluded that concluding that the University of Mississippi's use of different ACT admissions thresholds for automatic admission to specific campuses, though race-neutral, had the purpose and effect of maintaining campuses that are identifiable white and black. *Id.* at 734-39. To permit states to use system-wide numbers to maintain or establish the type of "discriminatory system that should, by

now, be only a distant memory" would be a major departure from this Court's equal protection jurisprudence. *Id.* at 745 (O'Connor, J., concurring).

CONCLUSION

This Court need not tear at the fabric of its equal protection decisions to reaffirm the compelling nature of a state's interest in the educational and political benefits that flow from a diverse student body. The standards applied to race-conscious decision making in recent redistricting cases provide an established and entirely appropriate means of evaluating the University's and the Law School's consideration of race as one of several factors in its admissions process. Application of these standards is consistent with Justice Powell's opinion in *Bakke* and this Court's other recent decisions in the area of equal protection. Application of the race-consciousness standard in this context also will confirm this Court's prior guidance to other governmental decision makers as to the way in which race may be taken into account in situations where it is a critical aspect of responding to an identified need. This prior guidance has resulted in enactment of race conscious admissions criteria that have been effective to obtain educational diversity without resort to quotas. The University and the Law School's consideration of race in admissions furthers the compelling interest in educational diversity and the resulting benefits in education and political participation that flow to the school's students and society at large. Michigan educators' discretion in this regard is constitutional. The decisions of the Court of

Appeals for the Sixth Circuit and the U.S. District Court for the Eastern District of Michigan should be upheld.

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Nos. 02-241 & 02-516

IN THE

Supreme Court of the United States

BARBARA GRUTTER,
Petitioner,
v.
LEE BOLLINGER, ET AL.,
Respondents.

JENNIFER GRATZ AND PATRICK HAMACHER,
Petitioners,
v.
LEE BOLLINGER, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE UNIVERSITY OF PITTSBURGH, TEMPLE UNIVERSITY, WAYNE STATE UNIVERSITY, AND THE UNIVERSITY OF ARIZONA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Amici will address the following question:

Whether the putatively "race-neutral" plans in Texas, Florida, and California that grant university admission to high-school graduates who finish in a top percentage of their class provide a basis for striking down the University of Michigan's affirmative action policies as not narrowly tailored to serve the compelling interest in a diverse student body.

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Personnel Admin. v. Feeney, 442 U.S. 256 (1979) 17

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San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) 13

United States v. Fordice, 505 U.S. 717 (1992) 17-18

United States v. Paradise, 480 U.S. 149 (1987) 6, 7

Washington v. Davis, 426 U.S. 229 (1976) 17

Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982) 18

CONSTITUTION

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OTHER MATERIALS

Roger Clegg, *Texas's Unconstitutional Experiment*, Wash. Post, Nov. 7, 2002, at A24 19

Jodi S. Cohen, *U-M: Texas Plan Won't Work; State's Racial Pattern, Outside Enrollment Would Scuttle It*, Detroit News, Jan. 24, 2003, at 6A..... 8

Michael Fletcher, *Race-Neutral Plans Have Limits in Aiding Diversity, Experts Say*, Wash. Post, Jan. 17, 2003, at A12 19

Catherine L. Horn & Stella M. Flores, The Civil Rights Project, Harvard University, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* (Feb. 2003), *available at* http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf..... 15, 17

Connie Langland, *The State Takes Over, Budgets Get Tighter, N.J. Redefines the "Abbott" Case*, Phila. Inquirer, Mar. 3, 2002, at P4 12

Curt A. Levey, *Texas's 10 Percent Solution Isn't One*, Wash. Post, Nov. 12, 2002, at A24 20

Lydia Lum, *Minority Rolls Cut by Hopwood*, Hous. Chron., Sept. 16, 1997, at A15 18

Patricia Marin & Edgar K. Lee, The Civil Rights Project, Harvard University, *Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida* (Feb. 2003), *available at* http://www.civilrightsproject.harvard.edu/research/affirmativeaction/florida.pdf..... 16

National Center for Education Statistics, *Common Core of Data: America's Public Schools*, *available at* http://nces.ed.gov/ccd/bat/Result.asp?id=644705706&CurPage=1&view=State..... 10

National Center for Education Statistics, *Common Core of Data: America's Public Schools*, *available at* http://nces.ed.gov/ccd/bat/Result.asp?id=644705706&CurPage=2&view=State..... 8

Ron Nirsimov, *Detouring Toward Diversity: Schools Push Limits of Hopwood Ruling*, Hous. Chron., May 5, 2002, at A1 ..... 19, 20

Petition for Writ of Certiorari, *Texas v. Hopwood*, No. 95-1773 (U.S. filed Apr. 17, 2001), *available at* http://www.law.utexas.edu/hopwood/hopwoodpetcert.pdf..... 19

R.G. Ratcliffe, *Senate Approves Bill Designed To Boost Minority Enrollments*, Hous. Chron., May 9, 1997, at A1 19

Jeffrey Selingo, *What States Aren't Saying About the "X-Percent Solution,"* Chronicle of Higher Education (June 2, 2000), *available at* http://www.bamn.com/ce/2000/000602-che-x-percent.txt 11, 18

Marta Tienda, *et al.*, *Closing the Gap?: Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action* (Jan. 21, 2003), *available at* http://www.texastop10.princeton.edu/publications/tienda012103.pdf. 8, 14, 15

Temple University Policy 04.81.02 (adopted Nov. 14, 1977), *available at* http://policies.temple.edu/getdoc.asp?policy_no=04.81.02 1

University of Arizona President's Council on Diversity Vision Statement, *available at* http://w3fp.arizona.edu/pcd/vision.htm 1-2

University of Pittsburgh Affirmative Action Committee Mission Statement (approved 1996) 1

University of Pittsburgh Board of Trustees Resolution (adopted Feb. 24, 2000) 1

University of Texas News Release, *The University of Texas at Austin's Experience with the "Top 10 Percent" Law* (Jan. 16, 2003), *available at* http://www.utexas.edu/admin/opa/news/03newsreleases/nr_200301/nr_toptenpercent030116.html 15-16

Wayne State University Mission Statement (adopted Dec. 13, 1985), *available at* http://www.dmac.wayne.edu/MissionStatement.htm 1

INTEREST OF *AMICI CURIAE*[1]

The University of Pittsburgh, Temple University, Wayne State University, and the University of Arizona have concluded that a diverse student body is a crucial component of a premier education – an education that prepares students to live in a multi-ethnic, multi-racial, and globally interdependent society. The Board of Trustees of the University of Pittsburgh has adopted a policy that commits the University to "ensur[ing] that the full range of opportunities [it provides] are accessible to all segments of an increasingly diverse society"[2] and "[e]nhancing opportunities for enrolling, retaining, and graduating students from underrepresented groups."[3] Temple University, Wayne State University, and the University of Arizona have similar policies.[4]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that it authored this brief and that no entity other than *amici*, their members, or counsel made a monetary contribution to the preparation or submission of the brief. Counsel for *amici* represents that counsel for all parties have consented to the filing of this brief. Letters granting blanket consent to any party filing an *amicus* brief in support of either petitioners or respondents have been filed with the Clerk.

[2] University of Pittsburgh Board of Trustees Resolution (adopted Feb. 24, 2000).

[3] University of Pittsburgh Affirmative Action Committee Mission Statement (approved 1996).

[4] *See, e.g.*, Temple University Policy 04.81.02 (adopted Nov. 14, 1977) (affirming university's commitment to according "students of any race, color, national and ethnic origin" "all the rights, privileges, programs and activities . . . made available to students at the University"), *available at* http://policies.temple.edu/getdoc.asp?policy_no=04.81.02; Wayne State University Mission Statement (adopted Dec. 13, 1985) (recognizing that, "as an urban university," it has "an obligation to develop special avenues that encourage access for promising students from disadvantaged educational backgrounds," including "implement[ing] its curricula in ways that serve the needs of a nontraditional student population that is racially and ethnically diverse"), *available at* http://www.dmac.wayne.edu/MissionStatement.htm; University of Arizona President's Council on Diversity Vision Statement (stating commitment to "eliminate institutional barriers

Because of their strong interest in fostering and maintaining diversity to provide their students the best possible education, *amici* file this brief to explain why the alternative method of obtaining diversity proffered by the Solicitor General is not a viable one in many States and for many public and state-related universities. Percentage plans have even less relevance to private universities. And these plans have never been used anywhere for graduate and professional schools, so they cannot be considered an alternative to the carefully tailored admissions policies at the University of Michigan Law School.

Amici urge the Court to conclude that these plans are not a nationwide solution that renders the carefully considered diversity initiatives at the University of Michigan unconstitutional. Rather, in light of the paramount interest of the States in matters of public education, what policies pass constitutional muster as narrowly tailored must be evaluated in light of the discretion responsible educators at state and state-related universities must have to experiment and to determine appropriate means to achieve diversity in their student bodies, given their unique demographics, educational missions, and policy priorities.

SUMMARY OF ARGUMENT

The existence of percentage plans adopted in Texas and a few other States does not justify a conclusion by this Court that the more nuanced, individualized diversity approaches employed by the University of Michigan are not narrowly tailored. The Solicitor General asserts that percentage plans (1) serve the overriding interest in ensuring educational diversity – an interest that the government does not contend is anything other than compelling – at the University of Michigan and elsewhere; and (2) are race-neutral. With respect, he is wrong on both points.

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to an equitable and diverse educational . . . environment"), *available at* http://w3fp.arizona.edu/pcd/vision.htm.

I. There is simply no basis to conclude that a percentage plan would work to ensure diversity at the University of Michigan or at many other public or private universities. The plaintiffs in these cases provided no evidence of any kind on that point and indeed have rejected throughout this litigation the argument that the Constitution requires such an approach. The Solicitor General's suggestion that analogous plans would be viable around the country finds no support in the record, and is not based upon any testimony by educators as to the feasibility of these plans generally across the Nation or any evaluation of the particular demographic circumstances facing different States. Such an unsubstantiated assertion cannot be regarded as a valid (much less, a dispositive) criticism of the University of Michigan's admissions systems for graduate and undergraduate programs.

Indeed, significant evidence demonstrates that, because of differences between the States, percentage plans are not a one-size-fits-all solution. As the Director of Admissions at the University of Texas has candidly acknowledged, these plans were never designed as a national solution. Even if percentage plans have served the interests in diversity in Texas and Florida – a conclusion that is based on extra-record speculation by the Solicitor General and is subject to significant question empirically – they are not a panacea in other States. For instance, even if the University of Pittsburgh were to guarantee admission to the top 20% of its in-state applicants, that policy would not come close to maintaining a diverse student body at that school. On the contrary, by itself, such a program would ensure admission of only about 23% of the African American students currently enrolled at the campus.

Accordingly, to provide all students with the significant benefits of a diverse educational environment, the University of Pittsburgh, like many other schools, must make individualized determinations of the potential contributions that each applicant may make to the University's academic and social environment, taking into consideration such non-exhaustive factors as test scores, grades, leadership, preparedness, socio-

economics, geography, race, and ethnicity. The Constitution permits state academic professionals to experiment and to tailor diversity initiatives to their particular needs, within the bounds enunciated by Justice Powell in *Regents of University of California v. Bakke*, 438 U.S. 265, 314-15, 317 (1978); it does not shackle state educators around the country to the one solution that policymakers in a few States have selected.

By recognizing the authority of state and local educators to craft policies responsive to their particular needs within constitutional limits not implicated by the University of Michigan's policies, this Court would be adhering to its long tradition of recognizing the primacy of the States and localities in education. As the Court has long explained, "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools." *Milliken v. Bradley*, 418 U.S. 717, 741 (1974). Adherence to that tradition here would allow individual States to determine the kinds of diversity initiatives that are consistent with their priorities, their demographics, and their schools' educational missions. By contrast, adoption of the Solicitor General's proposal would represent the worst kind of top-down federal mandate – a mandate that forces all localities into the same rigid model, without regard to the unique circumstances that confront educators across our diverse Nation.

Even beyond the limitations of percentage plans in undergraduate education, they have never even been tried for graduate and professional schools, so they have no conceivable relevance to the issues presented in the *Grutter* case. The Solicitor General's extensive reliance on the availability of those plans in his brief in that case is thus misplaced.

Finally, there is significant reason to doubt that these percentage plans have had any significant effect in maintaining diversity even in the few States where they have been tried. Studies by researchers from Princeton and Harvard have shown that students guaranteed admission under these programs were virtually assured of acceptance even without these plans; that minorities below the level of guaranteed

acceptance are harmed under these plans; and that minorities remain heavily under-represented at flagship universities in these States. Given those facts, the Constitution cannot operate as a federal straitjacket to limit the freedom of other States and universities to pursue a different path.

II. The proposals highlighted by the Solicitor General are not, in any event, race-neutral. Policies that are *motivated* by race are not race-neutral, and that is so whether or not the relevant government policy facially accounts for race. *See Miller v. Johnson*, 515 U.S. 900, 913 (1995). State decisionmakers adopted these percentage plans because of race-based considerations. Florida policymakers have *conceded* that they chose to guarantee admission to the top 20% of high-school students because research indicated that a 10% or 15% plan would not yield sufficient minority enrollment. The Texas plan was similarly motivated by a significant drop in minority enrollment after the Fifth Circuit's decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

Accordingly, these plans do not offer an easy way out of the issues raised by affirmative action. Rather, they are simply another race-conscious way of obtaining some degree of the educational diversity that most educators and policymakers believe is essential to a first-class education. A few States have chosen to use percentage plans as one mechanism for attaining diversity. However, other States and other universities, facing different circumstances, must be free to make different choices that are responsive to their own situations in providing their students the benefit of a diverse education. Consistent with longstanding constitutional tradition, this Court should respect the different choices made by different States and not sanction a single federal race-based solution that negates the authority of States to employ other mechanisms that they have found to be more effective in their circumstances.

ARGUMENT

I. PERCENTAGE PLANS ARE NOT A VIABLE MECHANISM IN MANY CONTEXTS TO SERVE THE COMPELLING INTEREST IN ENSURING DIVERSITY IN HIGHER EDUCATION

A. The Use of Percentage Plans in a Few States Does Not Establish that the University of Michigan's Affirmative Action Plan Is Not Narrowly Tailored.

The Solicitor General claims that the University of Michigan's affirmative action policies are unconstitutional because of the existence of percentage plans of the type used in Texas, Florida, and California. These percentage plans, the Solicitor General argues, provide race-neutral alternatives that would be "efficacious" in ensuring a diverse student body in Michigan. *See* U.S. *Amicus* Br. at 13-21, *Grutter v. Bollinger*, No. 02-241 ("U.S. *Grutter* Br."). The Solicitor General thus does *not* dispute that educational diversity is a compelling state interest – on the contrary, he acknowledges the "paramount" state objective of ensuring an educational environment open to all. *Id.* at 13. Rather, he claims only that, because of the alleged existence of the purportedly race-neutral alternative of the percentage plans, the University of Michigan's affirmative action plans are not narrowly tailored to serve the interest in educational diversity. *See id.* at 18-26.

1. Even assuming that these percentage plans are race-neutral – which they are not, as discussed below – the University of Michigan would have an obligation to employ this alleged alternative to serve its compelling interest only if a percentage plan were an *effective* means of ensuring diversity *at the University of Michigan*. *See United States v. Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion) (in determining whether challenged action is narrowly tailored, Court considers factors including efficacy of alternatives); *Bernal v. Fainter*, 467 U.S. 216, 227 (1984) ("[t]o satisfy strict scrutiny," State must show that classification on the basis of

alienage "furthers a compelling state interest by the least restrictive means *practically available*") (emphasis added); *see also Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 622 (1990) (O'Connor, J., dissenting) (policy is not properly tailored when agency ignored available alternative "means of directly accomplishing the governmental interest").[5]

Neither the Solicitor General nor petitioners have made such a showing, nor could they. Indeed, petitioners provided *no* record evidence that such plans would be effective at the University of Michigan, although they had ample opportunities to do so had they believed that such plans would be an effective, race-neutral solution in the context presented here. For his part, the Solicitor General leaps from the assertion that these plans have been successful at a few schools in a few States to the conclusion that they will work in Michigan, Pennsylvania, Arizona, and everywhere else around the country. But the Solicitor General's speculation on this point is no substitute for record evidence as to the efficacy of such alternatives *at the University of Michigan*. By itself, petitioners' decision not to present such evidence precludes the claim that such plans are an effective alternative here. *See Paradise*, 480 U.S. at 174-175 & 177 n.28 (plurality opinion) (rejecting alternative proffered by the government in part because "[t]his alternative was never proposed to the District Court"). *See also Reno v. Koray*, 515 U.S. 50, 55 n.2 (1995) (declining to consider argument by *amicus* waived by party).

2. In any event, the Solicitor General's analytical leap is not only wholly unsupported; it is incorrect. All States, and all universities, are not alike. The 50 States are diverse in their demographics and in the educational missions and selectivity of their public and state-related universities. There

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[5] In this regard, it should be noted that the University of Michigan did consider race-neutral alternatives in both its undergraduate and law school admissions programs and found them insufficient to serve the compelling interest in diversity. The Sixth Circuit in *Grutter* and the district court in *Gratz* agreed with that conclusion. *See* Pet. App. 33a-34a, No. 02-241; Pet. App. 40a-42a, No. 02-516.

is simply no basis for this Court to mandate a one-size-fits-all strategy in the absence of any evidence that such an approach will in fact work in all States and all localities, or for all universities.

Indeed, the percentage plans in place in Texas and elsewhere were never *designed* as national solutions, but rather as responses to the particular circumstances facing those States, given their demographics, the level of segregation in their high schools, and the goals of their university systems. The Director of Undergraduate Admissions at the University of Texas has forthrightly acknowledged as much. As he has explained, the Texas legislators who drafted that State's 10% plan "*weren't thinking nationally*"; instead, "[t]hey were thinking: 'What can we do *in Texas* to still have diverse universities?'" Jodi S. Cohen, *U-M: Texas Plan Won't Work; State's Racial Pattern, Outside Enrollment Would Scuttle It*, Detroit News, Jan. 24, 2003, at 6A (emphases added). Thus, even assuming that these plans serve the compelling interest in diversity at public universities in Texas, they are not a solution for many state universities (and, indeed, their relevance to private universities is even further attenuated).

The University of Pittsburgh provides a clear example in this regard. Unlike in Texas, where the *majority* of the school-age population is Hispanic and African American,[6] minorities (including Asian Americans and Native Americans) make up only 16% of the twelfth-grade students in the State of Pennsylvania.[7] Given the limited number of minority students who graduate from Pennsylvania high schools in any given year, there is only a small pool of in-state minority

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[6] *See* Marta Tienda, *et al.*, *Closing the Gap?: Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action* 6-7 (Jan. 21, 2003) ("Tienda, *Closing the Gap*"), *available at* http://www.texastop10.princeton.edu/publications/tienda012103.pdf.

[7] *See* National Center for Education Statistics, *Common Core of Data: America's Public Schools*, *available at* http://nces.ed.gov/ccd/bat/Result.asp?id=644705706&CurPage=2&view=State.

applicants to the University of Pittsburgh who finished at the top of their high-school class.

In 2002, for example, only 232 African American students who had graduated in the top 20% of their Pennsylvania high-school class applied to the University of Pittsburgh, 187 of whom were accepted, and 64 of whom enrolled. Because a number of public secondary schools (and most private secondary schools) in Pennsylvania do not rank students, the University of Pittsburgh received an additional 199 applications from African American students without a class ranking, 61 of whom were accepted, and 20 of whom enrolled. Thus, even including these un-ranked students, a percentage plan would only ensure the University of Pittsburgh less than one-quarter of the 363 African American students who actually enrolled in 2002. Consistent with this evidence, experience has demonstrated that the University of Pittsburgh must make individualized decisions about students who fall below the top 20%, and, to maintain a diverse student body, at times must take race into account (among a number of factors) in evaluating those students. Importantly, moreover, the fact that the University of Pittsburgh has enrolled approximately 30% of the high-ranking in-state African Americans who it has accepted demonstrates that extensive competition exists among the best universities in Pennsylvania and throughout the country for the same limited pool of high-ranking minority students.

The percentage plans advocated by the Solicitor General have even less relevance in other States with even more limited demographic diversity. In Minnesota, for example, there were only approximately 6,400 minority high-school graduates in 2002. Information from the University of Minnesota indicates that only 302 in-state minority students who graduated in the top 10% of their class applied to that university's flagship Twin Cities campus last year, 290 of whom were accepted, and 178 of whom eventually enrolled. Even at the level of the top 25% of in-state high-school graduates, there were only 636 minority applicants, 608 acceptances, and 360 enrollments at the Twin Cities campus. By contrast, in 2002,

959 minority students actually enrolled at that campus. Accordingly, a plan under which the University of Minnesota accepted the top 25% of graduating in-state students would guarantee only 37% of the university's current minority enrollment.

The pool of minority students at the top of their high-school classes is even smaller in the State of Iowa. In 2002, there were only 428 minority students in the entire State who, according to self-reporting at the time of the ACT test, were in the top 25% of their high-school class. Moreover, information from the University of Iowa indicates that it received applications from only 62 in-state minority students who had finished in the top 10% of their graduating class. By contrast, more than 4,000 first-year students enrolled at the University of Iowa in 2002.

Although the demographics in Arizona are very different than in Iowa, the University of Arizona has special concerns with the imposition of a percentage plan along the lines followed in Texas, Florida, and California because of the variety of racial and ethnic groups in the State and their distinctive historical traditions, socio-economic circumstances, and residential patterns. For instance, approximately 6.2% of twelfth graders in Arizona are Native American, and 26% are Hispanic.[8] Both of those groups bring unique backgrounds, histories, and experiences that enrich university life and that should be reflected in a diverse student body. A one-size-fits-all approach that ignored those differences – occasioned by such influences as residential patterns and the prevalence of tribal lands – could leave some groups behind and result in disproportionate effects on some racial minorities. Any constitutional rule adopted by this Court that too severely cabined the discretion of state decisionmakers could therefore hinder Arizona's compelling interest in reflecting the true

[8] *See* National Center for Education Statistics, *Common Core of Data: America's Public Schools*, *available at* http://nces.ed.gov/ccd/bat/Result.asp?id=644705706&CurPage=1&view=State.

diversity of the State's population at its premier institutions of higher education.

3. Even aside from the impossibility of relying upon a percentage plan as a basis for ensuring a diverse student body at many universities, these plans are inconsistent with the missions of many institutions. These plans deprive the schools of the ability to judge applicants as individuals and may compel the admissions of students who are not as academically prepared to do the work at a selective institution as other, lower ranking students. In fact, as the statistics noted above indicate, the University of Pittsburgh admits most, but not all, minority (and non-minority) students who are in the top 20% of their class, and admits many minority (and non-minority) students who finish out of the top 20% of their class. The school thus makes individualized judgments of the capabilities of all students, relying on more than just their high-school class rank.

Indeed, while the Solicitor General makes the ironic – and inaccurate – assertion that, under percentage plans, students are treated "as individuals" (U.S. *Grutter* Br. at 21), in fact those plans rely solely on one indication of a student's abilities. Such a system ignores evidence demonstrating that a student who ranked highly at a less competitive high school may not be prepared to do the work at a premier university and, conversely, that a student who did less well at a highly competitive high school would in fact succeed at the same university.

For instance, in Florida, at 75 high schools, students could have a C+ average and be in the top 20% of their class; at other, more competitive schools, students with 3.9 GPAs who have taken multiple Advanced Placement classes would not fall in the top 20%. *See* Jeffrey Selingo, *What States Aren't Saying About the "X-Percent Solution,"* Chronicle of Higher Education (June 2, 2000) ("Selingo, *What States Aren't Saying*"), *available at* http://www.bamn.com/ce/2000/000602-che-x-percent.txt. In Philadelphia, the part of Pennsylvania with the highest concentration of African American students,

the State has assumed direct supervision over the school system because the education provided by the district was deemed to be so inadequate in preparing students.[9] Indeed, in 2002, Temple University had 334 applicants who were in the top 10% of Philadelphia public schools (other than magnet schools), and 146 of those applicants had combined SAT scores of 800 or less. Thus, there can be no assurance that students who finish at or near the top of their class at some Philadelphia schools are as academically ready to succeed at the more competitive colleges in the State, including the University of Pittsburgh and Temple University, as are students from other schools who finish below the top quartile.

4. At the graduate level, there is no basis for the Solicitor General's heavy reliance on the percentage plans as a viable alternative. *See* U.S. *Grutter* Br. at 14-18. No State has used such a plan for graduate or professional school admissions, and there is no evidence of any kind that they would serve the compelling interest in a diverse student body. Indeed, it is difficult to conceive how an analogously framed percentage plan for graduate school admissions could in any way address diversity concerns. The Solicitor General's reliance on such plans as a supposed race-neutral alternative in the graduate school context thus lacks any foundation in real-world facts.

B. The Constitution Permits State and Local Educators To Determine Appropriate Diversity Strategies and Does Not Mandate a Single Federal Solution

Because there is no one policy that will serve the needs of all colleges and universities in all places, educators and local policymakers have latitude under the Constitution to decide upon strategies that work in their particular environments. As the Court has recognized, local policymakers and professionals are best suited "to evaluate the substance of the

[9] Connie Langland, *The State Takes Over, Budgets Get Tighter, N.J. Redefines the "Abbott" Case*, Phila. Inquirer, Mar. 3, 2002, at P4.

multitude of academic decisions that are made daily by faculty members of public educational institutions." *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 226 (1985). Accordingly, as Justice Powell properly noted in *Bakke*, universities must have "wide discretion" in making admissions decisions so long as they treat each applicant as an individual and look at the combined qualifications of each applicant, not just his or her race. *Bakke*, 438 U.S. at 314, 317 (opinion of Powell, J.).

Justice Powell's insight in *Bakke* accords with this Court's long tradition of respecting the paramount role that the States play in education. As the Court stated in *Brown v. Board of Education*, 347 U.S. 483 (1954), "education is perhaps the most important function of state and local governments." *Id.* at 493. Federal courts' "lack of specialized knowledge and experience" in educational policy counsels against "interference with the informed judgments made at the state and local levels" in this area of historic state control. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973) (Powell, J.). Accordingly, the proper federal court role in higher education is not to impose one choice over another in determining how to serve a compelling interest, but rather to act interstitially, serving as a brake when a particular approach clearly violates federal law. *See Board of Educ. v. Dowell*, 498 U.S. 237, 247-48 (1991).

The Solicitor General's proposal is inconsistent with these principles. He suggests that, on the basis of alleged success in a few States, the Court should hold that Michigan's very different choice is unconstitutional. Implicit in that suggestion is that, regardless of local priorities and demographics, *all* States must use the same strategy should they choose to pursue diversity in higher education. Acceptance of that proposal would constitute a massive federal intrusion into a core area of State decision-making. Neither the evidence in this record nor this Court's precedents establishing the limited federal role in public education indicate that such a result is compelled by the constitutional requirement of narrow tailoring.

C. There Is Significant Evidence that Percentage Plans Do Not Serve the Compelling Interest in Educational Diversity Even in Texas, Florida, and California

This Court need not determine whether in Texas and other States percentage plans have successfully maintained the "atmosphere of speculation, experiment, and creation" that is both "essential to the quality of higher education" and "widely believed to be promoted by a diverse student body." *Bakke*, 438 U.S. at 312 (opinion of Powell, J.) (internal quotation marks omitted). It is worth stressing, however, that there is substantial academic research indicating that these plans have done little or nothing to maintain a diverse student body even in Texas, Florida, and California.

For instance, Princeton University Professor Marta Tienda and a team of researchers have carefully studied the Texas plan and concluded that, even before the adoption of this plan, students ranked in the top 10% of their high-school class are "virtually ensured admission" at both the University of Texas and Texas A&M. Tienda, *Closing the Gap* at 15-16; *see id.* at 41-42 (effects on top 10% students are "trivial"). The chief effect of this plan is thus on students who are *below* the top 10%. There, Professor Tienda and her colleagues found that the evidence demonstrates that admission probability of African Americans and Hispanics has *fallen* by 8 to 12 percentage points. *See id.* at 26. As they explained, the statistical evidence shows that "students ranked below the top decile of their senior class who were admitted pre-*Hopwood* and are at risk of post-*Hopwood* rejection are significantly more likely to be African American or Hispanic, and less likely to be white." *Id.* at 31; *see id.* at 42 (analysis "reveals that African American and Hispanic students are disproportionately at risk of rejection, not acceptance, under the top ten percent policy").

The Solicitor General's defense of these plans as enabling a return to pre-*Hopwood* levels of minority enrollment is also not persuasive, even on its own terms. *See* U.S. *Grutter* Br.

at 14-15. The Solicitor General uses 1996 as a baseline for his argument, but ignores the fact that minorities were extremely under-represented at the flagship Texas universities in that year. For instance, minority enrollment at the University of Texas in 1996 (14% Hispanic, 4% African American) was far below the percentage of minorities in the Texas school-age population. Indeed, even by 1990, Hispanics alone were 31% of the school-age population in Texas. *See* Tienda, *Closing the Gap* at 6-7. Hispanic and African American population growth has skyrocketed since then, and minorities now constitute a majority of the school-age population in Texas. *See id.* Holding steady at these low levels from 1996 hardly demonstrates that public universities in Texas are fully open to the State's diverse population. As a Harvard research study recently concluded with reference to Texas (as well as California and Florida), "the gap between the racial distribution of college-freshman-age population and that of the applications, admissions, and enrollments to the states' university systems and to their premier campuses is substantial and has grown even as the states have become more diverse."[10]

Moreover, as the recent Harvard study also concluded, even the ability to maintain those low numbers is not due to the supposedly race-neutral 10% plan – which, as noted, mandates admission of students who almost certainly would have been accepted anyway – but rather to concerted recruitment and scholarship efforts targeted at communities with large minority populations. *See* Horn & Flores, *A Comparative Analysis* at 50-54, 58-59. Indeed, as this Harvard study notes, the University of Texas itself has stated that any success is "due largely to 'increasing recruiting and financial aid for minority students.'" *Id.* at 58-59 (quoting University of

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[10] Catherine L. Horn & Stella M. Flores, The Civil Rights Project, Harvard University, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* 50 (Feb. 2003) ("Horn & Flores, *A Comparative Analysis*"), *available at* http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf.

Texas News Release, *The University of Texas at Austin's Experience with the "Top 10 Percent" Law* (Jan. 16, 2003), *available at* http://www.utexas.edu/admin/opa/news/03news releases/nr_200301/nr_toptenpercent030116.html).

Similar evidence rebuts any notion that the Florida "Talented 20" plan has maintained or improved minority representation in higher education. Rather, as a companion Harvard study has concluded, this plan has had an "inconsequential" effect.[11] Even before the program was put in place, many state universities (including Florida State University) had abandoned affirmative action, making comparisons of before and after figures less meaningful. *See* Marin & Lee, *Appearance and Reality* at 37. Moreover, as in Texas, even before this program, students who graduated in the top 20% of their high-school class would be virtually guaranteed admission to a university within Florida's state university system. *See id.* at 21 ("very few students in the Talented 20 needed this policy"). In any event, the Talented 20 program has disproportionately benefited white and Asian students who are not under-represented minorities in the Florida university system. *See id.* at 24. Fewer than 150 additional African American and Hispanic students in the entire State are made eligible by the plan, and even then they are not guaranteed admission to the most competitive, flagship schools (the University of Florida and Florida State University) but simply to one school in the system. *See id.* at 22. And any gains that have been made appear to stem from continued race-conscious recruiting and scholarships, not the Talented 20 program. *See id.* at 34.

In California as well, there is no basis to conclude that the percentage plan has ensured diversity. First, even though African Americans and Hispanics make up approximately 46%

[11] Patricia Marin & Edgar K. Lee, The Civil Rights Project, Harvard University, *Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida* 36 (Feb. 2003) ("Marin & Lee, *Appearance and Reality*"), *available at* http://www.civilrightsproject.harvard.edu/research/affirmativeaction/florida.pdf.

of the school-age population in California, in 2001, the first year the percentage plan was in place, only 17% of percentage plan admissions were Hispanic and only 2% were African American. *See* Horn & Flores, *A Comparative Analysis* at 26, 42-43. Moreover, since 1995, both African American and Hispanic freshman enrollments have declined significantly at both the University of California at Berkeley and UCLA, the State's two most selective institutions. *See id.* at 48-49. For instance, Hispanic enrollment at Berkeley dropped from 16.9% to 10.8%, and African American enrollment fell from 6.7% to 3.9%. *See id.*

II. THE PERCENTAGE PLANS THAT A FEW STATES HAVE ADOPTED TO INCREASE MINORITY ENROLLMENT ARE NOT RACE-NEUTRAL

A. Policies that Are Motivated by Race Are Not Race-Neutral

Contrary to the Solicitor General's suggestion, the percentage plans adopted by a few States are not race-neutral. Even a facially-neutral law that is adopted with a race-based intent is subject to scrutiny under the Equal Protection Clause. A "racial purpose" need not "be express or appear on the face of the statute." *Washington v. Davis*, 426 U.S. 229, 241 (1976). Rather, a law "neutral on its face" but motivated by racial considerations is subject to the same strict scrutiny accorded to government practices that draw express racial classifications. *Id.* As this Court explained in *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), "intent" for purposes of the Equal Protection Clause "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,'" its effects. *Id.* at 279. *See also Miller*, 515 U.S. at 913 (government actions are "subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though neutral on their face, they are motivated by a racial purpose or object") (citing *Reno v. Shaw*, 509 U.S. 630, 644 (1993)); *United States*

v. Fordice, 505 U.S. 717, 732-38 (1992) (finding constitutionally suspect a facially neutral minimum test score requirement for entry into Mississippi's flagship universities because the policy had originally been adopted to exclude African Americans from the State's historically white colleges and had present discriminatory effects); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 471 (1982) (applying strict scrutiny to referendum because "despite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes").

B. These Percentage Plans Are Motivated by Race

There is abundant evidence that the percentage plans touted by the Solicitor General as race-neutral were in fact intended to enhance or maintain minority enrollment. Indeed, in Florida, "[a]ides to Gov. Jeb Bush of Florida *admit* they settled on a 20-percent standard after computer models of 10-percent and 15-percent policies failed to produce enough black and Hispanic students."[12] And, if there were any doubt as to Florida's specific intent, the nearly exclusive focus of Florida's *amicus* brief is on the extent of minority enrollment under the Talented 20 program. *See* State of Florida *Amicus* Br. at 9-17, *Grutter v. Bollinger*, No. 02-241 & *Gratz v. Bollinger*, No. 02-516. That emphasis confirms that Florida's purportedly race-neutral program is based on the same racial considerations as Michigan's admissions policies. Florida seeks to accomplish more crudely and indirectly the same goal of educational diversity that Michigan promotes directly by considering race, as well as many other factors, in its admissions processes.

Texas's 10% plan was motivated by similar concerns. In the year after the *Hopwood* decision, the percentage of minority enrollment at the University of Texas at Austin dropped significantly.[13] Texas adopted its plan to boost

[12] Selingo, *What States Aren't Saying*, *supra* (emphasis added).

[13] *See* Lydia Lum, *Minority Rolls Cut by Hopwood*, Hous. Chron., Sept. 16, 1997, at A15.

minority enrollment in the wake of this fallout. The state senator who sponsored the Texas bill explained its purpose as "increas[ing] the number of minority admissions to colleges and universities, which had plummeted with the chill that Hopwood had put on admissions."[14] The State of Texas, moreover, previously acknowledged to this Court that it adopted its 10% program "in an effort to retain diversity's contributions for [its] schools," and further had directed its admissions professionals to consider "eighteen admissions factors, mostly having nothing to do with academics, in the hope that some of these factors will turn out to be proxies that increase the number of minority students."[15] For these reasons, opponents of affirmative action have labeled the Texas 10% plan "unconstitutional because it was adopted to circumvent a federal court decision striking down the use of racial preferences and rewrites admissions criteria to achieve a particular racial mix."[16]

Indeed, many of petitioners' supporters have acknowledged that percentage plans "amount to a thinly veiled system of selecting students by race."[17] One such supporter has stated that the Texas 10% plan "furthers racial diversity on campus because it effectively applies a lower admissions standard to applicants from predominantly minority schools –

[14] R.G. Ratcliffe, *Senate Approves Bill Designed To Boost Minority Enrollments*, Hous. Chron., May 9, 1997, at A1.

[15] Petition for Writ of Certiorari at 18, 19, *Texas v. Hopwood*, No. 95-1773 (U.S. filed Apr. 17, 2001), *available at* http://www.law.utexas.edu/hopwood/hopwoodpetcert.pdf.

[16] Roger Clegg, *Texas's Unconstitutional Experiment*, Wash. Post, Nov. 7, 2002, at A24.

[17] Michael Fletcher, *Race-Neutral Plans Have Limits in Aiding Diversity, Experts Say*, Wash. Post, Jan. 17, 2003, at A12 (quoting statement of Center for Equal Opportunity's Roger Clegg); *see also* Ron Nissimov, *Detouring Toward Diversity: Schools Push Limits of Hopwood Ruling*, Hous. Chron., May 5, 2002, at A1 ("Nissimov, *Detouring Toward Diversity*").

in effect using a race-based double standard to engineer a specific racial mix."[18]

The percentage plans advocated by the Solicitor General are therefore also race-conscious, and thus cannot constitute the kind of race-neutral alternative that would support a conclusion that the University of Michigan's policies are not narrowly tailored. Moreover, there is evidence that, especially in States with demographics that are different from those in Texas, Florida, and California, the "fit" between the compelling state interest in diversity and the percentage plan mechanism is weak, and thus that such plans are less efficacious than the Harvard-type plans endorsed by Justice Powell and adopted by Michigan. We do not mean to suggest that, when considered on the basis of a properly developed record, a particular percentage plan in a particular State would be unable to survive constitutional scrutiny. However, unlike the narrowly tailored admissions standards before this Court, rigid percentage plans effectively preclude States from giving individualized attention both to their applicants and to their own educational mission. Such plans cannot be considered a viable, let alone a mandated, alternative for all universities and all States that make up our Nation.

[18] Curt A. Levey, *Texas's 10 Percent Solution Isn't One*, Wash. Post, Nov. 12, 2002, at A24; *see also* Nissimov, *Detouring Toward Diversity*, *supra* (quoting statement of Center for Individual Rights' Curt Levey that Texas program "is a sham substitute for a racial quota").

CONCLUSION

Amici respectfully urge this Court to affirm the judgments below.

Respectfully submitted,

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Nos. 02-241 & 02-516

In the Supreme Court of the United States

BARBARA GRUTTER,
Petitioners,

v.

LEE BOLLINGER, et al.,
Respondents.

JENNIFER GRATZ AND PATRICK HAMACHER,
Petitioners,

v.

LEE BOLLINGER, et al.,
Respondents.

On Writ Of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF SOCIAL SCIENTISTS GLENN C. LOURY, NATHAN GLAZER, JOHN F. KAIN, THOMAS J. KANE, DOUGLAS MASSEY, MARTA TIENDA AND BRIAN BUCKS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF AUTHORITIES

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Bush v. Vera, 517 U.S. 952 (1996) 8

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 7

Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) 4

Hopwood v. Texas, 861 F. Supp. 551 (W.D. Tex. 1994) 22

Miller v. Johnson, 515 U.S. 900 (1995) 8

Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) 3

Shaw v. Hunt, 517 U.S. 899 (1996) 7

Shaw v. Reno, 509 U.S. 630 (1993) 8

Wygant v. Jackson Bd. of Ed., 476 U.S. 267 (1986) 8

Rules:

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State Statutes:

Tex. Educ. Code Ann. § 51.803 4

Administrative Codes:

Florida Admin. Code Ann. r. 6C-6.002(7) 6

Executive Orders:

Florida Exec. Order No. 99-281 6

Other Authorities:

Marta Tienda et *al.*, *Closing the Gap? Admission & Enrollment at the Texas Public Flagships Before and After Affirmative Action* (2003) http://www.texastop10.princeton.edu/publications

/tienda012103.pdf 4, 11, 16, 17, 22, 26

Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* (2003) http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.php#fullreport 5, 9, 10, 12, 19, 22, 23, 24, 25, 27

Office of Vice Chancellor, First Year Implementation of Comprehensive Review in Freshman Admissions, http://www.ucop.edu/regents/regmeet/nov02/302attach.pdf 5, 25

U.S. Comm'n on Civil Rights, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education* (2002) http://www.usccr.gov/pubs/percent2/ch2.htm 5, 24

Patricia Marin & Edgar K. Lee, *Appearance & Reality in the Sunshine State: The Talented 20 Program in Florida* (last modified February 7, 2003) http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.php. 6, 9, 10, 11, 23, 24, 26

Thomas J. Kane, *Racial & Ethnic Preferences in College Admissions*, in *The Black-White Test Score Gap* (C. Jencks & M. Phillips eds., 1998) 7, 15, 21, 27, 29

Ian Ayres, *Narrow Tailoring*, 43 U.C.L.A. L. Rev. 1781 (1996) 8

John F. Kain & Daniel M. O'Brien, *Hopwood and the Top 10 Percent Law: How They Have Affected the College Enrollment Decisions of Texas High School Graduates* (2003), http://www.utdallas.edu/research/greenctr/Papers/pdfpapers/paper26.html.....9, 16, 18, 26

Michael A. Fletcher, "Race Neutral Plans Have Limits In Aiding Diversity, Experts Say," *Wash. Post*, Jan. 17, 2003.....10

Curt A. Levey, "Texas' 10 Percent Solution Isn't One," *Wash. Post*, Nov. 12, 2002.....10

Student Financial Affairs Scholarship Central, (last modified May 30, 2002) http://www.ufsa.ufl.edu/sfa/programs/scholarhq.html.....10

Student Financial Affairs, State of Florida Aid, (last modified December 3, 2002) http://www.ufsa.ufl.edu/sfa/programs/fl/floridaaid.html.....10

Connexus, Longhorn Scholars, (last modified October 9, 2002) http://www.utexas.edu/student/connexus/scholars/index.html.....11

C. Irving, "Texas' Demographic Challenge," National CrossTalk, Vol. 7, No. 2 Spring 1999 http://www.highereducation.org/crosstalk/ct0499/news0499-texas.shtml.....11

Marta Tienda & Kim Lloyd, *UT's Longhorn Opportunity Scholars (LOS) and A&M's Century Scholars Programs*, (2003) http://www.texastop10.princeton.edu/publications.htm.....11

Scholarship Information for Freshman Students, http://honors.tamu.edu/honors/scholarships/freshman.htm.....11

"A Progress Report: President Larry R. Faulkner offers update on campus reorganization, UT's achievements and soaring energy costs," On Campus (Feb. 27, 2001) http://www.utexas.edu/admin/opa/oncampus/01oc_issues/oc010227/oc010227.pdf.....11

Brian Bucks, *The Effects of Texas' Top Ten Percent Plan on College Choice* (2003) http://www.utdallas.edu/research/greenctr/papers/pdfpapers/paper34.pdf.....12, 16, 22

The National Center for Education Statistics Common Core of Data, 2000-2001, http://www.nces.ed.gov.....12

Glenn C. Loury et al., *Research Memorandum on "Color-Blind Affirmative Action,"* (2003) http://www.bu.edu/irsd/research memorandum.pdf 13, 14

Thomas J. Kane, *Misconceptions in the Debate Over Affirmative Action*, in *Chilling Admissions* (G. Orfield & E. Miller eds., 1998) 14

Texas Education Association 2000-2001 Graduates by Graduation Plans, Statewide Totals, http://www.tea.state.tx.us/adhocrpt/ adstg01.html 16

University of California, Office of the President, *Final Summary of Freshman Applications, Admissions and Enrollment, Fall 1995-2001*, http://www. ucop.edu/news/studstaff.html 19, 25

Matt Flores, "Top 10% Admissions Rule Could See Changes in Austin; Wentworth Would Toughen The College-Prep Menu in Texas High Schools," *San Antonio Express-News*, Feb. 7, 2003 20

One Florida Accountability Commission: An Independent Review of Equity in Education and Equity in Contracts Components of One Florida, (June 2002) http://www.myflorida.com/myflorida/government/ otherinfo/documents/executive_summary.doc ..... 20 http://www.myflorida.com/myflorida/government/

otherinfo/documents/enrollment3.xls 24

U.S. News & World Report, *America's Best Colleges* (2003 ed.) 21

William G. Bowen & Derek Bok, *The Shape Of The River* (1998) 21, 29

Susanna Finnell, *The* Hopwood *Chill: How the Court Derailed Diversity Efforts at Texas A&M*, in *Chilling Admissions* 22

University of Texas Statistical Handbook, 2002-2003 http://www.utexas.edu/academic/oir/statistical _handbook/02-03/students/s16 22

University of California Eligibility in the Local Context Program Evaluation Report, (last modified August 6, 2002) http://www.ucop.edu/ news/cr 25

Gary M. Lavergne & Bruce Walker, *Implementation and Results of the Texas Automatic Admissions Law*, http://www.utexas.edu/student/research/reports/ admissions/HB588-Report5.pdf 26

1990 Census of Population, General Population Characteristics, California (May 11, 1992) http://www.census.gov/prod/cen1990/cp1/ cp-1-6-1.pdf 27

Thomas J. Kane, *Concentration of Disadvantaged Minorities in High Schools of Similar Race/Ethnicity* http://www.sppsr.ucla.edu/template/subtemp/dept.cfm?department= ps&submenus= psfaculty &id= 350&filenameq= faculty1.cfm 27, 28

INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, Professors Glenn C. Loury, Nathan Glazer, John F. Kain, Thomas J. Kane, Douglas Massey, and Marta Tienda submit this brief as *amici curiae* in support of Respondents Lee Bollinger, *et al.*[1] All parties have filed with the Court their written consent to the filing of all *amicus curiae* briefs in this case.

Amici are scholars who have studied the effects of race-conscious admissions programs or "race-neutral" alternatives to those programs.

Glenn Loury is a University Professor and Professor of Economics at Boston University. He is also Director of Boston University's Institute on Race and Social Division, a multidisciplinary research center examining the causes, consequences, and methods of resolution of divisive conflicts between social groups within the modern nation-state. He has written extensively on affirmative action. He is the author of *One by One from the Inside Out: Essays and Reviews on Race and Responsibility in America*, which won the 1996 American Book Award and the 1996 Christianity Today Book Award. His most recent book, *The Anatomy of Racial Inequality*, was published last year.

Nathan Glazer is Professor of Education and Sociology Emeritus at Harvard University. He is a former editor of *Commentary* and from 1973 to 2002 was co-editor of *The Public Interest*. He is the author of numerous books and articles including, *American Judaism*, *Beyond the Melting Pot* (with Daniel P. Moynihan), *Affirmative Discrimination: Ethnic Inequality and Public Policy*, *The Limits of Social Policy*, and *We Are All Multiculturalists Now*.

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief.

John F. Kain holds the Cecil and Ida Green Chair for the Study of Science and Society as Professor of Economics and Professor of Political Economy at the University of Texas at Dallas. He is past Chair of the Harvard University Economics Department, and Henry Lee Professor of Economics and Professor of Afro-American Studies Emeritus at Harvard. He has written widely on issues of race, education, and urban society.

Thomas J. Kane is Professor of Policy Studies and Economics at the University of California at Los Angeles. He is also a nonresident Senior Fellow at the Brookings Institution. He has studied and published extensively on issues of race and higher education. His most recent book is *The Price of Admission: Rethinking How Americans Pay for College*.

Douglas Massey is Professor and Chair of the Sociology Department at the University of Pennsylvania. He has studied and written extensively on demography, urban sociology, and race/ethnic relations. He is a past President of the American Sociological Association and current member (since 1998) of the National Academy of Sciences. He is most recently lead author of *The Source of the River: The Social Origins of Freshmen at America's Selective Colleges and Universities*.

Marta Tienda is Maurice P. During '22 Professor in Demographic Studies and Professor of Sociology and Public Affairs at Princeton University. She has studied and published extensively on various aspects of race and ethnic inequality. She is co-author of *The Color of Opportunity: Pathways to Family, Work, and Welfare in the Inner City* and *The Hispanic Population of the United States*. She is past President of the Population Association of America.

Brian Bucks is a Ph.D. candidate in Economics at the University of Wisconsin-Madison. His doctoral dissertation focuses on the effects of the adoption of facially race-neutral higher education policies in Texas.

SUMMARY OF ARGUMENT

This brief presents social science research that bears directly on whether the admissions policies of the University of Michigan (the "University") satisfy strict scrutiny. Specifically, this brief draws upon *amici's* original research—including the most extensive body of original research conducted to date regarding the Texas plan adopted following the Fifth Circuit decision in *Hopwood*—to demonstrate that the "percentage plans" advocated by the United States[2] in its *amicus* briefs are not preferable, more narrowly tailored, race-neutral alternatives.

Amici's own research and their review of academic literature addressing the subject have convinced them that the careful use of racial preferences in higher education admissions, such as those at issue in these cases, is in fact more narrowly tailored than the percentage plans, for several reasons.

First, it is not clear that these plans are actually race-neutral, and counsel for petitioners and their *amici* have made statements suggesting that these alternatives likely will be challenged as unconstitutional. Second, these plans are both less effective and less efficient than *Bakke*[3] "plus factor" affirmative action admission criteria. Third, in their pure form, percentage plans require admissions officers to reserve places for students from a defined pool of in-state applicants based upon a single criterion, and to ignore all other criteria that predict college success. Finally, percentage plans are very new and largely untested, and they depend upon the presence of a large and segregated minority high school population, as well as costly scholarship, financial aid, retention and recruitment programs directed toward minority applicants.

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[2] These plans are also advocated by the State of Florida's *amicus* brief.

[3] *Regents of the University of Cal. v. Bakke*, 438 U.S. 265, 316-19 (1978) (opinion of Powell, J.) (discussing the example of Harvard College's "plus-factor" admissions policy).

For these reasons, this Court should not invalidate race-conscious admissions programs based upon the existence of these percentage plan alternatives. It should instead provide states the leeway necessary for them to find the programs best suited to the educational mission of their institutions and the particular characteristics of their applicant pools.

ARGUMENT

I. DESCRIPTION OF THE TEXAS, CALIFORNIA, AND FLORIDA PERCENTAGE PLANS.

In order to evaluate the United States' proposed race-neutral alternatives to plus factor admissions programs, it is important to understand how the only concrete alternatives put forward actually function.

A. TEXAS

In 1996, the Fifth Circuit ordered Texas to eliminate all race-conscious affirmative action in university admissions decisions. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). In response to *Hopwood*, the Texas legislature passed H.B. 588, which guarantees Texas public high school students who graduate in the top 10% of their class admission to any Texas public college or university. *See* Tex. Educ. Code Ann. § 51.803; Marta Tienda *et al.*, *Closing the Gap? Admissions & Enrollment at the Texas Public Flagships Before and After Affirmative Action* 2 (2003).[4] The first class admitted under the 10% plan matriculated in the 1998-99 academic year. *Id.* at 12 n.16. Texas' plan has been supplemented by intensive financial aid, recruitment, and retention programs aimed at low-income schools with large numbers of minority students. *See infra* Section III.B.

B. CALIFORNIA

[4] *Available at* http://www.texastop10.princeton.edu/publications/tienda012103.pdf.

In 1995, the University of California ("UC") Board of Regents implemented SP-1, which eliminated the use of race and ethnicity in admissions. A year later, California voters approved Proposition 209, which amended the state constitution to ban race-conscious admissions decisions in the state's public education system. Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* 16 (2003).[5] Proposition 209 was fully implemented for students entering the UC system in the Fall of 1998. U.S. Comm'n on Civil Rights, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education* 4 (2002).[6]

In the Fall of 2001, California implemented Eligibility in the Local Context ("ELC"), which guarantees that the top 4% of each high school graduating class in the state will be admitted to one campus in the university system. Horn & Flores, *supra* at 17, 19-20. For students admitted in the Fall of 2002, the UC system implemented a "comprehensive review" policy, which permits each campus to set admissions standards based on ten academic and four non-academic supplemental criteria, two of which may relate to socioeconomic status.[7] *Beyond Percentage Plans*, *supra* at 5. Comprehensive review had been in place at the University of California at Berkeley ("Berkeley") since 1998; however, it only applied to the 50% of admissions for which the UC system, until 2002, allowed

[5] *Available at* http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.php#fullreport.

[6] *Available at* http://www.usccr.gov/pubs/percent2/ch2.htm.

[7] These two supplemental criteria are: (1) Academic accomplishments in light of disability, low family income, first generation to attend college, need to work, disadvantageous social or educational environment, difficult personal and family situations or circumstances, refugee status, or veteran status; and (2) location of the applicant's secondary school and residence. Office of Vice Chancellor, First Year Implementation of Comprehensive Review in Freshman Admissions (hereafter, "Vice Chancellor's Report"), at Appendix A-vi (2002), *available at* http://www.ucop.edu/regents/regmeet/nov02/302attach.pdf.

consideration of nonacademic criteria. *Id.* at 5; Horn & Flores, *supra* at 54.

C. FLORIDA

In February 2000, pursuant to a request from Governor Bush in his "One Florida" executive order, Exec. Order No. 99-281, the Florida State Board of Education banned consideration of race in admissions decisions for the state's higher education institutions, *see* Fla. Admin. Code Ann. R. 6C-6.002(7). Patricia Marin & Edgar K. Lee, *Appearance & Reality in the Sunshine State: The Talented 20 Program in Florida* 9 (2003).[8] Florida's colleges and universities, however, remain entirely free to consider race and ethnicity in awarding scholarships and other financial aid, conducting outreach, and developing pre-college summer programs. *Id.* at 10.

Florida's percentage plan, the "Talented 20" program, took effect in the Summer of 2000. *Id.* at 28. Under the Talented 20 program, students who graduate from Florida's public high schools in the top 20% of their class, complete nineteen specific academic credits, and take an SAT or ACT test are guaranteed admission to one of eleven state universities, although not necessarily admission to the institution of the student's choice. *Id.* at 7 n.2, 9. Talented 20 students receive special consideration only after being rejected by three state institutions. *Id.* at 19. Some of Florida's universities began admitting Talented 20 students in 2000; the University of Florida ("UF"), however, apparently used plus factor admissions that year, and did not begin admissions until 2001. *Id.* at 28-29.

II. UNDER STRICT SCRUTINY, FACIAL RACE-NEUTRALITY, EVEN IF PREFERRED, CANNOT OUTWEIGH LESS-NARROW TAILORING.

[8] *Available at* http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.php.

The University's admissions policies comport with the Equal Protection Clause of the Fourteenth Amendment if they: (1) further a "compelling state interest," and (2) are "narrowly tailored" to furthering that interest. *Shaw v. Hunt*, 517 U.S. 899, 908 (1996); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (plurality opinion); *id.* at 520 (Scalia, J., concurring).

This brief presents social science research that bears directly on whether the University's admissions policies meet the second prong of this exacting test.[9] *Amici* start from the same premise as the United States in its briefs, namely, that the respondents have a very strong interest in the educational benefits which flow from racial diversity—a student population in which traditionally under-represented racial minorities are present in meaningful numbers. *See* U.S. Br. (*Gratz*) at 13; U.S. Br. (*Grutter*) at 8, 13. Indeed, *amici* believe that this interest is one that may truly be characterized as "compelling." This belief stems from the experience of *amici* as university faculty that meaningful racial diversity enhances learning and the exchange of ideas in higher education. Furthermore, it is well-established that minority students, if admitted to selective educational institutions, are more likely to graduate and to succeed in their post-collegiate careers than their counterparts who attend less selective institutions. Thomas J. Kane, *Racial & Ethnic Preferences in College Admissions*, in *The Black-White Test Score Gap* 443, 447 (C. Jencks & M. Phillips eds., 1998).

Narrow tailoring refers to the fit between the means and the end—*i.e.*, the extent to which the means achieve the stated compelling interest, while also minimizing effects beyond that interest. *See Shaw*, 517 U.S. at 908 ("'The means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose.'") (quoting

[9] Although this brief focuses primarily on the University's undergraduate admissions policies, much of the information it presents is also relevant to law school admissions policies. Therefore *amici* file this brief in both cases.

Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 280 (1986) (plurality opinion)); *id.* at 914 ("Although we have not always provided precise guidance on how closely the means (the racial classification) must serve the end (the justification or compelling interest), we have always expected that the legislative action would substantially address, if not achieve, the avowed purpose."); *Shaw v. Reno*, 509 U.S. 630, 655 (1993) (plan not "narrowly tailored" if it goes "beyond what [is] reasonably necessary" to accomplish goal); *Bush v. Vera*, 517 U.S. 952, 994 (1996) (O'Connor, J., concurring) (narrow tailoring satisfied where state pursues compelling interest through means which both "substantially address" that interest and do not "deviate substantially" from what is necessary).

Contrary to the assertions of the United States, *see* U.S. Br. (*Gratz*) at 11, U.S. Br. (*Grutter*) at 17-18, this Court has never grafted an automatic preference for facial race-neutrality onto the narrow tailoring test. Indeed, this Court's precedents make plain that facially race-neutral state action that is motivated by racial concerns is no less subject to judicial scrutiny than an explicitly race-conscious one. *See Miller v. Johnson*, 515 U.S. 900, 913 (1995) ("[S]tatutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race-neutral on their face, they are motivated by a racial purpose or object."). Moreover, it is hard to see why a facially race-neutral and therefore indirect means would "fit" a race-conscious goal better than means designed to reach those goals directly. *See* Ian Ayres, *Narrow Tailoring*, 43 U.C.L.A. L. Rev. 1781 (1996).

Even assuming, however, that race-neutral alternatives must always be explored, they are not preferred where they are less narrowly tailored than a race-conscious alternative. *Cf. Wygant*, 476 U.S. at 280 n.6 (plurality opinion) (nonracial approach must "promote the substantial interest about as well"). As the social science data that *amici* present below demonstrates, the only examples of race-neutral alternatives

discussed in the briefs of the United States would be significantly less narrowly tailored than the University's current policy. Thus, they do not provide a constitutionally preferable benchmark against which to assess the University of Michigan's *Bakke*-style plus factor admissions programs.

III. THE "PERCENTAGE PLANS" ADVOCATED BY THE UNITED STATES AND THE STATE OF FLORIDA ARE NOT TRULY RACE-NEUTRAL.

Even if the United States were correct that race-neutral means are always more narrowly tailored than race-conscious approaches, the percentage plans currently in operation in Texas, California, and Florida, would not deserve such preference because they are not truly race-neutral.

A. THE PURPOSE OF THE PERCENTAGE PLANS IS TO INCREASE RACIAL DIVERSITY.

The purpose of percentage plans is avowedly to promote the government interest in racial diversity that the plaintiffs in these actions decry. Public officials involved in the programs have acknowledged this publicly, and measure the programs' success in terms of attracting students from underrepresented minority groups.[10] Moreover, these plans take advantage of, and depend on the continuing existence of, high degrees of racial segregation in the states' high schools. *See infra* Section IV.C.4. It is difficult to see, therefore, how they can truly be considered a "race-neutral" measure for assessing Michigan's programs.

Indeed, lawyers for both the Center for Individual Rights and the Center for Equal Opportunity have signaled interest in

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[10] *See* Horn & Flores, *supra* at 15-19; Marin & Lee, *supra* at 11; John F. Kain & Daniel M. O'Brien, *Hopwood and the Top 10 Percent Law: How They Have Affected the College Enrollment Decisions of Texas High School Graduates* 3-4 (2003), *available at* http://www.utdallas.edu/research/greenctr/Papers/pdfpapers/paper26.html.

moving on after this case to challenge these aspects of the Texas program. The Center for Equal Opportunity has attacked Texas' percentage plan, stating that "while the percentage plans are better than 'racial preferences,' they still amount to a thinly veiled system of selecting students by race" and that it "think[s] these plans are very vulnerable to a legal challenge."[11] Similarly, the Center for Individual Rights has written that it "see[s] substantial problems with the [Texas] plan" due to the fact that it "furthers racial diversity on campus because it effectively applies a lower admissions standard to applicants from predominantly minority schools—in effect using a race-based double standard to engineer a specific racial mix."[12] Thus, even were this Court to relegate admissions nationwide to the percentage plan approach, it appears this would only spawn new challenges.

B. PERCENTAGE PLANS' RESULTS DEPEND UPON RACE-TARGETED FINANCIAL AID AND OUTREACH PROGRAMS.

While Texas, California and Florida have adopted admissions criteria that are facially race-neutral, these criteria are but one feature of their higher education admissions policies. In practice, they operate in tandem with financial aid and outreach programs that target minority students, and that are used in order to maintain racial diversity.

The One Florida program ended race-consciousness in higher education admissions decisions, but not in financial aid, support or recruitment. Marin & Lee, *supra* at 9. The University of Florida ("UF"), Florida State University ("FSU") and the State Board of Education each offer race-targeted scholarships. *Id.* at 36.[13] UF provides four-year scholarships to

[11] Michael A. Fletcher, "Race Neutral Plans Have Limits In Aiding Diversity, Experts Say," *Wash. Post*, Jan. 17, 2003, at A12.

[12] Curt A. Levey, "Texas' 10 Percent Solution Isn't One," *Wash. Post*, Nov. 12, 2002, at A24.

[13] *See also* Student Financial Affairs Scholarship Central, *available at* http://www.ufsa.ufl.edu/sfa/programs/scholarhq.html; Student Financial Affairs, State of Florida Aid, *available at* http://www.ufsa.ufl.edu/sfa/programs/fl/floridaaid.html.

students from five urban high schools chosen for their high minority population and failing school status. *Id.* at 33. It has also hired a full-time Minority Outreach Coordinator to coordinate financial aid and admissions efforts targeting minority students. *Id.* at 32. FSU also provides minority students with special summer programs and recruits heavily in South Florida, an area with many communities that are predominantly African-American and Hispanic. *Id.* at 35.

Following implementation of Texas' 10% policy, UT began awarding scholarships to low income students under its Longhorn Scholars program. Tienda, *Closing the Gap?* at 13. These scholarships are awarded to top decile students from a finite group of targeted high schools in Texas.[14] Approximately 86% of UT's Longhorn Scholars are Hispanic or African-American.[15] Texas A&M implemented a comparable program, Century Scholars, and began awarding scholarships to top 10% students from targeted high schools in 2000. *Id.*[16] Even comparing schools within the same economic strata, the Longhorn Scholar and Century Scholar programs target significantly greater minority-population schools. Marta Tienda & Kim Lloyd, *UT's Longhorn Opportunity Scholars (LOS) and A&M's Century Scholars Programs*.[17]

Financial aid packages offered under the Longhorn and Century Scholars programs appear to have played a large role in the limited results Texas' 10% policy has produced.[18] When

[14] For a list of the targeted schools, *see* Connexus, Longhorn Scholars, *available at* http://www.utexas.edu/student/connexus/scholars/index.html.

[15] C. Irving, "Texas' 'Ten Percenters,'" National CrossTalk, Vol. 10, No. 3 at 14 (Summer 2002), *available at* http://www.highereducation.org/crosstalk/pdf/ct_summer02.pdf.

[16] *See also* Scholarship Information for Freshman Students, *available at* http://honors.tamu.edu/honors/scholarships/freshman.htm.

[17] *Available at* http://www.texastop10.princeton.edu/publications.htm.

[18] *See* C. Irving, "Texas' Demographic Challenge," National CrossTalk, Vol. 7, No. 2 (Spring 1999), *available at* http://www.highereducation.org/crosstalk/ct0499/news0499-texas.shtml; "A Progress Report: President Larry

UT implemented the Longhorn Scholars program in 1999, enrollment of African-American and Hispanic students increased by 1.1 and 0.7%, respectively, compared with increases of 0.3 and 0.6% the first year of the 10% plan. Brian Bucks, *The Effects of Texas' Top Ten Percent Plan on College Choice* 11 (2003).[19] At Texas A&M, the proportion of enrollees that were Hispanic decreased 0.5% in 1999, but increased 1.4% to recover some post-*Hopwood* loss in 2000, when Texas A&M began awarding Century Scholars scholarships. *Id.*

California universities also provide significant scholarship funds to attract under-represented students. Like Texas' Longhorn and Century Scholars, Berkeley runs at least three scholarship programs for students from targeted high schools, many of which are have majority-minority student populations. Horn & Flores, *supra* at 55; *see* The National Center for Education Statistics Common Core of Data, 2000-2001 ("NCES Data").[20] Similarly, the University of California at Los Angeles' ("UCLA's") Blue & Gold Scholarships provide scholarships to students from targeted high schools in the Los Angeles area, many of which have large minority student populations. *Id.* at 56; *see* NCES Data, *supra.*

R. Faulkner offers update on campus reorganization, UT's achievements and soaring energy costs," On Campus, Feb. 27, 2001, at 2, *available at* http://www.utexas.edu/admin/opa/oncampus/01oc_issues/oc010227/oc010227.pdf ("Through efforts such as the Longhorn Opportunity Scholarships and the UT Ex-Students' Association's Texas Leader Scholarships, we are attracting more outstanding minority students to our campus. In the freshman class, we have made gains in Hispanic and African-American participation large enough to have erased the losses caused by the Hopwood decision.").

[19] *Available at* http://www.utdallas.edu/research/greenctr/papers/pdfpapers/paper34.pdf.

[20] Demographic data for each school are available at http://www.nces.ed.gov/cc/bat.

IV. PERCENTAGE PLANS ARE NOT MORE NARROWLY TAILORED THAN PLUS FACTOR PROGRAMS.

Even if one were to accept the proposition that these facially race-neutral percentage plans are indeed race-neutral, these alternatives are much less narrowly tailored and cannot be preferred to the *Bakke*-style plus-factor programs like the University's. The percentage plans, both as currently implemented and as they would operate in Michigan, do not achieve the goal of racial diversity nearly as well as plus factor programs and carry far more undesirable consequences.

A. ATTEMPTING TO ACHIEVE RACIAL DIVERSITY THROUGH PROXIES, RATHER THAN DIRECTLY, PRODUCES SIGNIFICANT INEFFICIENCIES

Plus factor admissions regimes are the most efficient way for schools to achieve diversity while admitting the most highly qualified applicants of all races. These regimes permit admissions officers to evaluate each candidate's entire application file as a whole, instead of mandating that any single characteristic be entirely dispositive. They thereby permit schools to admit candidates who demonstrate the greatest likelihood of academic success following enrollment. As *amicus* Glenn Loury shows, this is particularly important because admissions officers generally have great difficulty predicting subsequent performance from the standardized test scores and high school grades of eighteen-year-old applicants. *See* Glenn C. Loury *et al.*, *Research Memorandum on "Color-Blind Affirmative Action,"* Tables 5 & 7 (2003).[21] Admissions committees therefore take other information into account—by reading applicant essays, examining extra-curricular activities, and considering the quality of instruction at particular high schools, for example—that adds great value to forecasting post-

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[21] *Available at* http://www.bu.edu/irsd/researchmemorandum.pdf.

admission outcomes. *Id.* at 3. By contrast, percentage plans introduce formulaic evaluation practices that limit this "whole file review" process, and thereby impair the effectiveness of admissions decision-making. *Id.* at 4.

The inherent inefficiency of regimes that attempt to achieve racial diversity without explicitly considering race as a factor is demonstrated by Professor Loury's analysis using actual admissions data from seven elite institutions that employ affirmative action and data regarding the subsequent academic performance of admitted students. *Id.* at 1-2, Table 5. Professor Loury's model shows that if an admissions office attempted to devise a system that achieved the prior degree of racial diversity without explicitly considering race, it would be far less likely to select an incoming class of minorities and white students who would perform as well academically. *Id.* at 2, 4, Table 5. Such race-neutral admission policies would necessarily give less weight to academic factors and more weight to social background factors. *Id.* at Table 7. Applying this type of race-neutral admissions method to a pool of candidates for whom subsequent academic performance is known reveals that race-neutral policies are far less efficient than current plus factor admissions programs because they would select students who generally perform *worse* in college than the students chosen under the current plus factor system. The efficiency loss from using such race-neutral factors to achieve racial diversity can be three to four times greater than in regimes in which race may be considered. *Id.* at Table 5. In fact, the model shows that race-neutral admissions methods for achieving diversity would be even *less* efficient in admitting good students than admissions systems that abandon diversity as an objective altogether and also *completely ignore* high school class rank. *Id.* at Table 5; *see also* Thomas J. Kane, *Misconceptions in the Debate Over Affirmative Action*, in *Chilling Admissions* 17, 26-28 (G. Orfield & E. Miller eds., 1998) (in order for a class-based admissions system to produce significant racial diversity, it

would need to weigh factors such as lack of parents' education and low SAT scores very heavily).

Through single-minded focus on class rank, pure percentage plans do violence to traditional methods of assessing students for admission on an individual basis and are much less narrowly tailored than the University's admissions criteria. By guaranteeing a large number of positions to applicants who meet a simplistic admission criterion or set of criteria, these programs resemble the quota system at issue in *Bakke*, make admission to one or all state higher education systems a numbers game, and may significantly alter the character of the institutions that use them.

B. PERCENTAGE PLANS HAVE HAD UNDESIRABLE CONSEQUENCES THAT WOULD BE WORSE IN MICHIGAN AND OTHER STATES NATIONWIDE.

That the theoretical predictions of Professor Loury are borne out in practice can be seen in the undesirable consequences that percentage plans create through their indirect use of race. The plans have altered admission criteria for all of the applications submitted under the plan, while also impairing the schools' ability to identify and admit the strongest minority candidates.

1. Percentage plans affect many more decisions than necessary.

African-American and Hispanic students comprise a small percentage of high school graduates in most states and, comprised only 23% of all students in the entire country who graduated from high school in 1992. Kane, *Racial & Ethnic Preferences in College Admissions*, *supra* at 449. As a result, percentage plans aiming to produce meaningful representation of minority students will necessarily affect far more admissions decisions than those regarding the minority applicants they are designed to help. Last year, 54% of admissions decisions at the

University of Texas at Austin ("UT") were determined solely by the top 10% requirement. *See* Bucks, *supra* at 9.

By contrast, plus factor admissions programs affect a very small number of admissions decisions. For example, *amicus* Marta Tienda's intensive study of admissions programs at UT and Texas A&M found that at most 5% of decisions were affected by the pre-*Hopwood* plus factor admissions program. Tienda, *Closing the Gap?* at 32.

2. Percentage plans cause disruptions in total enrollment.

Percentage plans are a very blunt instrument, particularly in the restricted freedom they afford universities to control their entering class. As *amicus* John Kain has noted, following implementation of the 10% plan, UT scaled back its Summer and Provisional enrollment programs because the plan had so enlarged freshman class sizes. Kain & O'Brien, *supra* at 8-9.[22] The percentage of students enrolling in UT & Texas A&M through the Texas plan has increased steadily. Bucks, *supra* at 9. In fact, if all of the more than 21,500 students eligible for admission under the program applied, the plan would require these institutions to admit 1.5 times the total current freshman class of both institutions combined. *See Texas Education Association 2000-2001 Graduates by Graduation Plans, Statewide Totals* (215,316 graduating seniors in 2001);[23] Bucks, *supra* at 11, Table 3.

3. Percentage plans lead to disproportionate rejection of qualified minority students below the percent cut-off.

The 10% plan has been widely criticized for denying admission to highly qualified students from elite suburban schools who are not in the top decile of their class. However,

[22] As explained in Section IV.D *infra*, admissions systems based upon socioeconomic criteria will have similar overbroad effects.

[23] *Available at* http://www.tea.state.tx.us/adhocrpt/adstg01.html.

the most pernicious effect of the Texas 10% plan on admission of undergraduates to UT and Texas A&M is a greater rate of rejection of African-American and Hispanic students falling below the 10% cut-off than of white students with similar class rank. Thus, critics' contention to the contrary notwithstanding, the probability of comparable white students being admitted to UT actually rose after implementation of the 10% plan.

Before the Texas 10% program, more than 90% of applicants in the top decile of their class were admitted to UT and Texas A&M. Tienda, *Closing the Gap?* at Table 5. Thus, the program improved admission rates for minority students in the top decile only marginally. *See id*. Meanwhile, after implementation of the plan, the admissions probability of African-American and Hispanic students in the second decile *declined* at both institutions, while the admissions probability of white students in this part of the graduating class *increased*. *See id*. For example, at UT, the admissions probability of African-American and Hispanic students in the second decile declined 4.9% points and 2.3% points, respectively, after *Hopwood*. *See id*. During that same period, the probability of white students being admitted to UT rose 10.7% points. *See id*.

The principal impact of the Texas 10% plan occurs in the lower deciles. Immediately below the top 10% cut-off, African-American and Hispanic students are disproportionately rejected from state flagship institutions vis-à-vis their white counterparts in the second decile of their graduating class. *Id.* at 42. This disparity widens even further in the third decile. *Id.* at 26; *see also id*. at Table 5. Thus, African-American and Hispanic students who would have been admitted under the pre-*Hopwood* admissions system are now significantly more likely than their white counterparts to be rejected. *See id*. at Tables 5 & 6.

4. Minority enrollment has "cascaded" to less selective state institutions under percentage plans.

The Texas 10% plan has produced a pattern of "cascading" African-American and Hispanic student enrollment toward less selective state schools. As of last year, the share of African-Americans enrolling at UT and Texas A&M, the state's flagship institutions, has been below pre-*Hopwood* levels each year that the Top 10% plan has been in place. Kain & O'Brien, *supra* at Addendum Table 2. The share of Hispanic students attending these universities has been lower in each of these years than in all but one year of race-conscious admissions programs. *Id.* Perhaps most startlingly, if one controls for all factors other than race, under the Texas 10% plan, African-Americans and Hispanics actually have a *lower* probability of attending one of Texas' top public schools than do whites of similar ability, performance and family background. *Id.* at 24-25. In particular, "black and Hispanic students attending the most competitive and highest quality suburban high schools appear to be enrolling in [Texas'] selective public universities in smaller numbers." *Id.* at 30.

Under the 10% plan, the likelihood that African-Americans and Hispanics will attend one of Texas' selective public universities has declined relative to that of equally qualified whites, while their likelihood of attending one of the State's less selective public universities has increased. For example, the probability of an African-American high school graduate from Texas enrolling in a public institution other than UT, Texas A&M or UT-Dallas (a much smaller selective institution), relative to whites of the same academic credentials, increased from 0.7% in 1996 to 8.6% in 1999 and 7.5% in 2000. *Id.* at 25.

Data from California likewise suggest redistribution of African-American and Hispanic[24] students from higher tier schools to lower tier schools within the UC system. Minority representation at both UCLA and Berkeley has fallen dramatically since Proposition 209, while African-American

[24] UC provides data disaggregated for Chicano and Latino students; both are described as "Hispanic" here.

and Hispanic representation has increased at less selective institutions. University of California, Office of the President, *Final Summary of Freshman Applications, Admissions and Enrollment, Fall 1995-2001* (hereafter "Freshman Final Summary") at 1.[25] From 1995 to 2001, total freshman enrollment at both Berkeley and UCLA increased, but the number of African-American and Hispanic students enrolling at each campus decreased. *Id.* The combination of lower enrollment numbers and a larger freshman class resulted in African-Americans and Hispanics constituting a significantly smaller percentage of the freshman class at both Berkeley and UCLA in 2001 than they did in 1995 despite significant increases in the shares of underrepresented minority students among California high school graduates. *See infra* Section IV.C.4.a.

5. Percentage plans have required expensive increases in financial aid and outreach programs in an attempt to maintain diversity.

Targeting scholarships, financial aid, and intensive recruitment efforts to students in high schools that contain overwhelming majorities of African-American and Hispanic students is a critical factor in the limited success of percentage plans in Texas, Florida, and California. *See infra* Section III.B. The availability of funding for these programs, however, is often dependent on state budgets. This makes enrollment of disadvantaged high performing students vulnerable to substantial cuts in state budgets being implemented in many states this year. *See, e.g.*, Horn & Flores, *supra* at 51 n.37 (noting the decline in California's funding of outreach programs from $200 million in 1998 to a proposed $47 million in 2003-2004).

C. PERCENTAGE PLANS HAVE NOT ACHIEVED SUCCESS AT PROMOTING

[25] *Available at* http://www.ucop.edu/news/studstaff.html.

DIVERSITY AS CLAIMED, AND WOULD DO WORSE IN MICHIGAN.

Not only do percentage plans cause significant inefficiencies and undesirable secondary effects, but these plans also have generally failed to maintain the levels of racial diversity present in selective institutions under plus factor plans. Moreover, whatever modest "success" these plans have achieved in Texas, California, and Florida is highly dependent on unique demographic circumstances not present in Michigan or, for that matter, much of the nation.

1. Unlike *Bakke*-type plus-factor plans, percentage plans are new and untested.

Alternative plans are still very new, making it too early to gauge their results definitively.[26] Further, as the One Florida Accountability Commission itself stated in its 2002 report, "it is not possible to accurately measure the impact of this program." *One Florida Accountability Commission: An Independent Review of Equity in Education and Equity in Contracts Components of One Florida*, at 5 (June 2002).[27] As the experience in all three states illustrates, they are also dynamic programs, with state legislatures and educational institutions frequently reconsidering their criteria. *See supra* Section I. This reason alone counsels against using early results of any of these programs as a yardstick against which to invalidate programs that have been in place since *Bakke*. Indeed, when the University implemented its current admissions program in 1998, Texas had admitted the first students under its 10% plan

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[26] *Cf.* Matt Flores, "Top 10% Admissions Rule Could See Changes in Austin; Wentworth Would Toughen The College-Prep Menu in Texas High Schools," *San Antonio Express-News*, Feb. 7, 2003 (citing statement by Michael A. Olivas, who helped draft the top 10 percent legislation, that the law hasn't been implemented long enough to measure its impact).

[27] *Available at* http://www.myflorida.com/myflorida/government/otherinfo/documents/executive_summary.doc.

that same year, and neither Florida nor California had even adopted their percentage plans.

2. Because University of Michigan is among the most competitive institutions nationwide, UC Berkeley and UCLA provide the most valid comparisons.

The University of Michigan, Berkeley and UCLA are three of the four most highly ranked public universities in the United States. *See e.g.*, U.S. News & World Report, *America's Best Colleges* 87 (2003 ed.). Both of Michigan's California peers have seen significant declines in minority admission and enrollment rates since abandoning plus factor admissions. For this reason, the results of a percentage plan with some form of whole-file review in Michigan are most likely to be similar to the significant declines in post-Proposition 209 minority admissions and enrollment at UCLA and Berkeley. *See infra* Section IV.C.3.c.

Data regarding minority admissions and enrollment in the selective, but less competitive, institutions in Texas and Florida are of little relevance to the effects on the respondents of switching to the alternatives advanced by the United States. Enrollment at even less selective institutions is even less relevant. Consideration of race as one of many plus factors in admissions decisions to promote racial diversity generally occurs only in highly selective colleges and universities. Kane, *Racial and Ethnic Preferences*, at 432; William G. Bowen & Derek Bok, *The Shape Of The River* 15 (1998).

3. On balance, percentage plans have not maintained previous levels of racial diversity.

Contrary to claims that percentage plans have succeeded in maintaining meaningful racial diversity vis-à-vis former plus-factor programs in Texas, California and Florida, adoption of these plans often has led to significant drops in African-American and Hispanic enrollment at the selective institutions in those states. These declines—which occurred despite rapidly

growing minority high school populations in all three states—indicate that any limited "success" in obtaining diversity since adoption of the percentage plans in those states could not be replicated in Michigan.

a. Texas.

As compared to admissions outcomes in 1992-1996, the years just prior to *Hopwood* and the 10% policy, the percentage of African-American and Hispanic admittees to UT and Texas A&M has declined. Tienda, *Closing the Gap?* at 15, Table 2. This decline occurred despite the fact that the numbers of minority high school graduates in Texas are growing much more rapidly than the numbers of white high school graduates. *See infra* Section IV.C.4.a. In addition, measurements, such as those cited by the United States, *see* U.S. Br. (*Grutter*) at 15, that use 1996 enrollment as a yardstick to assess the effects of the Texas 10% plan tend to overstate the plan's effects. Minority enrollment at UT declined steadily between 1993 and 1996, reaching its lowest level in 1996, while minority enrollment at Texas A&M fell significantly versus the previous two years.[28] *See* Bucks, *supra* at 11, Table 3; *see also* University of Texas Statistical Handbook, 2002-2003, Students Table 16.[29]

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[28] Susanna Finnell, former Executive Director of the Office of Honors Programs and Academic Scholarships at Texas A&M, has written that, although *Hopwood* did not directly affect admissions decisions for the entering class of 1996, the signal it sent had a "chilling" effect on minority acceptances. Susanna Finnell, *The* Hopwood *Chill: How the Court Derailed Diversity Efforts at Texas A&M*, in *Chilling Admissions* 72-73. Thus, 1996 is likely not even a truly "pre-*Hopwood*" year.

[29] *Available at* http://www.utexas.edu/academic /oir/statistical_handbook/02-03/students/s16/. Further, returning Texas to its pre-*Hopwood* levels of diversity would not be an achievement worthy of emulation. Texas' history of *de jure* racial segregation and resistance to eliminating its vestiges led to several investigations by the Department of Education's Office for Civil Rights ("OCR"). *See Hopwood v. Texas*, 861 F. Supp. 551, 554-57 (1994), *rev'd on other grounds*, 78 F.3d 932 (5th Cir. 1996). As recently as 1999 OCR found that "disparities traceable to *de jure* segregation still existed" in Texas. Horn & Flores, *supra* at 14.

b. Florida.

Because the Talented 20 program was not fully implemented on all campuses until Fall 2001, the results of this program are even newer and less reliable. Moreover, only one of Florida's selective state universities, the University of Florida, still used a plus factor admissions program to increase diversity at the time the Talented 20 program was adopted. Horn & Flores, *supra* at 13; Marin & Lee, *supra* at 34. Nonetheless, at best, the Talented 20 has shown mixed results at maintaining diversity in Florida's more selective universities.

The Talented 20 program really did no more than place a "guaranteed admission" label on students, the vast majority of whom already met the system's minimum eligibility requirement of a 3.0 GPA and completion of certain academic units. Marin & Lee, *supra* at 21–22. Fewer than one percent of all Talented 20 students were likely to need the program's guarantee to gain admission to the system; the program helped perhaps a handful of the 20,000 students labeled Talented 20. *Id.* at 22.

At UF, the end of race-conscious affirmative action initially produced a significant decline in racial diversity of both admitted and enrolled students. In 2001, the first year of the Talented 20 program, overall African-American student admissions and enrollment at UF declined significantly from the previous year.[30] *Id.* at 30-31, 37. Specifically, African-American admissions declined from 12.9% in 2000 to 9.4% of all admissions to UF in 2001; enrollment declined from 11.8%

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[30] The United States and Florida both understate this decline by comparing results against a baseline of 1999-2000, rather than 2000-01 data. *See* U.S. Br. (*Grutter*) at 16; Fla. Br., at 9. However, minority enrollment at UF increased in 2000-01 over the previous year consistent with a trend in other recent years in which UF used plus factor admissions. Marin & Lee, *supra* at 28-29, 31.[1] This trend in increasing minority enrollment crashed to a halt with the implementation of the One Florida initiative in 2001-02.

to 7.2% during that period. *Id.* at 30-31. Between 2000 and 2001, UF's total minority enrollment decreased from 32.5% to 26%. Beyond Percentage Plans, *supra* at 47; *see also One Florida Accountability Commission*, Chart 7.[31]

At FSU, which did not use race-conscious admissions and had low minority enrollment rates in the year before the Talented 20 program was implemented, the percentage of minority students in the campus population has increased—moving from 23.1% in 1999 to 25.6% in 2001. *Beyond Percentage Plans, supra* at 47. However, FSU's admissions director denies any connection between this increase and Talented 20 program, indicating that almost all admissions decisions were made without knowledge of which applicants were part of the program. Marin & Lee, *supra* at 36. Moreover, the percentage of minority students at FSU remains below both that at UF and that of the Florida system as a whole. *Beyond Percentage Plans, supra* at 47-48.

c. California.

It is likewise too early to judge the results of California's 4% Plan and its "comprehensive review" policy because only two classes have been admitted under the 4% Plan, and only one under the "comprehensive review" policy. Horn & Flores, *supra* at 42; *Beyond Percentage Plans, supra* at 6. Moreover, little data are available for the results of the first year of the "comprehensive review" policy.[32]

Those data indicate that California's alternative policies have been ineffective at maintaining pre-Proposition 209 levels of diversity in its university system, notwithstanding the

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[31]Data chart *available at* http://www.myflorida.com/myflorida/government/otherinfo/documents/enrollment3.xls.

[32]The increase in the number of California university applicants who decline to provide racial/ethnic information also makes analysis difficult. In 1998, the number of students who did not provide such information increased from approximately 4% to more than 14%. The number now stands at around 7%. Horn & Flores, *supra* at 32 n.34.

growth of California's minority population. In 1995, African-Americans comprised 4.4% of admittees to California's university system. As of 2001, their percentage stood at 3.4%. *Freshman Final Summary, supra* at 1. Hispanic admittees similarly decreased, falling from 15.8% in 1995 to 14.6% in 2001. *Id.*

At the most selective state institutions, Berkeley and UCLA, admission rates of minority students have fallen to even lower levels. At Berkeley, admission rates of African-American students fell from about 7% in 1995-1997, to about 4% in 2001. *See id.* Berkeley admission rates of Hispanic students also declined from 18.5% in 1995 to 12.5% in 2001. *See id.* UCLA admission rates of African-American students fell from 6.7% to 3.3% between 1995 and 2001, while admission rates of Hispanic students fell from 20.1% to 12.7%. *See id.*

Initial results of the ELC program are disappointing. In 2001, the first year both ELC and "comprehensive review" applied to all Berkeley applicants, underrepresented minorities comprised 16.3% of admittees to that university, well below pre-Proposition 209 levels. Vice Chancellor's Report, *supra* at 17. As of 2001, African-American and Hispanic students comprised only 2.3% and 17%, respectively, of all ELC admittees to the entire state system, and ELC students took up 42% and 39% of admission spaces at Berkeley and UCLA, respectively. University of California Eligibility in the Local Context Program Evaluation Report at 9;[33] Horn & Flores, *supra* at 44. Thus, it is not surprising that the ELC program has not resulted in any appreciable increase in minority admissions at California's most selective universities. Admission rates of African-American and Hispanic students remain well below admissions rates before Proposition 209 at Berkeley and UCLA, the institutions most comparable to the University of Michigan. *Freshman Final Summary* at 1.

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[33] *Available at* http://www.ucop.edu/news/cr.

4. Percentage plans' results depend on demographics not present in Michigan.

The limited results of the percentage plans in Texas, Florida, and California are properly understood only in relation to the distribution of the significant minority populations and the significant increases in the percentage of the college-age minority population in those states.

a. Demographic changes in Texas, Florida, and California.

As of 2000, African-Americans and Hispanics together accounted for over 52% of Texas' college-age population. Tienda, *Closing the Gap?* at Table 1. While Texas' college-age Hispanic population grew almost ten percent in the 1990s, the percentage of minority admittees to UT and Texas A&M has declined since the pre-*Hopwood* years. *Id.* at Tables 1 and 2. As of 2000, the last year for which data were available for *amicus* Tienda's comprehensive study of Texas' policy,[34] the percentage of Hispanic admittees to both UT and Texas A&M was below pre-*Hopwood* levels. *See id.* at Table 2; *see also* Kain & O'Brien, *supra* at 6-7.[35]

In the Fall of 2001, African-Americans and Hispanics accounted for over 45% of Florida's public school population. Marin & Lee, *supra* at 12. The percentage of African-American and Hispanic Floridians between the ages of 15 and 19 increased from 34.4% in 1990 to 40.5% in 2000. *Id.* at 12-13.

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[34] Data from UT for 2002 indicates no significant change in minority enrollment versus Tienda's data. *Compare* Tienda, *Closing the Gap?* at Table 2 (3.3% African-American and 13.7% Hispanic) *with* Gary M. Lavergne & Bruce Walker, *Implementation and Results of the Texas Automatic Admissions Law*, Table 1 (3% and 14% African-American and Hispanic enrollees, respectively), *available at* http://www.utexas.edu/student/research/reports/admissions/HB588-Report5.pdf.

[35] In the pre-*Hopwood* years of 1992-1996, African-Americans and Hispanics together accounted for a combined total of 22.2% and 19.4% of admittees to UT and Texas A&M, respectively. Tienda, *Closing the Gap?* at Table 2.

Hispanic Californians between the ages of 15-19 increased from 35% in 1990 to 39% in 2000, while the proportion of whites in that age group dropped ten percent during that same period to 34% in 2000. 1990 Census of Population, General Population Characteristics, California at 183;[36] Horn & Flores, *supra* at 26.

b. These demographics are not present in Michigan and other states.

If minority students often perform less well in high school than their white counterparts, then it follows that for a percentage plan to capture significant numbers of minority students, two conditions must be met. First, the state must have a significant minority high school population. Second, in order to yield a significant number of students at the highest ranks, these minority students must be concentrated largely in schools in which they constitute a majority or supermajority. In other words, there must be a relatively high degree of racial segregation.

Texas is ideally suited to these conditions, as data on minority student concentrations show. *See* Thomas J. Kane, *Concentration of Disadvantaged Minorities in High Schools of Similar Race/Ethnicity.*[37] Texas ranks above the median among states in the proportion of its student population that is African-American and the proportion that is Hispanic, and has the third highest proportion of Hispanic students and of Hispanic and African-American students combined. *Id.* at Table 1. Moreover, anywhere from one-half to three-fourths of these students are in schools which are majority-minority, and anywhere from one-quarter to one-third are in schools that are greater than 90% minority. *Id.* at Tables 1 & 4. Yet, even with these "favorable" demographics for a percentage plan, Texas' approach has not been terribly successful. *See supra*

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[36] *Available at* http://www.census.gov/prod/cen1990/cp1/cp-1-6-1.pdf.

[37] Available at http://www.sppsr.ucla.edu/template/subtemp/dept.cfm?department=ps&submenus=psfaculty&id=350&filenameq=faculty1.cfm.

Section IV.C.3.a. The demographics of Florida and California are not quite as "favorable," but both rank extremely high in percentage of minority students, and over half of those students attend majority-minority schools. *Id.* at Table 4.

As Professor Kane's data show, however, this sort of demographic distribution is not typical of most states. Michigan, for example, has a much lower proportion of total minority students, and while its African-American population is quite concentrated, its Hispanic population is dispersed geographically. *Id.* Other states, such as North Carolina, have been so successful at desegregation that, even though this state has a minority high school population about 10% above the median, only about a third or less of these are in majority-minority schools, and the percent located in significantly concentrated schools is in the single digits. *Id.* at Tables 1 & 4. Still other states, such as Minnesota, have very few minority students, but may still value a racially diverse student body. Relegating states such as these to a percentage plan would effectively end any possibility of achieving racial diversity from in-state students in the foreseeable future. In short, any plan which depends upon a rather unique set of geographic or demographic conditions is hopelessly ineffective as a nationwide solution, because as Kane's data shows, the minority population, and its concentration, is far too variable across the United States.

D. OTHER "RACE-NEUTRAL" ALTERNATIVES WOULD LIKELY FARE NO BETTER UNDER THE NARROW TAILORING TEST.

Some have suggested that other types of facially race-neutral systems, such as class-based affirmative action programs that target very poor high school graduates, offer viable alternatives to plus-factor plans. However, these approaches are not likely to be any more successful or narrowly tailored than percentage plans.

One alternative model that proponents of class-based preferences put forward is preferences based upon low family income. It is true that African-American and Hispanic students are more likely than white students to be socioeconomically disadvantaged, and are three times more likely to come from low income families. However, African-Americans and Hispanics of all incomes are only about 6.8% of the population of high school students with high test scores. Thus, even among the population of low income, high test scores students, African-American and Hispanic students comprise only one of six such students. Kane, *Racial and Ethnic Preferences*, at 450. Accordingly, even assuming it were financially feasible for a college or university to increase its admission of low-income applicants, such an increase would have only a marginal impact on campus diversity. Bowen & Bok, *Shape of the River* at 51.

There may be characteristics other than income, such as family wealth or coming from a single-parent family that would be more highly correlated with race. However, because African-American and Hispanic students *of all income levels* are such a small percentage of high test score youth, it is difficult to find any measure of socioeconomic criteria that would result in admission of a large percentage of minority students in selective institutions that continue to seek students with high test scores. *See* Kane, *Racial and Ethnic Preferences*, *supra* at 448-50.

CONCLUSION

For the foregoing reasons, this Court should find that the admissions criteria at issue in *Gratz* and *Grutter* are narrowly tailored to achieving the compelling interest in the educational benefits of racial diversity, and should affirm the judgment of the district court in *Gratz* and the Court of Appeals in *Grutter*.

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BARBARA GRUTTER, *Petitioner,*

and

JENNIFER GRATZ AND PATRICK HAMACHER, *Petitioners,*

v.

LEE BOLLINGER, *et al., Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF GENERAL MOTORS CORPORATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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Brown v. Board of Educ., 347 U.S. 483 (1954) 12

Gratz v. Bollinger, 122 F. Supp.2d 811 (E.D. Mich. 2000) 5, 7, 18

Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002) (en banc) ..... *passim*

Keyishian v. Board of Regents, 385 U.S. 589 (1967) 5, 12, 21

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) ... 7, 8

North Carolina Bd. of Educ. v. Swann, 402 U.S. 43 (1971) 11

Regents of University of Cal. v. Bakke, 438 U.S. 265 (1978) ..... *passim*

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) 11

Sweatt v. Painter, 339 U.S. 629 (1950) 11, 12, 22

Sweezy v. New Hampshire, 354 U.S. 234 (1957) 6

Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982) 11

STATUTES, RULES AND REGULATIONS

Rule 37.3(a) 1

Rule 37.6 1

TABLE OF AUTHORITIES – continued

Page(s)

MISCELLANEOUS

Akhil R. Amar & Neal K. Katyal, *Bakke's Fate*, 43 U.C.L.A. L. REV. 1745 (1996) 21, 23

GORDON W. ALLPORT, THE NATURE OF PREJUDICE (1954) 20

T.K. BIKSON & S.A. LAW, RAND REPORT ON GLOBAL PREPAREDNESS AND HUMAN RESOURCES: COLLEGE AND CORPORATE PERSPECTIVES (1994) 3, 4, 12

William G. Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WEEKLY 7 (Sept. 26, 1977) 6, 10, 20

WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER (1998) 8

TAYLOR H. COX, JR., CULTURAL DIVERSITY IN ORGANIZATIONS: THEORY, RESEARCH, AND PRACTICE (1993) 14

Taylor H. Cox, Jr. & Stacy Blake, *Managing Cultural Diversity: Implications for Organizational Competitiveness*, 5 ACADEMY OF MANAGEMENT EXECUTIVE No. 3, at 45 (1991) 13, 15

Rohit Deshpande *et al.*, *The Intensity of Ethnic Affiliation: A Study of the Sociology of Hispanic Consumption*, 13 JOURNAL OF CONSUMER RESEARCH No. 2, at 214 (1986) 13

EXECUTIVE COUNCIL 1998 25

FEDERAL GLASS CEILING COMM'N, A SOLID INVESTMENT: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL (1995) 15, 25

TABLE OF AUTHORITIES – continued

Page(s)

General Motors, *Workplace Diversity – The Competitive Advantage*, *at* http://www.gm.com/company/gmability/diversity/people/workforce.html 24

HARVARD UNIVERSITY, THE PRESIDENT'S REPORT 1993-1995 21

Janine S. Hiller & Stephen P. Ferris, *Separating Myth From Reality: An Economic Analysis of Voluntary Affirmative Action Programs*, 23 MEMPHIS ST. U. L. REV. 773 (1993) 25

JOHN P. FERNANDEZ, THE DIVERSITY ADVANTAGE (1993) 24

JOHN P. FERNANDEZ, RACE, GENDER AND RHETORIC: THE TRUE STATE OF RACE AND GENDER RELATIONS IN CORPORATE AMERICA (1998) 14, 15

ROSABETH MOSS KANTER, THE CHANGE MASTERS: INNOVATIONS FOR PRODUCTIVITY IN THE AMERICAN CORPORATION (1983) 24

Kenneth Labich, *Employees Must Reflect the Diverse World*, FORTUNE, Mar. 26, 1990, at 56 25

WILLIAM G. LEE, MAVERICKS IN THE WORKPLACE: HARNESSING THE GENIUS OF AMERICAN WORKERS (1998) 16

MINORITY BUSINESS DEVELOPMENT AGENCY, U.S. DEP'T OF COMMERCE, DYNAMIC DIVERSITY: PROJECTED CHANGES IN U.S. RACE AND ETHNIC COMPOSITION 1995 to 2050 (1999) 3, 4

Gareth Morgan, *Endangered Species: New Ideas*, 133 BUSINESS MONTH No. 4, at 75 (1989) 16

TABLE OF AUTHORITIES – continued

Page(s)

Charlan J. Nemeth, *Differential Contributions of Majority and Minority Influence*, 93 PSYCHOLOGICAL REVIEW No. 1, at 23 (1986) 24

DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION (Gary Orfield ed., 2001) 9, 19

Sumita Raghuram & Raghu Garud, *The Vicious and Virtuous Facets of Workforce Diversity, in* SELECTED RESEARCH ON WORK TEAM DIVERSITY 155 (Marian N. Ruderman et al. eds., 1996) 24

S.G. Redding, *Cultural Effects on the Marketing Process in Southeast Asia*, 24 JOURNAL OF MARKET RESEARCH SOC'Y No. 2, at 98 (1982) 13

Robert A. Rosenblatt, *PG&E Wins Federal Affirmative Action Award*, L.A. TIMES, Dec. 19, 1989, at D2 25

Walter G. Stephan & John C. Brigham, *Intergroup Contact: Introduction*, 41 J. SOC. ISSUES No. 3, at 1 (1985) 21

David K. Tse *et al.*, *Does Culture Matter? A Cross-Cultural Study of Executives' Choice, Decisiveness, and Risk Adjustment in International Marketing*, 52 JOURNAL OF MARKETING No. 4, at 81 (1988) 13

BRIEF OF GENERAL MOTORS CORPORATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

General Motors Corporation ("General Motors") is a multi-national corporation headquartered in Detroit, Michigan.[1] A global leader in automobile design and manufacturing, financial services, and advanced technology electronics, General Motors contributes substantially to the national and world economies, with annual revenues exceeding $175 billion. General Motors employs 388,000 people globally, including 193,000 people in the United States.

General Motors' interest in this case is substantial. General Motors employs a large number of graduates from the University of Michigan.[2] General Motors depends upon the University of Michigan and similarly selective academic institutions to prepare students for employment — to teach them the skills required to succeed and lead in the global marketplace. The quality of the education these students receive profoundly affects the ability of General Motors, and indeed all major American corporations, to compete.

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[1] Pursuant to Rule 37.3(a) of the Rules of the Court, the parties have lodged letters consenting generally to the filing of briefs of amici curiae. Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus and its counsel made a monetary contribution to its preparation or submission.

[2] In part because General Motors hires so many graduates from the University of Michigan, the University is one of General Motors' "Key Institutions," to which the company provides significant financial assistance.

SUMMARY OF ARGUMENT

General Motors files as amicus curiae in this case to explain that the Nation's interest in safeguarding the freedom of academic institutions to select racially and ethnically diverse student bodies is indeed compelling: the future of American business and, in some measure, of the American economy depends upon it.

In General Motors' experience, only a well educated, diverse work force, comprising people who have learned to work productively and creatively with individuals from a multitude of races and ethnic, religious, and cultural backgrounds, can maintain America's competitiveness in the increasingly diverse and interconnected world economy. Diversity in academic institutions is essential to teaching students the human relations and analytic skills they need to succeed and lead in the work environments of the twenty-first century. These skills include the abilities to work well with colleagues and subordinates from diverse backgrounds; to view issues from multiple perspectives; and to anticipate and to respond with sensitivity to the cultural differences of highly diverse customers, colleagues, employees, and global business partners.

General Motors speaks from first-hand experience regarding the importance of such cross-cultural skills. As General Motors' global enterprises expand, it is increasingly critical that employees at every level of its operations utilize these skills in their daily tasks. General Motors now maintains major market presences in more than 200 different countries on six continents. General Motors' employees, customers, and business partners thus could scarcely be more racially, ethnically, and culturally diverse.

A ruling proscribing the consideration of race and ethnicity in admissions decisions likely would dramatically reduce diversity at our Nation's top institutions and thereby deprive the students who will become the corps of our

Nation's business elite of the interracial and multicultural interactions in an academic setting that are so integral to their acquisition of cross-cultural skills. Such a ruling also likely would reduce racial and ethnic diversity in the pool of employment candidates from which the Nation's businesses can draw their future leaders, impeding businesses' own efforts to obtain the manifold benefits of diversity in the managerial levels of their work forces. Each of these results may diminish the ability of American businesses to utilize fully the opportunities of the global market.

ARGUMENT

The ability of American businesses to thrive in the twenty-first century will depend in large measure on our Nation's responses to two inevitable forces: the increasingly global and interconnected nature of the world economy (see, *e.g.*, T.K. BIKSON & S.A. LAW, RAND REPORT ON GLOBAL PREPAREDNESS AND HUMAN RESOURCES: COLLEGE AND CORPORATE PERSPECTIVES (1994) ("RAND REPORT")) and the increasing diversity of our own population (see, *e.g.*, MINORITY BUSINESS DEVELOPMENT AGENCY, U.S. DEP'T OF COMMERCE, DYNAMIC DIVERSITY: PROJECTED CHANGES IN U.S. RACE AND ETHNIC COMPOSITION 1995 TO 2050 (1999) ("DYNAMIC DIVERSITY")). The vast majority of businesses in the Fortune 500 currently maintain operations or do business in countries outside of the United States. Technological innovations, including the internet and other telecommunications tools, are creating a truly global, interlinked world economy. See RAND REPORT, *supra*, at 1-2. Global mergers and business expansion are continually increasing the diversity of American businesses' customer bases and business partners.

Nationally, our own population is also becoming increasingly diverse: by the year 2050, almost half of all Americans — 47% — will be African American, Hispanic, Asian American, or Native American. See DYNAMIC

DIVERSITY, *supra*, at 8. After 2050, that "minority" population is projected rapidly to surpass the non-Hispanic white population in size. *Id.* at 11; see also *id.* at 1.

To succeed in this increasingly diverse environment, American businesses must select leaders who possess cross-cultural competence — the capacities to interact with and to understand the experiences of, and multiplicity of perspectives held by, persons of different races, ethnicities, and cultural histories. Numerous authorities concur that "[c]rosscultural competence" is "the most important new attribute for future effective performance in a global marketplace." RAND REPORT, *supra*, at 51; see also *id.* at 24 (identifying "crosscultural competence" as "the *critical new human resource requirement* for corporations that have espoused a global business strategy") (emphasis in original). Thus, it is essential that the selective academic institutions that prepare students to enter the business and professional worlds adequately equip them with this skill. *Id.* at 51-52.

Much research confirms what is intuitively obvious: students are likely to acquire greater cross-cultural competence in a multicultural and multiracial academic environment, in which students and faculty of different cultures and races interact, than they are in a homogeneous one, in which cross-cultural communication is merely a theoretical construct. See pp. 17-18, *infra*.

The Court is presented with the question whether state universities have a compelling interest in ensuring that students receive these educational benefits. The answer to that question, originally provided by Justice Powell's opinion in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), and confirmed by the experience of the business community and academic institutions in the decades since *Bakke* was decided, is a resounding "yes," as the Sixth Circuit, sitting en banc, correctly concluded. *Grutter v. Bollinger*, 288 F.3d 732, 742 (6th Cir. 2002) (en banc); see

also *Gratz v. Bollinger*, 122 F. Supp.2d 811, 820 (E.D. Mich. 2000).[3]

I. CONSIDERATION OF RACE AND ETHNICITY IN UNIVERSITY ADMISSIONS FURTHERS A COMPELLING INTEREST IN EDUCATING STUDENTS AND TRAINING THEM TO COMPETE IN THE GLOBAL MARKETPLACE

A. Institutions Of Higher Education Have A Compelling Interest In Selecting Diverse Student Bodies

Justice Powell presciently declared in *Bakke* that "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." 438 U.S. at 313 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)). A majority of the Court held in *Bakke* that the University of California had "a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Id.* at 320 (opinion of Powell, J., joined by Brennan, White, Marshall, and Blackmun, JJ.). In his opinion, Justice Powell explained that "attainment of a [racially and ethnically] diverse student body * * * clearly is a constitutionally permissible goal for an institution of higher education" (*id.* at 311-312) because it augments the educational process in two ways.

First, racial and ethnic diversity in an academic institution teaches students skills that will improve their performance as leaders and professionals in a heterogeneous

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[3] We leave to the parties, who possess greater familiarity with the details of the University's program, the question whether the program is narrowly tailored to achieve the above-described compelling interest.

society. 438 U.S. at 313. Immersion in a multiracial academic environment enhances students' knowledge of different cultures and their understanding of perspectives that are influenced by race. That augmented understanding in turn prepares students, upon graduation, to work cooperatively in multiracial environments and to serve multiracial clienteles. As Justice Powell observed, for example, racial diversity in a medical school "enrich[es] the training of its student body[,] * * * better equip[ping] its graduates to render with understanding their vital service" to a "heterogeneous population." *Id.* at 314.

Second, racial and ethnic diversity promotes "'speculation, experiment, and creation,'" thinking processes that are "essential to the quality of higher education." 438 U.S. at 312 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)). Differences among students allow them to "'stimulate one another to reexamine even their most deeply held assumptions about themselves and their world,'" teaching them to view issues from myriad perspectives. *Id.* at 312 & n.48 (quoting William G. Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WEEKLY 7, 9 (Sept. 26, 1977)).

The en banc Sixth Circuit concluded that Justice Powell's opinion in *Bakke* is controlling.[4] Its decision that diversity is

[4] Petitioners and amici assert that this aspect of the *Bakke* opinion is not controlling because only Justice Powell's opinion held that an interest in fostering diverse student bodies is compelling. *E.g.*, Grutter Brief at 26-27 (Jan. 16, 2003); Gratz Brief at 31-32 (Jan. 16, 2003); Cato Inst. Brief at 15 (Jan. 16, 2003); Nat'l Ass'n of Scholars Brief (Grutter) at 16-17 (Jan. 15, 2003). Because Justice Powell's holding that diversity is a compelling state interest is the narrowest ground offered in support of the *Bakke* judgment, it is controlling. In any case, as the Sixth Circuit noted, Justice Brennan's opinion contains implicit support for Justice Powell's "diversity conclusion." *Grutter*, 288 F.3d at 742.

a compelling interest is supported by a mass of unrefuted evidence presented in the trial courts below, substantiating both of Justice Powell's statements regarding the ways in which racial and ethnic diversity enhance students' intellectual and social growth. Reviewing this evidence, Judge Duggan found that the University had presented "solid evidence regarding the educational benefits that flow from a racially and ethnically diverse student body" and, guided by Justice Powell's opinion, concluded that the University's interest in achieving these benefits is compelling. *Gratz*, 122 F. Supp.2d at 822, 824.

Petitioners and their amici[5] attack the Sixth Circuit's holding, arguing that the contention that racial diversity among students enhances educational diversity "reflect[s] * * * racial stereotyping about how people will (or should) think or behave on account of their skin color or ethnicity." Cato Inst. Brief at 3 (Jan. 16, 2003). But in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), the Court explicitly endorsed Justice Powell's view that racial diversity tends to promote a healthy and educational diversity of viewpoints. The Court explained: "[t]he predictive judgment about the overall result of minority" representation "is not a rigid assumption about how minorit[ies] * * * will behave in every case but rather" merely recognizes "that greater admission of minorities would contribute, on average, 'to the robust exchange of ideas.'" *Id.* at 579 (quoting *Bakke*, 438 U.S. at 313).[6]

[5] *E.g.*, Grutter Brief at 34-35; Gratz Brief at 29-30; Ctr. For New Black Leadership Brief at 3-4 (Jan. 15, 2003); Nat'l Ass'n of Scholars Brief (Grutter) at 12-13; Pac. Legal Found. Brief (Grutter) at 16-18 (Jan. 14, 2003); W. Connerly Brief at 23-24 (Jan. 16, 2003).

[6] In *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 225-227 (1995), the Court overruled *Metro Broadcasting* on a different ground — specifically, that a race-conscious federal government

That conclusion is plainly correct. Although persons of a particular race or ethnicity of course do not necessarily share a common perspective, race and ethnicity are as likely as any other experience to influence an individual's own, unique perspective. Just as growing up in a particular region, living with a disability, or having particular professional experiences are likely to affect an individual's views, so too is one's experience of being a member of a racial minority in a society, like ours, in which, unfortunately, race still matters. See WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER 278-279 (1998).

Numerous amici and Judge Boggs in his dissent all acknowledge that admitting students with diverse experiences is a valid academic goal because diverse experiences lead to divergent world views, which in turn enhance the quality of debate and promote learning among students. But they contend that pursuing "true experiential diversity" without direct reference to race would equally accomplish this goal. *Grutter*, 288 F.3d at 791-792 (Boggs, J., dissenting); see also, *e.g.*, Cato Inst. Brief at 3-4; Ctr. for Equal Opportunity Brief at 19-20 (Jan. 16, 2003); Ctr. for New Black Leadership Brief at 3-5 (Jan. 15, 2003); Law Professors Brief at 13 (Jan. 16, 2003); Mich. Ass'n of Scholars Brief at 14 (Jan. 16, 2003); United States Brief (Grutter) at 8 (Jan. 16, 2003); United States Brief (Gratz) at 10-11 (Jan. 16, 2003); cf. Grutter Brief at 44; Gratz Brief at 13, 17. Petitioners and amici ignore, however, that the mere fact of being a member of a racial or ethnic minority in this society — standing alone — is *itself* an experience that creates unique perspectives. As Judge Clay explained in his concurrence, an individual can only experience racial or

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program need only be reviewed under intermediate, rather than strict, scrutiny. The Court in *Adarand* did not revisit its holding in *Metro Broadcasting* that racial and ethnic diversity tends to promote a diversity of viewpoints.

ethnic discrimination *based on his or her race or ethnicity*; and endeavoring to include in a law school class individuals who have actually experienced the kind of racial or ethnic discrimination being discussed in class requires consideration of race in admissions. *Grutter*, 288 F.3d at 764-765 (Clay, J., concurring). Indeed, Judge Boggs acknowledged as much in his dissent. *Id.* at 791 (Boggs, J., dissenting) (stating that the minorities who are admitted "all, *on average*, have had some experience with being the object of racial discrimination" and that "[f]or law students, this might bring an understanding of the purposes behind the antidiscrimination laws that they might study") (emphasis in original). Thus, it is no answer, as Judge Boggs suggests, to favor in admissions students who attended "an under-funded public school, struggl[ed] with relative poverty, [or spent] a childhood * * * in urban rather than suburban areas" (*id.* (Boggs, J., dissenting)); these are insufficient proxies for the experience of being a member of a racial or ethnic minority in America, regardless of class or income. See *id.* at 764-765 (Clay, J., concurring).[7]

Several amici contend that exposure to a broad reading list and to popular culture's purportedly "ubiquitous" message of tolerance are alternative means of achieving the educational effects of diversity. See, *e.g.*, Ctr. for Equal Opportunity Brief at 20-21 (arguing that "the educational effects of random interracial conversations" can be gained, *inter alia*, from reading works by under-represented minorities or from popular culture); Law Professors Brief at 14 (arguing that "surely a sufficiently diverse r*eading list*

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[7] See also Gary Orfield, *Introduction*, *in* DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 26 (Gary Orfield ed., 2001) ("DIVERSITY CHALLENGED") ("[M]any racial problems have a serious impact on people who are not poor. * * * Middle-class blacks are actually more likely to perceive discrimination in their lives than are poor blacks, perhaps because they have more interaction with the white world.").

would suffice" to instill lessons learned by interaction with minority students) (emphasis in original); Nat'l Ass'n of Scholars Brief (Gratz) at 17-18 (arguing that "[s]tudents can listen to 'multiple perspectives' and learn to be considerate of others with or without a racially diverse student body"). But it is self-evident that requiring students to read works authored by under-represented minorities, or having them watch a movie about "the black experience" — without actually interacting with people of color — is grossly insufficient to expand the limited world views created by lifetimes spent in a largely segregated world. See pp. 19-21, *infra*. If the goal is to expand students' understanding of and ability to function in society as it now exists, actual interaction with *peers* of different races is far superior to merely reading or watching a movie about racial issues. For example, a student could too easily dismiss Martin Luther King's writings as reflecting a different, less-enlightened time; that same student would have a harder time dismissing the struggles of her classmates with race and identity issues on campus.

Importantly, it is not only in class discussions that these crucial interactions occur. As Justice Powell noted, quoting the comments of the then-president of Princeton University: "'[A] great deal of learning occurs informally * * * through interactions among students * * * of different races * * * who are able, directly or indirectly, to learn from their differences. * * * For many [students] * * * , the unplanned casual encounters with roommates, fellow sufferers in organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth.'" *Bakke*, 438 U.S. at 313 n.48 (quoting Bowen, *Admissions and the Relevance of Race*, *supra*, at 7, 9).

Petitioners' suggestion (Grutter Brief at 16-17, 22; Gratz Brief at 13) that the Sixth Circuit's holding lacks support in this Court's precedents, save for Justice Powell's opinion in *Bakke*, also misses the mark. The Court often has recognized that racial and ethnic academic diversity promotes vital educational goals, and that achieving diversity through race-conscious decisionmaking accordingly is within the prerogative of state educational institutions. In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), for example, the Court observed that, even absent any constitutional violation, it would be "within the broad discretionary powers of [elementary and secondary] school authorities" to "conclude" as an "educational policy * * * that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students." *Id.* at 16; accord *North Carolina Bd. of Educ. v. Swann*, 402 U.S. 43, 45-46 (1971). Similarly, in *Washington v. Seattle School District No. 1*, 458 U.S. 457, 460, 472-474 (1982), the Court struck down a measure that would have restricted a school district's power to address *de facto* segregation for the purpose of augmenting education. In the course of its opinion, the Court noted that "it should be * * * clear that white as well as Negro children benefit from exposure to ethnic and racial diversity in the classroom." *Id.* at 472 (internal quotation marks omitted). And it concluded that, "in the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process." *Id.* at 474; cf. *Sweatt v. Painter*, 339 U.S. 629, 634 (1950) (recognizing the educational value of diversity in ordering the desegregation of a law school).

As shown below, the experience of the business world confirms Justice Powell's and the Sixth Circuit's conclusion that state academic institutions have a compelling interest in using diversity to hone young minds and to "prepar[e] * * * children [to act as] citizens[ ]" (*Seattle Sch. Dist.*, 458 U.S. at

473 (internal quotation marks omitted)), leaders (*Keyishian*, 385 U.S. at 603), and professionals (*Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954); *Sweatt*, 339 U.S. 634) in our increasingly heterogeneous society. *Bakke*, 438 U.S. at 313.

B. Success In Today's Business World Demands Cross-Cultural Competence And The Ability To View Problems From Multiple Perspectives — Skills Best Learned In Diverse Academic Environments

The business world has learned that, just as Justice Powell observed, "the nation's future does indeed depend [ ] upon leaders trained" in diverse academic environments. *Bakke*, 438 U.S. at 313 (opinion of Powell, J.) (internal quotation marks omitted). The capacities to work easily with persons of other races and to view problems from multiple perspectives are essential skills in the business world of the twenty-first century. Indeed, the cross-cultural competence of a business' work force directly affects its bottom line. Academic institutions with diverse student bodies offer the best — and for many students, the only — opportunity to acquire these crucial skills.

1. *To Achieve Excellence In The New, Diverse Global Economy, Employees Of Any Race, Culture, Or Ethnicity Must Possess Cross-Cultural Competence*

Demographic changes in the racial and ethnic composition of business work forces, customer bases, and pools of potential business partners increasingly necessitate that entrants into the managerial levels of the business world come equipped with the abilities to work creatively with persons of any race, ethnicity, or culture and to understand views influenced by those traits. See, *e.g.*, RAND REPORT, *supra*, at 16-18, 24-27. Such cross-cultural competence affects a business' performance of virtually all of its major

tasks: (a) identifying and satisfying the needs of diverse customers; (b) recruiting and retaining a diverse work force, and inspiring that work force to work together to develop and implement innovative ideas; and (c) forming and fostering productive working relationships with business partners and subsidiaries around the globe.[8]

Creating and Selling Products to a Diverse Population. Racial minorities in the United States presently wield an impressive *$600 billion* in annual purchasing power (Expert Report of William G. Bowen, at 14 (Dec. 9, 1998)) — a number that is increasing exponentially with expanding minority populations. Moreover, with the global expansion of many businesses and the advent of internet shopping, the customer bases of many businesses now include people from many races and diverse cultures around the world.

Having high-level employees who possess cross-cultural competence is essential for a business to profit from these vast market opportunities. It is undeniable that consumers' cultures can and often do influence their purchasing preferences.[9] Businesses whose employees are able to

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[8] In light of the importance of diversity to a business' success, it is not surprising that many businesses have long promoted a commitment to diversity among their ranks. General Motors, for instance, made diversity a "core business objective" in 1995.

[9] See, *e.g.*, Taylor H. Cox, Jr. & Stacy Blake, *Managing Cultural Diversity: Implications for Organizational Competitiveness*, 5 ACADEMY OF MANAGEMENT EXECUTIVE No. 3, at 45, 49 (1991); David K. Tse *et al.*, *Does Culture Matter? A Cross-Cultural Study of Executives' Choice, Decisiveness, and Risk Adjustment in International Marketing*, 52 JOURNAL OF MARKETING No. 4, at 81-95 (Oct. 1988); Rohit Deshpande *et al.*, *The Intensity of Ethnic Affiliation: A Study of the Sociology of Hispanic Consumption*, 13 JOURNAL OF CONSUMER RESEARCH No. 2, at 214-220 (Sept. 1986); S.G. Redding, *Cultural Effects on the Marketing Process in Southeast Asia*, 24 JOURNAL OF THE MARKET RESEARCH SOC'Y No. 2, at 98-114 (1982).

identify and cater to these market preferences will prosper; those whose employees lack the sensitivity and domain knowledge to meet these diverse market demands will not.

To meet the challenge, businesses require managers and employees who understand that people from diverse backgrounds manifest diverse interests and who know how to translate that understanding into creative product development, community outreach, and marketing and advertising campaigns. Examples of such successful identification and satisfaction of the needs of culturally diverse populations abound. See, *e.g.*, TAYLOR H. COX, JR., CULTURAL DIVERSITY IN ORGANIZATIONS: THEORY, RESEARCH, AND PRACTICE 30-31 (1993) (citing, among other examples, a company's successful development of a cosmetics line designed for women of color and another company's success in turning around poor performance in inner cities by assigning management of those market areas to black and Hispanic managers sensitive to local consumer preferences).

Companies whose managers understand the importance of forging relationships with diverse communities similarly enhance their business opportunities. Author John Fernandez cites as one example General Motors' closure of a $1 billion automotive deal with China. The deal was aided by China's appreciation of the corporation's prior outreach efforts to Asian-American employees and the Asian-American community. JOHN P. FERNANDEZ, RACE, GENDER AND RHETORIC: THE TRUE STATE OF RACE AND GENDER RELATIONS IN CORPORATE AMERICA 224 (1999). Conversely, a business' lack of sensitivity to culturally based beliefs may disaffect an entire target market and result in decreased sales. Many of the best examples of this phenomenon have occurred in the global market, when American companies have failed to develop sufficient familiarity with the cultures of potential customers to avoid

offending them. See *id.* at 220-221 (enumerating notable mishaps and obstacles).

Relationships in the Workplace. In the year 2000, more than one-third of all new labor force entrants in the United States were minorities. See Expert Report of Bowen, at 5; see also FEDERAL GLASS CEILING COMM'N, A SOLID INVESTMENT: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL 1 (1995) (Message From The Chair) ("GLASS CEILING COMM'N REPORT"). Over the next 50 years, that percentage is projected to exceed the percentage of Caucasian work force entrants. See pp. 3-4, *supra*. Businesses also employ citizens of other nations to staff their global manufacturing and production operations. General Motors, for example, employs citizens of 53 different countries, many of whom are non-Caucasians.

The capacity of many businesses to recruit and retain talented labor — a critical resource — therefore increasingly will depend upon the sensitivity of their managers to interracial and multicultural issues. "Companies with strong records for developing and advancing minorities and women will find it easier to recruit [and retain] members of those groups." GLASS CEILING COMM'N REPORT, *supra*, at 4.

Indeed, companies that manage diversity well already are proving more successful in attracting and retaining top-quality workers. See Taylor H. Cox, Jr. & Stacy Blake, *Managing Cultural Diversity: Implications for Organizational Competitiveness*, 5 ACADEMY OF MANAGEMENT EXECUTIVE No. 3, at 45, 48-49 (1991). The need to make work environments more hospitable to non-Caucasian workers is apparent: at present, minorities in general experience higher turnover rates and levels of job dissatisfaction. See, *e.g.*, *id.* at 45, 46.

Managers' and employees' cross-cultural competence augments not only recruiting and retention of employees, but also work force creativity and productivity. The best ideas

and products are created by teams of people who can work together without prejudice or discomfort. Cf. Gareth Morgan, *Endangered Species: New Ideas*, 133 BUSINESS MONTH No. 4, at 75-77 (1989) (cooperation and conflict management are essential to innovation). The absence of such obstacles is of special import in the new work environments of cutting-edge businesses, which stress teamwork and the free movement of ideas between people: See, *e.g.*, WILLIAM G. LEE, MAVERICKS IN THE WORKPLACE: HARNESSING THE GENIUS OF AMERICAN WORKERS 4 (1998). General Motors, for example, strives for a "walls down" work environment to foster "idea flow" — an interactive process of creative brainstorming unhindered by titles and positions. Idea flow cannot be achieved across barriers of racial and cultural discomfort or among team members who are unable to accept diverse views.

A corporate management comprising individuals who have never before experienced the challenges of interracial and cross-cultural interactions that they will confront in the workplace poses great risks to efficiency and productivity. First, low-level unease between managers and employees of different races, ethnicities, and cultures may impede productivity and prevent the formation of the close working relationships that make a business "hum." Second, managers unskilled in considering diverse perspectives may fail to recognize excellent ideas when they come from unexpected sources. Third, a lack of exposure to persons of different races and ethnicities may result in economically inefficient, and improper, hiring and promotion decisions, influenced by false stereotypes rather than an objective assessment of true merit. Such decisions not only destroy morale, but deprive the business of the benefit of excellent workers' untapped potential. In a worst-case scenario, insensitivity to issues of race or ethnicity could produce intense conflict or render a business vulnerable to costly and disruptive discrimination lawsuits.

In sum, the graduates whom businesses recruit from top academic institutions, such as the University of Michigan, to serve as managers and professionals will shape the corporate cultures and reputations for diversity of those businesses in the years to come. Graduates who lack sensitivity to perspectives influenced by race and ethnicity will be ill-equipped to meet the fundamental challenge of attracting, retaining, and managing the human capital that businesses need to survive.

Forming and Maintaining Relationships With Global Business Partners. Expanding global presences also mean that businesses increasingly transact with potential commercial partners from diverse races and cultures. General Motors, for example, has business partners and subsidiaries in many different countries and is constantly seeking to expand its operations and sales throughout the world. The company's global business objectives thus dictate that many of its managers and employees engage daily in transnational, cross-cultural, and interracial contacts. Such contacts occur at every level, from the business people to the engineers, who must work across national lines to develop and market the very best products.

Establishing trust across racial and cultural lines is a serious corporate challenge for all businesses that have international aspirations. Graduates from our Nation's elite academic institutions who have been immersed in cross-cultural learning environments will be better prepared to meet it.

2. *Diversity In Academic Institutions Augments The Skills — Cross-Cultural Competence And Complex Thinking — That Students Need To Help Lead Our Country's Economic Future*

Abundant research has verified Justice Powell's conclusion that racial and ethnic diversity in institutions of higher education assists students in developing the skills that,

as we have just explained, are so essential to their success in the business world: (1) understanding the views of persons from different cultures and (2) addressing issues from multiple perspectives.

Open-mindedness and complex thinking are skills best honed through exposure to multiple ideas and challenging debate in an educational environment. Academics attest, and researchers confirm, that racial and ethnic diversity enhances this process, elevating the level of discourse in institutions of higher education by exposing students to a broader range of perspectives. Students emerge from a diverse academic experience with greater tolerance and ability to interact with persons of other cultures, far less parochial views, and more highly developed cognitive abilities.[10]

We do not undertake to catalogue the abundant research establishing the causal relationship between academic diversity and development of these cognitive and social skills — a task that other amici, representing numerous associations of university educators, have performed. We note only that Judge Duggan had ample basis for his conclusion that "solid evidence" establishes that "educational benefits * * * flow from a racially and ethnically diverse student body." *Gratz*, 122 F. Supp.2d at 822.[11]

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[10] Contrary to petitioner's argument, the point that an education in a diverse setting results in "benefits accruing to students after they have graduated from college" (Gratz Brief at 41) does not "demonstrate that there is no principle that confines the interest to the education context" and thereby enable diversity to "become a justification for using race to treat people differently in many walks of life." *Id.* Rather, it simply means that diversity in education benefits students long after their four years spent on a college campus.

[11] Professor Patricia Gurin's research provides especially powerful empirical support for the proposition that students who "participated in interactions with diverse peers, were comfortable and prepared to live and work in a diverse society." Expert Report of Patricia Gurin, at 33 (Dec. 15, 1998) *in* Ct. App. Joint Appendix at 2316; see also Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools, in* DIVERSITY CHALLENGED, *supra*, at 143.

3. Institutions Of Higher Learning Are Ideally Equipped To Provide The Exposure To Diversity, Development Of Cross-Cultural Competence, And Critical Thinking Skills That Graduates Need To Thrive In The Business World

Businesses depend upon institutions of higher learning to teach students the cross-cultural competence and cognitive skills they will need to perform at a high level in the business world. Higher education is the best, and for many students the only, opportunity to acquire these skills.

Selective academic institutions offer a large percentage of white students their first and last opportunity for significant contact with persons of other races and cultures prior to entering the working world. See Expert Report of Thomas J. Sugrue, at 3, 22, 37-44 (Dec. 15, 1998) *in* Ct. App. Joint Appendix at 2522; Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools, in* DIVERSITY CHALLENGED, *supra*, at 154-158 & Tables 2-7 (50% of the white students at Harvard Law School and University of Michigan Law School had little or no interracial contact prior to entering college or law school). Despite our Nation's increasing racial diversity, historical patterns of *de facto* segregation in housing, and hence, also in primary and secondary education, persist. See Orfield & Whitla, *supra*, at 155-156. For many students, then, the college or university experience presents the first "opportunity to disrupt an insidious cycle of lifetime segregation." Expert Report of Patricia Gurin, at 33 (Dec. 15, 1998) *in* Ct. App. Joint Appendix at 2316.

It is also the best such opportunity. Of course, many businesses, including General Motors, can and do provide extensive diversity training to workers after their arrival in the work force. But these courses are designed to supplement, not substitute for, training and experiences most employees should have received earlier. Should the most selective institutions of higher education return to a state of *de facto* segregation — as research indicates most will do if the Court were to overrule *Bakke* and prohibit them from considering race in admissions decisions[12] — businesses will be ill-equipped to bridge the gap.

A diminution of diversity in institutions of higher education would mean that a huge percentage of their graduates would arrive in the workplace having grown up in racially and ethnically homogeneous neighborhoods and attended racially and ethnically homogeneous schools: environments that empirical studies show breed prejudice and stereotypes.[13] Having been "'surrounded only by the likes of themselves,'" such students are likely to hold highly parochial and limited perspectives. *Bakke*, 438 U.S. at 312 n.48 (opinion of Powell, J.) (quoting Bowen, *Admissions and the Relevance of Race*, *supra*, at 9). They may lack the open-mindedness of students who have had more interactions with persons of other races.

It would be exceedingly difficult for businesses to play catch-up — to teach college graduates basic social and cognitive skills and values they should have acquired prior to

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[12] See, *e.g.*, Expert Report of Derek Bok, at 5-6 (Dec. 15, 1998) *in* Ct. App. Joint Appendix at 2240 (absent consideration of race in admissions, the representation of blacks in the Nation's premier law schools would sink to a *de minimis* level — in one calculation, 0.4%).

[13] See, *e.g.*, Expert Report of Sugrue, at 44; cf. GORDON W. ALLPORT, THE NATURE OF PREJUDICE 271-272 (1954).

entry into the workplace. First, businesses lack the pedagogical resources, including faculty, of academic institutions to provide the same training in these arenas. Businesses are primarily commercial, not educational, entities, incapable of replicating the safe academic environments that foster the "robust exchange of ideas which discovers truth out of a multitude of tongues." *Keyishian*, 385 U.S. at 603 (internal quotation marks omitted). Second, research suggests that interracial and cross-cultural contacts diminish prejudice and promote greater understanding primarily when they occur among individuals of equal status. See, *e.g.*, Walter G. Stephan & John C. Brigham, *Intergroup Contact*: *Introduction*, 41 J. SOC. ISSUES No. 3, at 1, 2 (1985); Expert Report of Gurin, at 20. Only schools, not businesses, offer a forum for cross-cultural contact among a society of equals, free of hierarchy. Finally, students tend to exhibit greater openness to such lessons at earlier stages of their development. "Students come to universities at a critical stage, * * * a time during which they define themselves in relation to others and experiment with different social roles." Expert Report of Gurin, at 4.

Accordingly, universities, not businesses, "are [the] ideal institutions to foster" the skills and values necessary for participation in a heterogeneous society. See *id.* at 9 (emphasis omitted). See generally HARVARD UNIVERSITY, THE PRESIDENT'S REPORT 1993-1995, at 43. As two constitutional scholars recently observed: "If a far-flung democratic republic as diverse — and at times divided — as [modern] America is to survive and flourish, it must cultivate some common spaces where citizens from every corner of society can come together to learn how others live, how others think, how others feel. If not in public universities, where?" Akhil R. Amar & Neal K. Katyal, *Bakke's Fate*, 43 U.C.L.A. L. Rev. 1745, 1749 (1996).

In sum, institutions of higher learning have a compelling interest in selecting diverse student bodies: to enhance the

educational experiences of students of all races and to equip them with the skills they need to thrive and lead our Nation as citizens and in the new global marketplace.

II. ELIMINATION OF AFFIRMATIVE ACTION IN EDUCATIONAL INSTITUTIONS LIKELY WOULD DEPRIVE BUSINESSES OF WELL TRAINED MINORITY CANDIDATES WHO ARE ESSENTIAL TO OUR NATION'S ECONOMIC SUCCESS

Institutions of higher learning have a compelling interest in considering race and ethnicity in admission decisions, not only because diversity enhances the quality of education, but because diversity enhances the many enterprises students will undertake following graduation. Selective universities and colleges serve as training grounds for and gateways to the higher echelons of all realms of American society, including corporate America.

Businesses hire from selective academic institutions not only because they tend to select the students with greatest potential, but also because they tend to prepare their students well to perform in the top levels of the work force. Utilizing the highest quality faculty, most effective curricula, superior programs and facilities, and most powerful alumni and community contacts, these universities and colleges offer unparalleled training opportunities. Cf. *Sweatt*, 339 U.S. at 634. The graduating classes of these institutions therefore, to some extent, define the pool from which future leaders and managers of the business world will emerge.[14] Selective institutions of higher learning bear a special responsibility to make admissions decisions that will not merely reward the

[14] As such, it is no answer that minority "students who, because of nonpreferential policies, are not admitted to a more selective school will assuredly be admitted elsewhere." Ctr. for Equal Opportunity Brief at 28.

past academic performance of individual students, but will enhance our Nation's economic future.

To accomplish that goal, academic institutions must be permitted to continue to consider, as one factor among many in their selection decisions, the race and ethnicity of applicants. Absent such consideration, the evidence suggests that the number of minorities admitted to and graduating from these selective institutions will plummet. See p. 20 n.12, *supra*. Any reduction in diversity at these institutions accordingly would reduce the diversity of the pool of candidates from which businesses could select top corporate managers and professionals. That, in turn, threatens to deprive businesses of the manifold benefits of having a critical mass of people of color and persons of different ethnicities in their upper ranks and would strike a harmful blow to our Nation's economic well-being.

In this regard, it is notable that "[h]igher education, by making up for educational inequities at early stages in life, can be the ramp up to a level playing field — with no further affirmative action — for the rest of one's future." Amar & Katyal, *supra*, 43 U.C.L.A. L. Rev. at 1749. Indeed, as the United States recognizes, "[i]f undergraduate and graduate institutions are not open to all individuals and broadly inclusive to our diverse national community, then the top jobs * * * will be closed to some." United States Brief (Grutter) at 13. If courts prohibit institutions of higher learning from performing this function, businesses will find it more difficult to hire superbly trained minority candidates.

There can be little doubt that racial and ethnic diversity in the senior leadership of the corporate world is crucial to our Nation's economic prospects. In a country in which minorities will soon dominate the labor force, commensurate diversity in the upper ranks of management is increasingly important. A stratified work force, in which whites dominate the highest levels of the managerial corps and minorities

dominate the labor corps, may foment racial divisiveness. It also would be retrogressive, eliminating many of the productivity gains businesses have made through intensive efforts to eradicate discrimination and improve relations among workers of different races.

Instead of finding that the consideration of diversity leads to racial tension and stigmatization, as petitioner and amici argue (*e.g.*, Grutter Brief at 34-35; Ctr. for Equal Opportunity Brief at 17-19; Nat'l Ass'n of Scholars Brief (Gratz) at 23-24; W. Connerly Brief at 13-15), businesses have discovered just the opposite: valuing diversity has helped their bottom line. Abundant evidence suggests that heterogeneous work teams create better and more innovative products and ideas than homogeneous teams. Homogeneity often causes teams to suffer from lock-step "group think." See, *e.g.*, Charlan J. Nemeth, *Differential Contributions of Majority and Minority Influence*, 93 PSYCHOLOGICAL REVIEW No. 1, at 23-32 (1986); Sumita Raghuram & Raghu Garud, *The Vicious and Virtuous Facets of Workforce Diversity*, *in* SELECTED RESEARCH ON WORK TEAM DIVERSITY 155, 156, 160 (Marian N. Ruderman et al. eds., 1996); JOHN P. FERNANDEZ, THE DIVERSITY ADVANTAGE 284-285 (1993). The most innovative companies therefore deliberately establish heterogeneous teams in order to "'create a marketplace of ideas,' recognizing that a multiplicity of points of view need to be brought to bear on a problem." ROSABETH MOSS KANTER, THE CHANGE MASTERS: INNOVATIONS FOR PRODUCTIVITY IN THE AMERICAN CORPORATION 167 (1983).

In short, as GM President and CEO Jack Smith has said, "Having people of different ethnic, racial, and social backgrounds in our corporation has not slowed our pursuit of excellence — it has accelerated it." General Motors, *Workplace Diversity – The Competitive Advantage*, *at* http://www.gm.com/company/gmability/diversity/people/workforce.html (last visited Feb. 15, 2003). The chief executive officers of numerous Fortune 500 companies agree. As

Robert J. Eaton, then-Chairman and CEO of Chrysler Corporation, explained, "workforce diversity is a competitive advantage. Our success as a global community is as dependent on utilizing the wealth of backgrounds, skills, and opinions that a diverse workforce offers, as it is on raw materials, technology and processes." EXECUTIVE COUNCIL 1998, at 10.[15]

Empirical research buttresses the conclusion of these corporate executives and industry representatives that work force diversity is important to effective competition in today's market. The federal Glass Ceiling Commission, for instance, reported that "[i]ndependent research has shown that companies that go the extra mile in hiring and promoting minorities and women are more profitable." GLASS CEILING COMM'N REPORT, at 2. Other studies have reached similar conclusions. See, *e.g.*, Janine S. Hiller & Stephen P. Ferris, *Separating Myth From Reality: An Economic Analysis of*

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[15] See also *id.* at 34 ("'We see diversity in the background and talent of our associates as a competitive advantage and as a commitment that is a daily responsibility.'") (quoting M. Douglas Ivester, then-Chairman and CEO of The Coca Cola Company); Robert A. Rosenblatt, *PG&E Wins Federal Affirmative Action Award*, L.A. TIMES, Dec. 19, 1989, at D2 ("'We are convinced that this investment in equal opportunity pays high dividends.'") (quoting George A. Maneatis, then-President of Pacific Gas & Elec. Co.); Kenneth Labich, *Employees Must Reflect the Diverse World*, FORTUNE, Mar. 26, 1990, at 56 ("'Any business climate in which broadly different individuals may succeed will be a climate where the whole organization prospers.'") (quoting James R. Houghton, then-Chairman and CEO of Corning Inc.); Janine S. Hiller & Stephen P. Ferris, *Separating Myth From Reality: An Economic Analysis of Voluntary Affirmative Action Programs*, 23 MEMPHIS ST. U. L. REV. 773, 777 & n.20 (1993) (observing that it is now commonly accepted in business circles that diversity is "good for business").

Voluntary Affirmative Action Programs, 23 MEMPHIS ST. U. L. REV. 773, 794-795 (1993).

General Motors strongly believes that the future of American businesses depends upon the availability of a diverse group of well-trained graduates. Only with the contributions of the best and brightest of every race, ethnicity, and culture can American businesses continue to create the world's most innovative products, manage the world's most productive work forces, and expand their operations across the globe. For the sake of the Nation's collective economic future, institutions of higher learning must be permitted to continue to achieve the diversity that enhances both the education of these individuals and the endeavors that they will undertake as graduates.

CONCLUSION

For the reasons stated, the Court should hold that the government has a compelling interest in achieving the educational benefits of diversity in higher education and that admissions parameters that are narrowly tailored to ensure a diverse, heterogeneous student body are permissible under the Constitution.

Respectfully submitted.

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In The
Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, *et al.*

JENNIFER GRATZ AND PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, *et al.*

On Writ Of Certiorari And Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE UNITED NEGRO COLLEGE FUND AND KAPPA ALPHA PSI AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Alexander v. Holmes,
396 U.S. 1218 (1969) 13

Berea College v. Kentucky,
211 U.S. 45 (1908) 9

Brown v. Board of Education,
347 U.S. 483 (1954) 4, 11, 14, 16

Cooper v. Aaron,
358 U.S. 1 (1958) 13

Florida ex rel. Hawkins v. Board of Control,
350 U.S. 413 (1956) 14

Lucy v. Adams,
350 U.S. 1 (1955) 14

Meredith v. Fair,
305 F.2d 343 (5th Cir.), *stay denied*, 83 S. Ct. 10
(1962) 14

Plyler v. Doe,
457 U.S. 202 (1982) 16, 28

Sweatt v. Painter,
339 U.S. 629 (1950) 19

United States v. Fordice,
505 U.S. 717 (1992) 14, 19

United States v. Virginia,
518 U.S. 515 (1996) 17, 19

STATUTES

Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq* 19

Elementary and Secondary Education Act of 1965,
20 U.S.C. 6301 *et seq* 15

TABLE OF AUTHORITIES

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No Child Left Behind Act of 2001, Pub. L. No. 107-
110, 115 Stat. 1425 (2002) 15

Second Morrill Act, ch. 841, 26 Stat. 417 (1890) 9

MISCELLANEOUS

146 Cong. Rec. H7845 (daily ed. Sept. 19, 2000) 18

Advisory Committee on Student Financial Assistance, *Empty Promises: The Myth of College Access In America* (2002) 27

Walter R. Allen & Joseph O. Jewell, *The Miseducation of Black America: Black Education Since "An America Dilemma," in An American Dilemma Revisited: Race Relations in a Changing World*
169 (Obie Clayton, Jr. ed., 1996) 14

William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions*
(1998) ..... *passim*

William G. Bowen & Neil L. Rudenstine, *Race-Sensitive Admissions: Back to Basics*, Chron. of Higher Educ., Feb. 7, 2003, at B7 ..... 23, 27

David Card & Alan B. Krueger, *School Quality and Black-White Relative Earnings: A Direct Assessment*, 107 Q. J. of Econ. 151 (1992) 10

Children's Defense Fund, *Progress and Peril: Black Children In America* (1993) 15

Henry N. Drewry & Humphrey Doermann, *Stand and Prosper: Private Black Colleges and Their Students* (2001) ..... *passim*

TABLE OF AUTHORITIES

Page

Elizabeth A. Duffy & Idana Goldberg, *Crafting A Class: College Admissions and Financial Aid*, 1955-1994 (1998) 21

Joe R. Feagin, American Council on Education, *The Continuing Significance of Racism: U.S. Colleges and Universities* (2002) 15

Jacqueline Fleming, *Blacks In College* (1984) 24

Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877* (1988) 7, 9

John Hope Franklin & Alfred A. Moss, Jr., *From Slavery to Freedom: A History of African Americans* (8th ed. 2000) 7, 9

Frederick D. Patterson Research Institute/UNCF, *The Torch: A Research Bulletin Shedding Light on Critical Issues in African American Education*, Dec. 2001 17

Frederick D. Patterson Research Institute/UNCF, *Two Decades of Progress: African Americans Moving Forward in Higher Education* (1999) 19, 25

Frederick D. Patterson Research Institute/UNCF, *UNCF 2001 Statistical Report* (2001) 12

General Accounting Office, *Information on Minority-Targeted Scholarships* (Jan. 1994) 27

William B. Harvey, American Council on Education, *Minorities in Higher Education 2001-2002: Nineteenth Annual Status Report* (2002) 13

Susan T. Hill, *The Traditionally Black Institutions of Higher Education 1860-1982* (1985) 10

TABLE OF AUTHORITIES

Page

Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* (2003) 25, 29

Gerald D. Jaynes & Robin M. Williams, Jr., eds., *A Common Destiny: Blacks and American Society* (1989) 10, 11

James Kent, *Commentaries on American Law* (4th ed. 1840) 8

Jacqueline E. King, American Council on Education, *Money Matters: The Impact of Race/Ethnicity and Gender on How Students Pay for College* (1999) 16

Gil Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, 72 Minn. L. Rev. 29 (1987) 9

Richard O. Lempert *et al.*, *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 Law & Social Inquiry 395 (2000) 21, 29

Laura Lippman *et al.*, U.S. Department of Education, *Urban Schools: The Challenge of Location and Poverty* (1996) 14, 15

Douglas S. Massey *et al.*, *The Source of the River: The Social Origins of Freshmen at America's Selective Colleges and Universities* (2003) 23, 24

Michael T. Nettles & Laura W. Perna, *The African American Education Data Book* (1997) 14

Herbert W. Nickens, Association of American Medical Colleges, *Questions and Answers on Affirmative Action in Medical Education* (1998) 28, 29

TABLE OF AUTHORITIES

Page

President's Board of Advisors on Historically Black Colleges and Universities, *2001-2002 Annual Report* (Sept. 2002) 9

Kenneth E. Redd, *HBCU Graduates: Employment, Earnings and Success After College*, USA Group Foundation New Agenda Series, Aug. 2000, at 1 16

Regents of the Univ. of California v. Bakke, No. 76-811, Brief of Columbia University, Harvard University, Stanford University, and University of Pennsylvania as *Amici Curiae* 20

Responding to the Needs of Historically Black Colleges and Universities in the 21st Century: Jt. Hearing Before the Subcomms. on 21st Century Competitiveness & Select Educ. of the House Comm. on Educ. & Workforce, 107th Cong., 2d Sess. (2002) 11, 18

Julian B. Roebuck & Komanduri S. Murty, *Historically Black Colleges and Universities: Their Place in American Higher Education* (1993).....8, 11

Southern Education Foundation, *Redeeming The American Promise: Report of the Panel on Educational Opportunity and Postsecondary Desegregation* (1995) 10

Marta Tienda *et al.*, *Closing the Gap?: Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action* (2003) 26

William E. Trueheart, *The Consequences of Federal and State Resource Allocation and Development Policies for Traditionally Black Land-Grant Institutions: 1862-1954* (1979)..... 9

TABLE OF AUTHORITIES

Page

U.S. Census Bureau, *Statistical Abstract of the United States* (2002).....12

Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race As a Factor in Law School Admission Decisions*, 72 N.Y.U. L. Rev. 1 (1997).....29

Xavier Remans at Head of Class, Times-Picayune, Jan. 16, 2002, at M1.....18

INTEREST OF *AMICI CURIAE*[1]

Amicus United Negro College Fund (UNCF) was founded in 1944 to increase educational opportunities for African Americans. A UNCF member institution must be a historically black, private, accredited, four-year college or university in the United States, founded prior to 1945 and operated solely for educational or scientific purposes. The 39 UNCF members are located in ten southern States, Ohio, and Texas. *See*, App., *infra*, 1a-2a (listing all UNCF member colleges and universities). Since its founding, UNCF has raised nearly $2 billion to support its member colleges and universities and has assisted more than 300,000 students earn undergraduate and graduate degrees. It is the Nation's oldest and most successfui African American education association.

UNCF's founding purpose was to raise general operating funds for its member colleges and universities in order to lower tuition costs. It provides unrestricted operational support to its members. Tuition and fees at UNCF member colleges and universities are half as much, on average, as other private American colleges even though their endowments are equal to one-third.

UNCF's mission also includes administering financial assistance that is awarded to deserving students. UNCF administers Ph.D. fellowships, which increase the number of African Americans with doctoral degrees, and a Corporate Scholars Program, which is a combination of scholarship, work experience and mentoring within corporate America. UNCF has partnered with particular corporations such as Pfizer, Inc., and the Merck Company Foundation to offer scholarship awards to minority students to

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[1] Letters from the parties consenting to the filing of this brief have been filed pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

expand the pool of African American biomedical scientists to achieve the complementary goals of national economic competitiveness and social diversity.

In 1999, UNCF became an administrator of the Gates Millennium Scholars Program. The program is aimed at increasing the number of African Americans, Hispanics, Native Americans, and Asian Americans with academic promise, significant unmet financial need, and demonstrated leadership who enroll in and complete undergraduate and graduate degree programs. Its stated goal is to enable 20,000 such students over the next 20 years to attend the colleges, universities, and professional schools of their choice.

Throughout its history, UNCF has enjoyed widespread support by Americans of all races and backgrounds. Significantly, it has been honored by a tradition of support from Presidents of the United States, beginning with President Franklin D. Roosevelt who supported the first annual fundraising campaign. President John F. Kennedy donated to UNCF the Pulitzer Prize funds awarded for his book, *Profiles in Courage*, and supported the second capital campaign in 1963 that raised $33 million. President George H.W. Bush hosted the reception to help UNCF launch its most ambitious capital campaign in 1990 that ultimately raised $280 million over the subsequent six years.

UNCF joined in an *amicus curiae* brief that was filed in one of the instant cases in the United States Court of Appeals for the Sixth Circuit urging that court to sustain the constitutionality of respondents' consideration of race in making admissions decisions. Given the historical mission of UNCF and its role over the past half-century in promoting access to higher education for African American students, UNCF has a strong interest in the proper resolution of the questions presented in these cases.

Amicus Kappa Alpha Psi Fraternity is an organization of primarily African American men who are graduates and undergraduates of colleges and universities throughout the nation. Founded in 1911, it has more than 100,000

members and 500 chapters. Long active in unlocking the doors of educational opportunities for young African American men who frequently encounter discrimination in their quest to obtain a college education, Kappa Alpha Psi Fraternity also has a strong interest in the outcome of these cases.

SUMMARY OF ARGUMENT

The importance of allowing traditionally white colleges, universities, and professional schools to consider race when identifying qualified students for admission cannot be understood fully without taking into account the history of the American educational system. The racial exclusion, segregation, and discrimination that, for centuries, permeated all aspects of the Nation's educational system, along with the current underfunding of primary and secondary schools in lower income minority communities, are significant to understanding the compelling nature of the governmental interest in admitting a diverse student body and the benefits to both individuals and society of ensuring educational opportunity for all, so that no child is left behind.

A. For the Nation's first one hundred years, more than four million African Americans were enslaved and kept illiterate by law. Over the course of the next century, most African Americans were relegated to racially segregated public schools for primary and secondary education, and those schools were not provided the same financial or other resources as their white counterparts. Opportunities for African Americans in higher education were generally limited to private historically black colleges and universities that were lacking in financial resources, or public land-grant institutions that were racially segregated by law as well as underfunded. *Amicus* United Negro College Fund was founded in 1944 by 27 of the private historically black colleges and universities to raise general operating funds and scholarship assistance for its members. Although most of UNCF's awards to individuals are not based on race and are awarded to students at a wide

variety of schools across the nation, its focus on financial aid directly addresses a particular need of African American college students who were, and continue to be, disproportionately from lower income families.

This Court's ruling in *Brown v. Board of Education*, 347 U.S. 483 (1954), led to a remarkable transformation in the American educational system. Notwithstanding that extraordinary progress, however, large numbers of African American school children, especially in large urban and smaller rural school settings, are locked in poorly-funded, inferior schools.

In light of this national history, both past and present, one cannot dispute that race is a unique factor in American education, and this Court has repeatedly recognized that education is a particularly important means of overcoming the effects of past racial discrimination. Therefore, *amici* believe that promoting racial diversity in higher education is a compelling governmental interest. Having racially diverse student bodies at the Nation's most prominent colleges, universities, and professional schools is important because it ensures that the unique benefits and opportunities gained through attendance at such schools extend to African Americans who were traditionally excluded, allows the development of a diverse pool of institutions that aim to serve the needs of an increasingly diverse Nation, and promotes the Nation's general welfare by increasing the economic resources of African Americans in society.

B. Historically black colleges and universities have played, and continue to play, an important role in American higher education, but the dramatic increase in African American access to higher education was not achieved through efforts like UNCF's alone. That increase could not have been achieved without efforts since the 1960s by traditionally white institutions to foster racial diversity on their campuses, including through race-conscious policies.

Amici believe that such efforts continue to be a necessary component of any successful strategy to maintain a significant enrollment of African Americans in higher

education, especially because the effects of past racial discrimination still are felt by many African Americans today. Those effects include attending substandard primary and secondary schools and having families whose members have not had an opportunity to attend college themselves. Such factors contribute to a child, regardless of ability, being less likely to perform well on traditional quantitative measurements of academic promise. Significantly, however, a determination that there is a lack of preparedness under traditional evaluation criteria does not mean that African Americans who are identified through other means are not qualified and do not thrive at colleges and universities once admitted. To the contrary, the success rate of African Americans at traditionally white institutions does not differ from their peers. The use by traditionally white institutions of additional admission criteria has helped to identify qualified African Americans who perform well in college, graduate school, and the "real world."

C. If traditionally white institutions of higher education are not allowed the flexibility to look beyond narrow quantitative measures of college readiness and consider race, much of the progress of African Americans in higher education will be lost. The many race-neutral alternatives that have been suggested have not proven effective and all suffer from serious limitations. The "percentage plans" adopted in states like Texas, which achieve racial diversity only because they are premised on *de facto* racial segregation in high school, are not an option for private colleges or universities, or for graduate and professional schools, whether public or private, that draw from a national and international applicant pool.

Allowing the use of race-conscious policies in the awarding of financial aid is also critical to ensuring African Americans continued access to higher education. After all, the admission of qualified African Americans even under the most rigid, traditional quantitative standards means nothing if such students cannot afford to attend.

Institutions of higher education also must be allowed to make race-conscious admissions decisions in order to ensure the presence of qualified African Americans in critical professions and positions of leadership in American society. Statistical analyses predict that colleges and universities would suffer drastic decreases in African American enrollment if race were not considered, with enrollment at the most selective schools falling more than 70 percent. Based on the studies of what would have happened if institutions of higher education had not, in the past, looked beyond "the numbers," there would be 40 percent fewer minority doctors today. No doubt similar reductions would have occurred in other professions. That waste of human potential would be detrimental not only to individual African American students, but to the Nation as a whole.

ARGUMENT

THE HISTORY OF RACIAL DISCRIMINATION IN AMERICAN EDUCATION DEMONSTRATES THAT CONTINUED EFFORTS TO ENHANCE MINORITY ACCESS TO HIGHER EDUCATION MUST EMBRACE RACE-CONSCIOUS ADMISSIONS TO FURTHER A COMPELLING GOVERNMENTAL INTEREST

The compelling nature of the governmental interest in fostering racial diversity in student bodies at traditionally white colleges, universities, and professional schools cannot be understood fully without consideration of the history of racial exclusion, segregation, and discrimination that, for centuries, permeated all aspects of the Nation's educational system, as well as the current underfunding of the primary and secondary schools that prepare many minority students who seek admission to college.

A. The Exclusion Of African Americans From The Nation's Traditionally White Educational Institutions Resulted In A Long History Of Disproportionate Numbers Of African Americans Attending Under-Resourced Schools

1. Historically black colleges and universities were created to educate emancipated slaves because they were excluded by law and practice from white schools on account of their race

a. The vast majority of African Americans were barred by law from educational institutions throughout the United States for the first one hundred years of the Nation's existence. Indeed, at the time of the Civil War, 92 percent of the entire population of African Americans in this country were enslaved, without the legal right to earn a living of their own, and generally without the most fundamental of human rights to marry or raise their own families, let alone to obtain any type of education. John Hope Franklin & Alfred A. Moss, Jr., *From Slavery to Freedom: A History of African Americans* 138-166 (8th ed. 2000); Henry N. Drewry & Humphrey Doermann, *Stand and Prosper: Private Black Colleges and Their Students* 13-15, 23 (2001).

Following emancipation in 1863 and the end of the Civil War in 1865, a major effort was made to provide the more than 4 million former slaves with educational opportunity. Initially, that effort was led by a loose coalition of religious missionary groups and private northern freedmen's aid societies. Further support was provided by the federal Freedmen's Bureau, a branch of the War Department. Their combined efforts nearly quadrupled the number of schools for African Americans in the United States in the first four years following the Civil War. *Stand and Prosper*, *supra*, at 39-40; *see also From Slavery to Freedom*, *supra*, at 256-257; Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877* 144-148 (1988).

Most of the historically black private colleges and universities that are members of *amicus* United Negro College Fund (UNCF) were established during the first decade or two following the end of the Civil War in the South, where more than 90 percent of African Americans then lived. *Stand and Prosper, supra,* at 23. These educational institutions were created as a direct response to the profound need of the African American population, nearly 90 percent of whom were illiterate because of laws that had made it a crime to teach African Americans, enslaved or free, to read or write. *Id.* at 34; 2 James Kent, *Commentaries on American Law* 253 n.a (4th ed. 1840) (citing laws of Georgia, Virginia, Alabama, and Louisiana prohibiting teaching slaves or "free negroes" to read or write). Even in the "free" States, there had been almost no opportunities for African Americans to obtain the most minimal education. Less than 2 percent of school-aged African Americans in 1860 were enrolled in school. *Stand and Prosper, supra,* at 25 tbl. 2.3. It was only in the rarest of circumstances that an African American was able to attend a college or university. By 1865, only 28 individuals among the 4.4 million African Americans living in this country had received college degrees. Julian B. Roebuck & Komanduri S. Murty, *Historically Black Colleges and Universities: Their Place in American Higher Education* 22 (1993).

Although many of the private black institutions established in the years following the Civil War were founded as colleges and universities to educate adults, their initial focus had to be on primary and secondary education because nearly all African American adults and adolescents, as well as children, had no formal education. Therefore, the early historically black colleges and universities were all dedicated to preparing former slaves for collegiate studies in order to create their own high school graduates who would be capable of succeeding in college-level work. Later, in the 1870s, a true public primary school system and, to a lesser extent, a secondary school system for African Americans began to take shape in the South. Those systems were almost entirely segregated and remained so

for nearly a century. *Reconstruction, supra,* at 365-368; *From Slavery to Freedom, supra,* at 445-455.

Meanwhile, in 1890, in response to newly enacted federal legislation permitting States to use federal land-grant funds for the "establishment and maintenance of such colleges separately for white and colored students," Second Morrill Act, ch. 841, 26 Stat. 417, 418 (1890), many southern States began establishing segregated public land-grant colleges for African Americans. The curriculum in the black land-grant colleges focused almost exclusively on teacher training and industrial education. And despite federal requirements to the contrary, "black public colleges suffered substantial, consistent, and nearly universal discrimination in funding" as well as "restricted programs of instruction and narrowly defined institutional missions" in comparison to their white counterparts. Gil Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, 72 Minn. L. Rev. 29, 45, 64 (1987). That differential resource allocation between white and black land grant institutions persists. William E. Trueheart, *The Consequences of Federal and State Resource Allocation and Development Policies for Traditionally Black Land-Grant Institutions: 1862-1954*, 58-61, 116-118, 165-169 (1979); President's Board of Advisors on Historically Black Colleges and Universities, *2001-2002 Annual Report* 20 & app. D (Sept. 2002).

Although the public land-grant institutions were racially segregated, the newly founded private colleges and universities were not. The historically black colleges and universities were once the only educational institutions in the country admitting all races and thus were among the few common meeting grounds for African Americans and whites. Indeed, some admitted white students despite state law prohibitions against doing so. *See, e.g., Berea College v. Kentucky*, 211 U.S. 45 (1908) (upholding criminal conviction of private college that violated state law prohibiting the operation of "any college, school, or institution where persons of the white and negro

races are both received as pupils for instruction"). In 1887, Atlanta University (one of the predecessor institutions to Clark Atlanta University) lost its state funding when it refused to stop enrolling white students. *Stand and Prosper, supra,* at 53.

b. Southern States also refused to provide sufficient resources to the segregated black primary and secondary public schools. As late as 1934, only 39 public secondary schools for African Americans in the South were accredited, including only two in Alabama, one in South Carolina, and none in Mississippi, which had the largest percentage of African American citizens of any State. *Stand and Prosper, supra,* at 72. In the 1940s, per-pupil spending on education in the South for African American children averaged about one-third of that for white students and the school year was one to three months shorter. Susan T. Hill, *The Traditionally Black Institutions of Higher Education 1860-1982* 11 (1985); *see generally* Southern Education Foundation, *Redeeming The American Promise: Report of the Panel on Educational Opportunity and Postsecondary Desegregation* (1995). African American children were taught in classes that contained, on average, 25 percent more students, but African American teachers were paid almost half the salary of white teachers. David Card & Alan B. Krueger, *School Quality and Black-White Relative Earnings: A Direct Assessment*, 107 Q. J. of Econ. 151, 167 (1992).

The States' failure to provide adequate resources to black primary and secondary schools meant that many African Americans were not prepared for college-level studies. By 1940, the median amount of education received by African Americans in the country aged 25-29 was 6.5 years. Gerald D. Jaynes & Robin M. Williams, Jr., eds., *A Common Destiny: Blacks and American Society* 334 (1989). Therefore, although the increased number of primary and secondary schools for African Americans by the early part of the 20th Century allowed private black colleges and universities to begin to focus exclusively on higher education, the African American student population did not increase in a corresponding manner. The number of college

degrees awarded by historically black colleges and universities more than doubled from the 1920s to the 1930s,[2] but still less than 2 percent of African Americans had received a college degree by 1940, compared with 7.5 percent of white men and 5 percent of white women. *Id.* at 339. In 1950, only 5 percent of college-aged African American men and 4 percent of African American women were enrolled in college, whereas 15 percent of white men and 8 percent of white women were enrolled as undergraduates. *Stand and Prosper, supra,* at 76.

2. UNCF was founded in 1944 to provide financial support to historically black colleges and universities

a. Because of the continuing state-sanctioned racial segregation in education, virtually all African American college students in the years prior to *Brown v. Board of Education*, 347 U.S. 483 (1954), attended historically black colleges and universities. *Historically Black Colleges, supra,* at 43. By the time of the Second World War, those institutions suffered from a lack of financial resources that led to the formation of UNCF in 1944.

UNCF's founding purpose was to raise general operating funds and scholarship assistance for its member colleges and universities to lower tuition costs. Twenty-seven private black colleges and universities answered the call of the President of Tuskegee Institute, Dr. Frederick D. Patterson, to "pool their small moneys and make a united appeal to the national conscience" through formation of UNCF. UNCF provided those colleges and universities with a stronger combined voice that could ensure that their appeal to conscience was heard by all Americans,

[2] In 1926-27, private black colleges awarded 818 college degrees, while public black colleges awarded 165. The number of college degrees awarded in 1935-36 were 1,970 and 1,490, respectively. *Stand and Prosper, supra,* at 73 tbl. 6.2.

both black and white, including prominent national leaders. *See* page 2, *supra*. UNCF's first annual campaign demonstrated the wisdom of the combined approach by raising three times the amount of funds that its members had been able to raise independently the prior year.

b. Although UNCF's focus on raising general operating funds and scholarship assistance for its members continues to be one of its primary functions, UNCF's mission also has evolved over the years to include capital campaigns, solicitation of special project grants, and contributions to endowments. UNCF further broadened its mission to include a public awareness campaign, originally launched in 1972, under the slogan – "A mind is a terrible thing to waste" – which served as a dramatic reminder to the Nation of the vital importance of education both to individuals and to society as a whole.

UNCF expanded its financial support for higher education by increasing its administration of scholarships and fellowships to individual students. Although most of those awards are not based on race, the focus on financial aid at historically black colleges and universities and elsewhere directly responded to a particular need of African Americans. In 1940, 90 percent of African Americans still lived in poverty, earning less than half of the average white person, due in no small part to the absence of equal educational opportunity. William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 1 (1998). Even today, an African American is twice as likely to live in poverty than a white American. U.S. Census Bureau, *Statistical Abstract of the United States* 442 (2002). In 1995, approximately 70 percent of the families of the African American students enrolled in four-year colleges had incomes below the national median. *Stand and Prosper*, *supra*, at 202 tbl. 11.6. In four-year colleges as a whole, a larger percentage of African Americans need financial aid than any other group. Most UNCF college students come from economically disadvantaged families – 59 percent have family incomes below $25,000. Frederick D. Patterson Research Institute/UNCF, *UNCF*

2001 Statistical Report 19 fig. 12 (2001). Approximately 90 percent of UNCF students require financial assistance to enroll in college, and 60 percent are the first in their families to attend college.

UNCF scholarships enable thousands of students to attend not only UNCF member colleges and universities, but also other historically black, as well as traditionally white, colleges and universities across the country. Approximately 60,000 UNCF students attend its 39 member colleges and universities and another 5,000 attend over 950 schools across the Nation. Currently, UNCF administers more than 450 programs, including scholarship programs, mentoring, summer enrichment, curriculum and faculty development, and leadership development. More important, the presence of these programs and UNCF's role in administering them reflect an increased awareness in America's donor community of the need to address the disparity in college participation between majority and minority students. William B. Harvey, American Council on Education, *Minorities in Higher Education 2001-2002: Nineteenth Annual Status Report* 1-2, 15-19, 21-23 (2002).

3. Disproportionate numbers of minority students continue to receive inferior primary and secondary schooling

a. Despite the formation of UNCF and other educational opportunities that became available following World War II, African Americans continued to have dramatically reduced opportunities to obtain a quality education. Finally, in 1954, this Court declared in *Brown* that racial segregation and discrimination in education could not be defended against constitutional challenge as "separate but equal," because segregated schools were inherently unequal. Because of delay, official recalcitrance, and local hostility, however, transforming that decree into reality at the primary and secondary level proved difficult. *See, e.g.*, *Cooper v. Aaron*, 358 U.S. 1 (1958); *Alexander v. Holmes*, 396 U.S. 19 (1969). That was even true at the level of

higher education, *see, e.g.*, *Meredith v. Fair*, 305 F.2d 343 (5th Cir.), *stay denied*, 83 S. Ct. 10, 11 (1962); *United States v. Fordice*, 505 U.S. 717 (1992), despite this Court having made clear from the start that any logistical problems that allowed a transition period at the primary and secondary education level did not apply to graduate schools, so that admission of African Americans to traditionally white institutions of higher education was mandated immediately, *see Lucy v. Adams*, 350 U.S. 1 (1955) (per curiam); *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413 (1956) (per curiam).

Ultimately, in the less than 50 years since *Brown*, the educational-system in America did undergo a remarkable transformation, with the African American children who attended the substandard segregated schools of the 1950s growing up to see many of their children not only attend integrated primary and secondary schools, but also have the opportunity to attend colleges and universities. For example, in 1992-1993, nearly 45 percent of African Americans who received college degrees were first-generation college students. 1 Michael T. Nettles & Laura W. Perna, *The African American Education Data Book* 265 tbl. 5 (1997); *see also* Walter R. Allen & Joseph O. Jewell, *The Miseducation of Black America: Black Education Since "An America Dilemma," in An American Dilemma Revisited: Race Relations in a Changing World* 169, 172-180 (Obie Clayton, Jr. ed., 1996) (providing an empirical assessment of educational progress of African Americans since World War II).

b. Notwithstanding the extraordinary progress made to date, very large numbers of minority school children, especially African American and Latino youngsters in large urban and smaller rural school settings, are locked in poorly-funded, inferior schools. Laura Lippman *et al.*, U.S. Department of Education, *Urban Schools: The Challenge of Location and Poverty* v-xii, 75-80 (1996). The twin barriers of race and poverty frequently prevent the laying of a proper educational foundation in the home, and often result in less well-funded or low-performing schools

operating in minority neighborhoods and cities. *Urban Schools, supra*, at 1-45.

Congress's recent enactment of the No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002), with the strong support of President George W. Bush, is a tacit acknowledgement that some schools are failing minority and other low-income children who are targeted by Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 6301 *et seq.* as amended. Unfortunately, the schools with the most limited resources, the least experienced and poorest paid teachers, and the parents least able to advocate effectively for their children, are attended by minority and low-income families. It is a simple fact that a low-income, less well-prepared student has the least chance of gaining access to college. Children's Defense Fund, *Progress and Peril: Black Children In America* 27-28, 79-98 (1993) (documenting poverty levels and educational attainment among African American children).

In addition, it cannot be said that institutions of higher education are free from racism and discrimination in the 21st Century. In Joe R. Feagin's *The Continuing Significance of Racism: U.S. Colleges and Universities* (2002), the American Council on Education reveals a reality that many in higher education would deny, except when racially charged incidents catch the attention of the national media and call the country's attention to our sobering shortcomings. *Id.* at 9-24. And there can be little doubt that race still plays an important, sometimes overriding, role in the everyday life, work, and school experiences of African Americans, such that African Americans consistently cope with the subtleties, nuances and omnipresence of race in America. This is true despite denials by those whose skin color means that they do not have to face that reality. The persistence of race as a factor, along with income, in determining available resources, quality of instruction, and the freedom and capacity of a family to support the educational aspirations of their children, ultimately determines both the academic preparation and rate of matriculation of minority students

with respect to college. Jacqueline E. King, American Council on Education, *Money Matters: The Impact of Race/Ethnicity and Gender on How Students Pay for College* 5-16 (1999).

c. In light of this national history, both past and present, one cannot dispute that race is a unique factor in American education. And this Court has repeatedly recognized that education is a particularly important means of overcoming past racial discrimination. Educational opportunity provides not only the means for individual success, *see Brown*, 347 U.S. at 493, but also a way to lessen the underlying prejudices that burden historically disfavored groups. *See Plyler v. Doe*, 457 U.S. 202, 222 (1982) ("by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority"). The education of African Americans and other minorities also is important to the Nation's general welfare. It is well documented that, over a lifetime, a college graduate will earn nearly double the income of a high school graduate. Even accounting for the racial disparities in income earned by degree attainment, minorities substantially increase their income potential by completing college. One cannot underestimate the economic and educational value added to America when she educates her minority citizens. Kenneth E. Redd, *HBCU Graduates: Employment, Earnings and Success After College*, USA Group Foundation New Agenda Series, Aug. 2000, at 1, 10-17.

Because the generation of change since *Brown* is still burdened with the remnants and the continued effects of the prior two centuries' racial exclusion, segregation, and discrimination, there is a continued need for attention to be given to matters of race in the colleges, universities, and professional schools of America. In particular, *amici* believe that promoting racial diversity in higher education is a compelling governmental interest. Having racially diverse student bodies at the Nation's most prominent colleges, universities, and professional schools is particularly compelling because it ensures that the unique benefits and

opportunities gained through attendance at such schools extend beyond the all-white population that most of those institutions were founded to serve. *Cf. United States v. Virginia*, 518 U.S. 515, 552-554 (1996) (describing tangible and intangible benefits of educational institutions that cannot easily be replicated). Moreover, affording flexibility to colleges, universities, and professional schools in admissions decisions allows the development of a diverse pool of institutions that aim to serve the needs of an increasingly diverse Nation.

B. The Dramatic Increase In African American Access To Higher Education Over The Past Several Decades Was Not Achieved Through Efforts Like UNCF's Alone, But Was Also The Result Of Efforts By Traditionally White Institutions To Foster Racial Diversity

1. Historically black colleges and universities continue to play an important role in higher education, but African Americans should have access to the full spectrum of colleges, universities, and professional schools

The increase in African American participation in education at all levels over the past several decades has been dramatic. In 1940, only 8 percent of African Americans over the age of 25 had completed four or more years of high school. Frederick D. Patterson Research Institute/UNCF, *The Torch: A Research Bulletin Shedding Light on Critical Issues in African American Education*, Dec. 2001, at 5. By 2000, nearly 80 percent had done so. *Ibid.* In that same time period, the number of African Americans over 25 years of age who had completed four or more years of college increased more than 2,600 percent. *Ibid.*

The efforts of UNCF, its member colleges and universities, and other historically black colleges and universities have played, and continue to play, an important role in that progress. Historically black colleges and universities

constitute just 4 percent of the 2,400 baccalaureate degree granting institutions in America, yet these institutions produce 24 percent of all African Americans with four year degrees. *Responding to the Needs of Historically Black Colleges and Universities in the 21st Century: Jt. Hearing Before the Subcomms. on 21st Century Competitiveness & Select Educ. of the House Comm. on Educ. & the Workforce*, 107th Cong., 2d Sess. 14 (2002) (statement of William B. DeLauder, President of Delaware State University). Moreover, historically black college and university graduates represent 85 percent of all African American physicians, 80 percent of all African American federal judges, 75 percent of African American Ph.D.s, 50 percent of all African American engineers, and 46 percent of all African American business executives. 146 Cong. Rec. H7845 (daily ed. Sept. 19, 2000) (statement of Rep. Cummings).[3]

The degree of success that African Americans have enjoyed in higher education could not have been achieved, however, without many other factors, including rulings by this Court ordering an end to racial segregation, the improvement of primary and secondary education for African Americans, and most important, the efforts by other institutions of higher education. Indeed, UNCF and its member colleges and universities do not have the

[3] In 2001, UNCF member Xavier University of Louisiana sent 94 African American graduates on to medical school, more than any other American college for the ninth year in a row. Three other historically black colleges and universities were among the ten schools that graduated the most African Americans who successfully applied to medical schools that year: Spelman College (38), Morehouse College (33), and Howard University (33). The traditionally white institutions in that top ten group each graduated less than half as many as Xavier: Harvard (37), the University of Maryland (24), Johns Hopkins University (20), the University of California Los Angeles (17), the University of North Carolina at Chapel Hill (16), and the University of Virginia (16). *Xavier Remains at Head of Class*, Times-Picayune, Jan. 16, 2002, at M1.

financial or other resources to provide higher education opportunities to all qualified African American students, nor should they be expected to do so. UNCF believes that, for the American ideals of educational access and economic progress to be achieved, African American students must be ensured access to the full spectrum of educational opportunities.

Before enactment of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*, the vast majority of African Americans who were enrolled in college attended historically black colleges and universities. By 1996, that number had decreased to approximately 25 percent because traditionally white institutions were educating nearly 75 percent of the African Americans in college. Frederick D. Patterson Research Institute/UNCF, *Two Decades of Progress: African Americans Moving Forward in Higher Education* 20-21 tbl. 7 (1999). That shift has resulted in an increased range of higher education choices for African American students. These students have profited from being able to select among a diverse array of institutions of higher education. *Cf. United States v. Fordice*, 505 U.S. 717, 748-749 (1992) (Thomas, J., concurring). Each college and university has a unique set of intangible qualities "which are incapable of objective measurement," but which define the value of the education apart from the curriculum. *Sweatt v. Painter*, 339 U.S. 629, 634 (1950). "Such qualities, to name but a few, include * * * position and influence of alumni, standing in the community, traditions and prestige." *Ibid.*

As this Court has recognized, an individual derives unique advantages from attending a school from which are drawn those who will hold "the most distinguished positions" in public and private life. *Id.* at 633; *United States v. Virginia*, 518 U.S. at 552-554. Graduates of UNCF colleges and universities have a particular interest in attending

the most selective graduate and professional schools because of their broader range of program offerings.[4]

2. Efforts by traditionally white institutions to increase racial diversity on campuses have contributed to the increased representation of African Americans in higher education

One of the important factors contributing to the dramatic increase in African American representation in higher education over the past 30 years is the concerted effort by traditionally white institutions to increase African American enrollment on their campuses. Beginning in the early 1960s, in the midst of the growing civil rights movement and this country's increased attention to the discrimination suffered by African Americans, many such institutions committed themselves to identifying and enrolling qualified African American students. They recognized that the lack of racial diversity on their campuses was, in significant part, a consequence of the Nation's history of racial segregation and discrimination in education. *Regents of the Univ. of California v. Bakke*, No. 76-811, Brief of Columbia University, Harvard University,

[4] The examples of UNCF graduates who have gone on to pursue advanced degrees at the most selective institutions are many, including renowned national leaders such as Deborah Hyde, M.D. (one of only four African American female neurosurgeons in the country) (B.S. Tougaloo College, M.S. Cleveland State University, M.D. Case Western Reserve Medical School); Donald Hopkins, M.D. (1995 recipient of MacArthur "Genius" Fellowship) (B.S. Morehouse College, M.D. University of Chicago, M.P.H. Harvard University); Ruth Simmons (President of Brown University) (B.A. Dillard University, M.A. and Ph.D. Harvard University); Walter E. Massey (physicist; former Director of the National Science Foundation) (B.S. Morehouse College, M.S. and Ph.D. Washington University in St. Louis); John Hope Franklin (historian; 1995 recipient of the Presidential Medal of Freedom) (A.B. Fisk University, A.M. and Ph.D. Harvard University); and Marian Wright Edelman (attorney; 2000 recipient of the Presidential Medal of Freedom) (B.S. Spelman College, LL.B. Yale Law School).

Stanford University, and University of Pennsylvania as *Amici Curiae* 30, 17 n.7.

The effort to build a diverse student body served a dual function – it provided African American students "with the same opportunities and education as their white peers," while also benefiting "majority as well as minority students" because of the diverse backgrounds and perspectives that were brought together for classroom debate. Elizabeth A. Duffy & Idana Goldberg, *Crafting A Class: College Admissions and Financial Aid, 1955-1994* 141 (1998). Creating an academic environment in which students of different races may exchange ideas also helped to dispel stereotypical views of minority groups.

Colleges, universities, and professional schools also learned that admitting students who did not perform as well on traditional tests or grading systems did not lead to a significantly different rate of graduation. They found that the success rate of African Americans whom they admitted at such institutions did not differ substantially from their peers. *See Shape of the River*, *supra*, at xxxi-xxxii, 60-61, 110-111, 138-140. That success reflects the care that the institutions have taken in making admissions decisions that reaffirm that considerations of non-quantitative factors such as the applicant's contributions to school and society, and his or her family circumstances, among others, are useful predictors of likely success in academia and beyond. *Ibid*; Richard O. Lempert *et al.*, *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 Law & Social Inquiry 395, 496 (2000).

The recruitment efforts of traditionally white institutions of higher education since the 1960s have succeeded in significantly increasing African American access to both undergraduate and professional schools. "From 1960 to 1995, the percentage of blacks aged 25 to 29 who had graduated from college rose from 5.4 to 15.4 percent." *Shape of the River*, *supra*, at 9-10. The percentage of African Americans in law school "grew from barely 1 percent in 1960 to 7.5 percent by 1995." *Id.* at 10. And the

percentage of medical students who were African American "climbed from 2.2 percent in 1964 to 8.1 percent in 1995." *Ibid.*

3. Use of race-conscious admission criteria and other non-quantitative factors to supplement traditional quantitative measures of college preparedness has assisted many colleges and universities in identifying qualified African American students

Many of the efforts by traditionally white institutions to increase the enrollment of African Americans have included race-conscious policies. *Amici* believe that such efforts continue to be a necessary component of any successful strategy to maintain a significant enrollment of African Americans in higher education.

Because race and income play such a decisive role in how students are educated in the primary and secondary grades, as well as whether they will gain admission to college, it is inconceivable that the Nation would assume that the mere unlocking of the door to college for minority students would permit their unfettered entry. Moreover, the continued use of arbitrary cut-off scores on standardized tests, such as the Scholastic Aptitude Test (SAT) and the American College Testing Assessment (ACT), along with grade point averages to determine admission extends the racially discriminatory effects of income and inferior schooling to the higher education admissions process. It is undisputed that the efforts over the past 30 years to increase African American representation in colleges, universities, and professional schools, could not have succeeded absent the application of selection criteria that extended beyond a strict comparison of grade point averages and scores on standardized tests. Historically, the grades and standardized test scores of African Americans have on average been lower than those of whites. Although that gap has narrowed over the last 30 years, it remains significant today. The reasons for the current disparities are varied and complex, but ultimately rooted in the

history of systemic discrimination against African Americans:

> [T]est-score gaps remain. . . . That is hardly surprising, given the deep-seated nature of the factors that impede academic opportunity and achievement among minority groups – including the fact that a very large proportion of such students continue to attend primary and secondary schools that are underfinanced, insufficiently challenging, and often segregated. It would be naive to expect that a problem as long in the making as the racial divide in educational preparation could be eradicated in a generation or two.

William G. Bowen & Neil L. Rudenstine, *Race-Sensitive Admissions: Back to Basics*, Chron. of Higher Educ., Feb. 7, 2003, at B7.

The effects of past discrimination against African Americans are felt today in a variety of ways including not only through attendance at substandard primary and secondary schools, but also through factors such as having parents who did not have an opportunity to attend college themselves. Those less tangible factors also contribute to a child, regardless of ability, being less likely to perform well on tests. Indeed, a recent comprehensive study of the preparedness gap between African Americans and whites and relative differences in academic performance has concluded that such differences can be attributed largely to the persistent educational and socioeconomic disadvantages suffered by African Americans. Douglas S. Massey *et al.*, *The Source of the River: The Social Origins of Freshmen at America's Selective Colleges and Universities* 166, 205-206 (2003).

Significantly, however, a determination that there is a lack of preparedness under traditional evaluation criteria does not mean that African Americans who are identified through other means are not qualified and do not thrive at colleges and universities once admitted. *See* page 21, *supra*. The use by traditionally white institutions of additional admission criteria has helped to identify qualified African Americans who perform well in college and

graduate school and in the "real world." *Amici* are particularly aware of such success with regard to their own alumni who gained the academic skills through four years of undergraduate education to qualify for admission at the most selective graduate and professional schools. *See* note 4, *supra*. Historically black colleges and universities have always devoted significant attention and resources toward ensuring that all of their students are afforded the support and appropriate environment to overcome poor secondary school preparation, as is necessary for them to succeed at the college level and beyond. *Stand and Prosper*, *supra*, at 235-236; Jacqueline Fleming, *Blacks In College* 8-10 (1984). For example, since 1990, more than 150 students at Xavier University of Louisiana (an approximate average of 10 per year) with SAT scores near or below the national average performed especially well in college course work and, following graduation, went on to earn medical degrees from institutions such as the University of Pennsylvania, Emory University, New York University, and the University of Michigan. Other Xavier graduates with similar SAT scores have obtained doctoral degrees from the Massachusetts Institute of Technology and Princeton University, and law degrees from Columbia University and Tulane University.[5]

[5] Other private historically black colleges and universities and formerly segregated public land-grant institutions have prepared African American students who have gone on to achieve outstanding academic success at the graduate level, to enjoy prominent careers, and to provide superior public service. The late Ronald E. McNair, a NASA astronaut and crew member on the space shuttle Challenger, is a classic example of that phenomenon. McNair graduated from North Carolina Agricultural & Technical State University and then went on to obtain a Ph.D. in physics from the Massachusetts Institute of Technology.

C. Colleges, Universities, And Professional Schools Must Continue To Be Able To Consider Race In Admissions And Financial Aid In Order To Maintain Access By African Americans

As demonstrated above, the history and continued denial of educational opportunities for African Americans in this country, rooted in slavery and antebellum laws, the subsequent disparate financing of racially segregated public education, and the continued underfunding of many schools in minority communities, have resulted in a financial gap for many African Americans, as well as a college preparedness gap for some, that persists to this day. Consequently, African Americans continue to have lower participation rates at institutions of higher education. That pattern is most evident in graduate and professional schools. In 1996, African Americans received only 6.4 percent of professional degrees, 6.0 percent of Master's degrees and 3.5 percent of doctoral degrees awarded throughout the country. *Two Decades of Progress*, *supra*, at 61 fig. 24, 69 fig. 26, 76.

1. Colleges, universities, and professional schools should be free to use a variety of strategies with regard to admissions and financial aid in order to assemble diverse student bodies that best advance their varied educational missions

a. Educational institutions must have the flexibility to use strategies other than traditional quantitative means of evaluating preparedness and likelihood of success in order to maintain racial diversity on their campuses. The only alternative that has consistently proven effective is one that incorporates some measure of race-consciousness into its admission criteria. Although many race-neutral alternatives have been suggested – and some implemented – none of them have yet proven effective, and all suffer from serious limitations. Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences*

(2003); Marta Tienda *et al.*, *Closing the Gap?: Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action* (2003).

For example, the "percentage plans" adopted in states like Texas rely upon an arbitrary and mechanical admissions factor – a student's rank in a high school – that leaves no room for consideration of other applicant qualifications or the relative academic strengths of high schools. Moreover, to the extent such plans are effective in achieving racial diversity in colleges, it is only because of *de facto* racial segregation in the high schools. In any event, such a plan is not an option for private colleges or universities or for graduate and professional schools, whether public or private, that draw from a national and international applicant pool.

In a recent defense of race-conscious admissions policies, William G. Bowen, the president emeritus of Princeton University, and Neil Rudenstine, the president emeritus of Harvard University, discuss several purportedly "race-neutral" approaches, including percentage plans and plans focused on socioeconomic or geographic factors. They explain that all of the plans "pose serious problems" and cannot "be accurately described as 'race-neutral'":

> They have all been conceived with the clear goal (whether practicable or not) of producing an appreciable representation of minority students in higher education. In some cases, they involve the conscious use of a kind of social engineering decried by critics of race-sensitive admissions.
>
> Surely the best way to achieve racial diversity is to acknowledge candidly that minority status is one among many factors that can be considered in an admissions process designed to judge individuals on a case-by-case basis. We can see no reason why a college or university should be compelled to experiment with – and "exhaust" – all suggested alternative approaches before it can turn to a carefully tailored race-sensitive policy that focuses on individual cases. The alternative approaches are susceptible to systematic analysis, based on experience and empirical investigation. A preponderance of them have been tested for decades. All can be shown to be seriously deficient. Indeed, if genuinely race-neutral (and educationally appropriate) methods were available, colleges and universities would long ago have gladly embraced them.

Race-Sensitive Admissions, *supra*, at B10.

b. Allowing the use of race-conscious policies in the awarding of financial aid is also critical to ensuring African Americans continued access to higher education. After all, the admission of qualified African Americans even under the most rigid, traditional quantitative standards means nothing if such students cannot afford to attend. Given that minorities disproportionately come from lower income families, they rely on federal, state, and institutional "need-based" aid to pay college costs. Moreover, colleges rely on such aid to help recruit and retain minority students. Even those forms of aid – packaged for needy students – leave significant funding "gaps" in meeting the cost of attendance. Advisory Committee on Student Financial Assistance, *Empty Promises: The Myth of College Access In America* 15-29, 34-37 (2002).

It is unclear how reversal of the court of appeals' ruling would affect the wide variety of financial aid programs in use today. Privately administered scholarships would not, of course, be subject to the same strictures as public funds. Nonetheless, a decrease in available public sources of aid would increase the demand for private aid. The limited pool of private financial aid certainly is inadequate to meet such an increase in demand. The current imbalance in grant aid versus loan aid could be exacerbated if minority scholarships were determined to be impermissible – resulting in a reduction in the availability of such scholarships to minority college students. General Accounting Office, *Information on Minority-Targeted Scholarships* 1-4 (Jan. 1994).

2. In order to ensure the presence of African Americans in critical professions and positions of leadership in American society, institutions of higher education must include students of diverse racial backgrounds

For most Americans, education is a means of achieving economic and social success. Thus, the under representation of African Americans in higher education means that proportionately fewer African Americans have access to society's more influential and lucrative occupations. Such occupations represent "powerful engines of social mobility," and in many ways hold the key to the emergence of a substantial and permanent African American middle class. *Shape of the River*, *supra*, at 10-14, 94-96, 118-154; *see Plyler v. Doe*, 457 U.S. 202, 222 (1982).

Between 1960 and 1990, for example, the number of African American physicians in the country almost doubled and the number of African American attorneys and engineers nearly tripled. *Shape of the River*, *supra*, at 10. The percentage of managers or professionals among African Americans has increased from 5 percent in 1950 to 20 percent in 1990. *Ibid.* The proportion of African Americans who earned more than $50,000 per year rose from 5.8 percent in 1967 to 13 percent in 1992. *Id.* at 10-11. Despite these gains, the African American middle class remains much smaller proportionately than the white middle class, with African Americans less than half as likely as whites to earn $50,000 per year. *Id.* at 11. Continued improvement will depend upon continued access to higher education.

According to a recent statistical analysis of medical school admissions and enrollment in 1996, an admissions policy based strictly upon undergraduate grades and standardized test scores would have resulted in an 85 percent drop in African American acceptances at traditionally white medical schools, leading to a 2 percent population of underrepresented minorities at these schools. Herbert W. Nickens, Association of American Medical Colleges, *Questions and Answers on Affirmative Action in Medical*

Education 7 (1998). Similarly, according to one estimate, if law school admissions had been based solely on numerical measures, 90 percent of the African Americans in the 1991 entering class would not have been admitted. Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race As a Factor in Law School Admission Decisions*, 72 N.Y.U. L. Rev. 1, 50-51 (1997). Yet African Americans who have been admitted to such schools in the past have graduated successfully and entered those professions. *E.g.*, *Michigan's Minority Graduates in Practice*, *supra*, at 395, 496.

As for the most selective undergraduate institutions, a statistical analysis of admissions data predicts that such institutions would suffer "drastic" decreases in African American enrollment if race were not considered, with enrollment at the most selective of these schools falling more than 70 percent. *Shape of the River*, *supra*, at 31-42. Those predictions are consistent with the over 50 percent drop in enrollment that the University of California, Berkeley, experienced in 1998, the first year following the University of California's state-wide abandonment of race-conscious admissions policies. *Percent Plans in College Admissions*, *supra*, at 49 tbl. 29.

Based on the studies of what would have happened if institutions of higher education had not, in the past, looked beyond "the numbers," there would be 40 percent fewer minority doctors today. *Questions and Answers*, *supra*, at 7. No doubt similar reductions would have occurred in other professions. That waste of human potential would be detrimental not only to individual African American students, but to the Nation as a whole.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals for the Sixth Circuit in *Grutter v. Bollinger*, No. 02-241, and the judgment of the District Court for the Eastern District of Michigan in *Gratz v. Bollinger*, No. 02-516, should be affirmed.

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FEBRUARY 2003

United Negro College Fund
Member Colleges and Universities

Barber-Scotia College (est. 1867), Concord, NC

Benedict College (1870), Columbia, SC

Bennett College (1873), Greensboro, NC

Bethune-Cookman College (1904), Daytona Beach, FL

Claflin University (1869), Orangeburg, SC

Clark Atlanta University (1865), Atlanta, GA

Dillard University (1869), New Orleans, LA

Edward Waters College (1866), Jacksonville, FL

Fisk University (1866), Nashville, TN

Florida Memorial College (1879), Miami, FL

Huston-Tillotson College (1876), Austin, TX

Interdenominational Theological Center (1867), Atlanta, GA

Jarvis Christian College (1912), Hawkins, TX

Johnson C. Smith University (1867), Charlotte, NC

Lane College (1882), Jackson, TN

LeMoyne-Owen College (1862), Memphis, TN

Livingstone College (1879), Salisbury, NC

Miles College (1905), Birmingham, AL

Morehouse College (1867), Atlanta, GA

Morris College (1908), Sumter, SC

Morris Brown College (1885), Atlanta, GA

Oakwood College (1896), Huntsville, AL

Paine College (1882), Augusta, GA

Paul Quinn College (1872), Dallas, TX
Philander Smith College (1877), Little Rock, AR
Rust College (1866), Holly Springs, MS
Saint Augustine's College (1867), Raleigh, NC
Saint Paul's College (1888), Lawrenceville, VA
Shaw University (1865), Raleigh, NC
Spelman College (1881), Atlanta, GA
Stillman College (1876), Tuscaloosa, AL
Talladega College (1867), Talladega, AL
Tougaloo College (1871), Tougaloo, MS
Tuskegee University (1881), Tuskegee, AL
Virginia Union University (1865), Richmond, VA
Voorhees College (1897), Denmark, SC
Wilberforce University (1856), Wilberforce, OH
Wiley College (1873), Marshall, TX
Xavier University (1915), New Orleans, LA

Nos. 02-241 and 02-516

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IN THE

Supreme Court of the United States

BARBARA GRUTTER,
Petitioner,
v.
LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,
Respondents.

JENNIFER GRATZ AND PATRICK HAMACHER,
Petitioners,
v.
LEE BOLLINGER, JAMES J. DUDERSTADT, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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Missouri v. Jenkins, 515 U.S. 70 (1995) 10

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 2, 3, 4, 5, 10

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) 5

MISCELLANEOUS

Adam Clymer, *Service Academies Defend Use of Race in Their Admissions Policies*, N.Y. TIMES, Jan. 28, 2003 9

Diversity: An Imperative For Business Success, THE CONFERENCE BOARD (1999) 7

Diversity Helps to Deliver Better Business Benefits, PERSONNEL TODAY, June 18, 2002 7

Robert L. Lattimer, *The Case for Diversity in Global Business, and the Impact of Diversity on Team Performance*, COMPETITIVENESS REV., Vol. 8, No. 2 (1998) 8

Jon Meacham, *The New Face of Race*, NEWSWEEK, Sept. 18, 2000 6

TABLE OF AUTHORITIES - continued

Population Estimates Program, Population Division, U.S. Census Bureau, *U.S. Population Estimates by Age, Sex, Race, and Hispanic Origin:1980 to 1999* (rel. April 11, 2000), *available at* http://www.census.gov/population/estimates/nation/natdoc.txt 6

Population Estimates Program, Population Div., U.S. Census Bureau, *Population Estimates for States by Race and Hispanic Origin: July 1, 1999* (rel. Aug. 30, 2000), *available at* http://www.census.gov/population/estimates/state/srh/srh99.txt 6

Research Makes a Business Case for Diversity, FED. HUM. RESOURCES WEEK, Sept. 24, 2001 7

Trevor Wilson, *Diversity At Work: The Business Case for Equity* (1996) 7

INTEREST OF *AMICI CURIAE*[1]

Amici are global businesses that recruit at the University of Michigan or similar leading institutions of higher education. Collectively, *amici* have annual revenues well over a trillion dollars and hire thousands of graduates of the University of Michigan and other major public universities. *Amici* have a vital interest in who is admitted to our nation's colleges and universities, and what kind of education and training those students receive. Many of the *amici* have substantial business presences in the state of Michigan, some are headquartered in Michigan, and all have substantial ties to Michigan suppliers and consumers.

The existence of racial and ethnic diversity in institutions of higher education is vital to *amici*'s efforts to hire and maintain a diverse workforce, and to employ individuals of all backgrounds who have been educated and trained in a diverse environment. As explained in this brief, such a workforce is important to *amici*'s continued success in the global marketplace.

Amici have devoted substantial financial and human resources to create and maintain a diverse workforce. These extensive efforts are part of the very fabric of *amici*'s cultures, are implemented and overseen by senior managers, and are supported at the highest levels. In addition, many of the *amici* pursue a variety of endeavors to support minority students in higher education, including participating in numerous joint initiatives with the University of Michigan and other leading universities with strong academic programs and diverse student

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[1]All parties have consented to the filing of this *amicus curiae* brief. No portion of the brief was authored by counsel for a party. No person or entity other than the *amici* signing this brief or their counsel made a monetary contribution to the preparation or submission of the brief.

bodies, providing under-represented minority students with substantial financial assistance and summer internship opportunities, recruiting and mentoring minority students, extending financial grants, and partnering with university staff and chapters of national minority professional organizations.

INTRODUCTION AND SUMMARY OF ARGUMENT

Now more than ever, the ability of universities, such as the University of Michigan, to consider all of an applicant's attributes is essential to create the educational environment necessary to best train all their students to succeed. The students of today are this country's corporate and community leaders of the next half-century. For these students to realize their potential as leaders, it is essential that they be educated in an environment where they are exposed to diverse people, ideas, perspectives, and interactions. In the experience of the *amici* businesses, today's global marketplace and the increasing diversity in the American population demand the cross-cultural experience and understanding gained from such an education. Diversity in higher education is therefore a compelling government interest not only because of its positive effects on the educational environment itself, but also because of the crucial role diversity in higher education plays in preparing students to be the leaders this country needs in business, law, and all other pursuits that affect the public interest.

If the University of Michigan is not able to consider all qualities of each applicant to the University, including his or her racial or ethnic background, the University will be hampered in its search for students with the most promise, and its graduates will be less likely to receive an education that gives them "'wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Regents of the*

University of California v. Bakke, 438 U.S. 265, 313 (1978) (opinion of Powell, J.). The University's graduates will therefore be less likely to possess the skills, experience, and wisdom necessary to work with and serve the diverse populations of the United States and the global community. Graduates with such an education are important to the community as a whole, as well as to the *amici* businesses. Accordingly, *amici* seek to add their collective voice in support of the importance of racial, ethnic and other diversity in our leading institutions of higher education, which will better train *all* students and ensure that members of all segments of our society obtain the education and training necessary to enable them to become the community and corporate leaders of tomorrow.

ARGUMENT

THE PURSUIT OF DIVERSITY IN HIGHER EDUCATION IS A COMPELLING STATE INTEREST BECAUSE IT PREPARES ALL STUDENTS TO SUCCEED IN AND ENHANCE THE GLOBAL COMMUNITY.

"[T]he attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education." *Bakke*, 438 U.S. at 311-12 (opinion of Powell, J.). And "[e]thnic diversity . . . is . . . one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body." *Id.* at 314. Thus, the Court held in *Bakke* that "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Id.* at 320 (opinion of Powell, J., joined by Brennan, White, Marshall, and Blackmun, JJ.).

As Justice Powell recognized in his controlling opinion in *Bakke*, a diverse student body promotes an atmosphere of "speculation, experiment and creation" that is "essential to the quality of higher education." *Id.* at 312 (internal quotations omitted). Moreover, by enriching students' education with a variety of perspectives, experiences, and ideas, a university with a diverse student body equips all of its students with the skills and understanding necessary to succeed in any profession. *Id.* at 314. Those skills include the ability to understand, learn from, and work and build consensus with individuals from different backgrounds and cultures. In finding the attainment of diversity to be a constitutionally permissible state interest, Justice Powell emphasized that "it is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Id.* at 313 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

Justice Powell's recognition of the compelling nature of the state's interest in diversity was not limited to undergraduate admissions. "[E]ven at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial." 438 U.S. at 313. Quoting the Court's decision in *Sweatt v. Painter*, 339 U.S. 629 (1950), Justice Powell observed, "'The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.'" *Bakke*, 438 U.S. at 314 (quoting *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)).

Justice Powell thus concluded that "the interest of diversity is compelling in the context of a university's admissions program," and that "a university must have wide discretion in making the sensitive judgments as to who should be admitted." *Id.* Justice Powell emphasized that ethnic diversity is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body. *Id.* "The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.* at 315.

The Court has not addressed since *Bakke* the importance of diversity in the context of higher education. But Members of the Court have recognized the controlling force of Justice Powell's opinion in *Bakke* in the 25 years since the case was decided. *See, e.g., Wygant v. Jackson Board of Education*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) ("Additionally, although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest."); *cf. id.* at 313, 314 & n.7 (Stevens, J., dissenting).

In the practical experience of the *amici* businesses, the need for diversity in higher education is indeed compelling. Because our population is diverse, and because of the increasingly global reach of American business, the skills and training needed to succeed in business today demand exposure to widely diverse people, cultures, ideas and viewpoints. Employees at every level of an organization must be able to work effectively with people who are different from

themselves. *Amici* need the talent and creativity of a workforce that is as diverse as the world around it.

The population of the United States is increasingly defined by its diversity. Two years after *Bakke* was decided, the 1980 census showed that African Americans, Native Americans, Asian Americans and Hispanics constituted 20 percent of the nation's population.[2] By 1999, those groups made up 28 percent of the population of the United States.[3] And by one estimate, these groups will constitute almost half – 47 percent – of the United States' population by the year 2050.[4] The rich variety of ideas, perspectives and experiences to which both non-minority and minority students are exposed in a diverse university setting, and the cross-cultural interactions they experience, are essential to the students' ability to function in and contribute to this increasingly diverse community.

The nature of American business also is changing. Most of the *amici* are truly international companies, and virtually all are becoming so. *Amicus* 3M is a $16.7 billion diversified manufacturing and technology company with operations in more than 60 countries and customers in nearly 200 countries. *Amicus* Boeing makes 70 percent of its commercial airplane

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[2] *See* Population Estimates Program, Population Division, U.S. Census Bureau, *U.S. Population Estimates by Age, Sex, Race, and Hispanic Origin: 1980 to 1999* (rel. April 11, 2000), *available at* http://www.census.gov/population/estimates/nation/natdoc.txt.

[3] *See* Population Estimates Program, Population Div., U.S. Census Bureau, *Population Estimates for States by Race and Hispanic Origin: July 1, 1999* (rel. Aug. 30, 2000), *available at* http://www.census.gov/population/estimates/state/srh/srh99.txt.

[4] Jon Meacham, *The New Face of Race*, NEWSWEEK, Sept. 18, 2000, at 40.

sales to international customers. *Amicus* Procter & Gamble sold a branded product to more than 2.5 billion people across the world last year, yielding more than $40 billion in sales. Similar figures could be provided for many of the *amici*: they operate and compete in a global environment, serving and working with people and cultures of all kinds.

In the experience of *amici*, individuals who have been educated in a diverse setting are more likely to succeed, because they can make valuable contributions to the workforce in several important and concrete ways. First, a diverse group of individuals educated in a cross-cultural environment has the ability to facilitate unique and creative approaches to problem-solving arising from the integration of different perspectives. Second, such individuals are better able to develop products and services that appeal to a variety of consumers and to market offerings in ways that appeal to those consumers. Third, a racially diverse group of managers with cross-cultural experience is better able to work with business partners, employees, and clientele in the United States and around the world. Fourth, individuals who have been educated in a diverse setting are likely to contribute to a positive work environment, by decreasing incidents of discrimination and stereotyping. Overall, an educational environment that ensures participation by diverse people, viewpoints and ideas will help produce the most talented workforce.[5]

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[5] *See also, e.g.*, *Diversity: An Imperative For Business Success*, THE CONFERENCE BOARD (1999); Trevor Wilson, *Diversity At Work: The Business Case for Equity* (1996); *Diversity Helps to Deliver Better Business Benefits*, PERSONNEL TODAY, June 18, 2002 ("Four out of five organizations believe there is a direct link between diversity and improved business performance, according to independent research."); *Research Makes a Business Case for Diversity*, FED. HUM. RESOURCES WEEK, Sept. 24, 2001 ("[r]esearch by the National Academy of Public Administration shows that

Amici attest to the validity of these claims through their actions. *Amici* are hiring an increasingly diverse workforce. Drawing upon the diverse student bodies that have existed at schools like the University of Michigan, *amicus* Microsoft has steadily increased its percentage of minority employees, from 16.8% in 1997 to 25.6% of Microsoft's domestic workforce today. Many of the *amici* spend millions of dollars each year to provide financial and other support for minority students to participate in undergraduate and graduate programs at the University of Michigan and other schools. For each of the *amici*, diversity is an increasingly critical component of their business, culture and planning.

There is not, and cannot be, serious debate about the importance of maintaining racial and ethnic diversity in our nation's leading colleges and universities. Whatever methodology is employed to select those who will be afforded the opportunity to obtain the best education and training available in America today, that methodology must operate in such a way that students of all races, cultures and ethnic backgrounds are in fact meaningfully included.

The United States strongly endorses these core propositions. It recognizes that "[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective." Brief for the United States, *Grutter v. Bollinger*, No. 02-241, at 13. The United States argues that "[s]chools may identify and discard facially neutral criteria that, in practice, tend to skew admissions in a

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diverse workforces are more productive"); Robert L. Lattimer, *The Case for Diversity in Global Business, and the Impact of Diversity on Team Performance*, COMPETITIVENESS REV., Vol. 8, No. 2, at 3-17 (1998).

manner that detracts from educational diversity." *Id.* at 13-14. The thrust of the government's position is that it *is* permissible to take affirmative steps to ensure educational diversity – a goal that itself includes consideration of race. The United States defends particular admissions programs it prefers in Texas, Florida and California explicitly on the ground that those programs allegedly continue to produce, at least in raw numbers, the same racial and ethnic diversity in enrollment. *Id.* at 14-17. Thus, the United States acknowledges, as *amici* urge here, that diversity is important, that universities can reject facially-neutral admissions criteria that do not produce diversity, and that admissions programs can be evaluated and defended based on the levels of racial and ethnic diversity they produce. Finally, in terms of the ultimate importance of diversity in admissions, the actions of the United States also speak loudly: each of our national service academies explicitly considers race in the admissions process. *See* Adam Clymer, *Service Academies Defend Use of Race in Their Admissions Policies*, N.Y. TIMES, Jan. 28, 2003, at A18.

Amici are not in a position to evaluate the propriety or efficacy of any particular admissions program. *Amici* recognize that any admissions program that considers race and ethnicity must be narrowly tailored to serve the compelling state interest in the attainment of a diverse student body. What is critical to *amici* is that the leading colleges, universities and graduate schools from which they recruit and hire their employees be diverse, and consist of the most qualified and talented diverse students as is possible. Universities historically have been responsive to the needs of business and other professions, developing an extraordinary talent pool upon which *amici* and others may draw. The interest in diversity in higher education is compelling, and it must accommodate reasonable, narrowly tailored measures that allow the admission of the most

qualified, diverse student body. *Cf. Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'") (internal citation omitted); *Missouri v. Jenkins*, 515 U.S. 70, 112 (1995) (O'Connor, J., concurring) (same).

The experiences of *amici* in the 25 years since *Bakke* was decided confirm Justice Powell's holding that the pursuit of diversity in higher education is a compelling state interest. The reasons given by Justice Powell are just as valid today, if not more so. Institutions of higher learning must be allowed to prepare students to thrive in an increasingly diverse environment. The best way to do this is to ensure that students learn in an environment of diversity, including racial and cultural diversity. Students from diverse backgrounds bring to school "experiences, outlooks, and ideas that enrich the training of the student body and better equip its graduates to render with understanding their vital service to humanity." *Bakke*, 438 U.S. at 314 (opinion of Powell, J.). Accordingly, institutions of higher learning should be able to use "competitive consideration of race and ethnic origin" in pursuit of a diverse student body. *Id.* at 320 (opinion of Powell, J., joined by Brennan, White, Marshall, and Blackmun, JJ.). Such consideration is vital to the interests of American business, and it is necessary to ensure that members of all segments of our society receive the education and training they need to become the leaders of tomorrow.

CONCLUSION

For these reasons, the Court should find that the pursuit of diversity in higher education is a compelling state interest, and that the University of Michigan may take appropriate, narrowly tailored actions to admit a student body that, among other things, is racially and ethnically diverse.

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BARBARA GRUTTER
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v.

LEE BOLLINGER, ET AL.,
Respondents.

and

JENNIFER GRATZ AND
PATRICK HAMACHER,
Petitioners,

v.

LEE BOLLINGER, ET AL.,
Respondents.

ON WRIT OF CERTIORARI AND ON WRIT OF CERTIORARI
BEFORE JUDGMENT TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF AMICUS CURIAE OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF RESPONDENTS

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City of Richmond v. *J.A. Croson Co.*, 488 U.S. 469 (1989) 15

Gratz v. *Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000), *cert. granted*, 123 S. Ct. 602 (2002) 16

Regents of the University of California v. *Bakke*, 438 U.S. 265 (1978) 13, 14, 29

Sweatt v. *Painter*, 339 U.S. 629 (1950)..... 29

OTHER AUTHORITIES:

Robert P. Abelson, *A Variance Explanation Paradox: When a Little is a Lot*, 97 Psychol. Bull. 129 (Jan. 1985)..... 20

APA Guidelines for Providers of Psychological Services to Ethnic, Linguistic, and Culturally Diverse Populations, *at* http://www.apa.org/pi/oema/guide.html.....27-28

APA Resolution on Ethnic Minority Recruitment and Retention (Feb. 1994), *at* http://www.apa.org/pi/oema/oemares.html ..2, 25-26

Association of American Medical Schools, Cultural Competency in Medical Education and Practice (Mar. 2002)..... 30

Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Gender Stereotyping in Judgments of Fame*, 68 J. Personality & Soc. Psychol. 197 (1995) 12

Mahzarin R. Banaji *et al.*, *The Social Unconscious*, *in* Blackwell Handbook of Social Psychology (A. Tesser & N. Schwartz eds., 2001)..... 13

Deborah M. Barnes, *Promising Results Halt Trials of Anti-AIDS Drug AZT* 234 Science 15 (Oct. 1986)..... 20

Monica Biernat & Theresa K. Biernat, *Categorization and Stereotyping: Effects of Group Context on Memory and Social Judgment*, 29 J. Experimental Soc. Psychol. 166 (1993)..... 7

T.K. Bikson & S.A. Law, Rand Report on Global Preparedness and Human Resources: College and Corporate Perspectives (1994)..... 30

Irene V. Blair, & Mahzarin R. Banaji, *Automatic and Controlled Processes in Stereotype Priming*, 70 J. Personality & Soc. Psychol. 1142 (1996)..... 12

Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 Personality & Soc. Psychol. Rev. 242 (2002)..... 13

J. Blascovich *et al.*, *Racism and Racial Categorization*, 72 J. Personality & Soc. Psychol. 1364 (June 1997)..... 7

Brief for *Amicus Curiae* National Association of Scholars in Support of Petitioners in *Gratz* v. *Bollinger*, No. 02-516..... 18, 19, 21, 22, 23

Jacob Cohen, Statistical Power Analysis for the Behavioral Sciences (1988)..... 21

Laurie L. Cohen and Janet K. Swim, *The Differential Impact of Gender Ratios on Women and Men: Tokenism, Self-Confidence, and Expectations*, 21 Personality & Soc. Psychol. Bull. 876 (Sept. 1995). 11

Faye J. Crosby, Affirmative Action Is Dead; Long Live Affirmative Action (Yale Univ. Press)..... 4-5

Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. Personality & Soc. Psychol. 5 (Jan. 1989)..... 8

John F. Dovidio *et al.*, *Cognitive and Motivational Bases of Bias: Implications of Aversive Racism for Attitudes toward Hispanics*, *in* Hispanics In The Workplace 75 (Stephen B. Knouse *et al.* eds., 1992)..... 5

John F. Dovidio & Samuel L. Gaertner *et al.*, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 Psychol. Sci. 315 (2000)..... 6-7

John F. Dovidio *et al.*, *Implicit and Explicit Prejudice and Interracial Interactions*, 82 J. Personality & Soc. Psychol. 62 (Jan. 2002) 9

John F. Dovidio *et al.*, *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. Experimental Soc. Psychol. 510 (1997)..... 8, 9

Robert C. Dunton & Russell H. Fazio, *An Individual Difference Measure of Motivation to Control Prejudiced Reactions,* 23 Personality Soc. Psychol. Bull. 316 (1997) 10

Seymour Epstein, *Aggregation and Beyond: Some Basic Issues on the Prediction of Behavior*, 51 J. Personality 360 (1983) 19

Ethical Principles of Psychologists and Code of Conduct, 57 Am. Psychol. 1060 (Dec. 2002) 28

Evidence for the Educational Benefits of Diversity in Higher Education: Response to the Wood & Sherman Critique by the National Association of Scholars of the Expert Witness Report of Patricia Gurin in *Gratz* v. *Bollinger* and *Grutter* v. *Bollinger* by Patricia Gurin, May 30, 2001, *at* http://www.umich.edu/~urel/admissions/research/ 18, 19

Expert Report of Patricia Y. Gurin, *Gratz* v. *Bollinger,* No. 97-75231 (E.D. Mich.) & *Grutter* v. *Bollinger,* No. 97-75928 (E.D. Mich.), *in* The Compelling Need for Diversity in Higher Education (1999) 16, 17, 18, 21, 23

Russell H. Fazio & Michael A. Olson, *Implicit Measures in Social Cognition Research: Their Meaning and Use*, 54 Ann. Rev. Psychol. 297 (2003) 9

Russell H. Fazio *et al., Variability in Automatic Activation as an Unobtrusive Measure of Racial Attitudes: A Bona Fide Pipeline?*, 69 J. Personality & Soc. Psychol. 1013 (Dec. 1995) 9

Russell H. Fazio & Laura E. Hilden, *Emotional Reactions to a Seemingly Prejudiced Response: The Role of Automatically Activated Racial Attitudes and Motivation to Control Prejudiced Reactions*, 27 Personality and Soc. Psychol. Bull. 538 (May 2001) 10

Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination, in* 2 The Handbook of Soc. Psychol. (D. Gilbert *et. al.* eds., 1998) 13

Florak *et al., When Do Associations Matter? The Use of Automatic Associations Toward Ethnic Groups in Person Judgments*, 37 J. Experimental Soc. Psychol. 518 (2001) 10

Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 Psychol. Review 4 (1995) 12

Anthony G. Greenwald *et. al., Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. Personality & Soc. Psychol. 1464 (1998) 8

Guidelines on Multicultural Education, Training, Research, Practice, and Organizational Change for Psychologists 27, 28

Patricia Gurin *et. al., Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 Harv. Educ. Rev. 330 (2002) 18

Institute of Medicine, Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care (Smedley *et al.* eds., 2002) 24

Jonathan Kozol, Savage Inequities: Children in America's Schools (1991) 12

Charles G. Lord & Delia S. Saenz, *Memory Deficits and Memory Surfeits: Differential Cognitive Consequences of Tokenism for Tokens and Observers*, 49 J. Personality & Soc. Psychol. 918 (Oct. 1985) 11, 13

Brian S. Lowery *et. al.*, *Social Influence Effects On Automatic Racial Prejudice*, 81 J. Personality & Soc. Psychol. 842 (Nov. 2001) 14

Allen R. McConnell & Jill M. Liebold, *Relations among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 J. Experimental Soc. Psychol. 435 (2001) 9

Minority Business Development Agency, U.S. Dep't of Commerce, Dynamic Diversity (1999) 23

Douglas G. Mook, *In Defense of External Invalidity*, 38 Am. Psychol. 379 (Apr. 1983) 20

National Cancer Institute, *at* http://www.plan.cancer.gov/public/disparities.htm 24

National Center on Minority Health and Health Disparities, *at* http://www.ncmhd.nih.gov/about_ncmhd/mission.asp 25

National Heart, Lung, and Blood Institute, *at* http://www.nhlbi.nih.gov/resources/docs/plandisp.htm 24

National Institute of Diabetes and Digestive and Kidney Diseases, *at* http://www.niddk.nih.gov/federal/planning/mstrathealthplan.htm 24

National Institute of Mental Health, *at* http://www.nimh.nih.gov/strategic/healthdisparities.pdf 24

Yolanda F. Niemann & John F. Dovidio, *Tenure, Race/Ethnicity and Attitudes Toward Affirmative Action: A Matter of Self-Interest?*, 41 Sociological Perspectives 783 (1998) 11

Thomas Pettigrew & Linda R. Tropp, *Does Intergroup Contact Reduce Prejudice? Recent Meta-Analytic Findings, in* Reducing Prejudice and Discrimination 93 (Stuart Oskamp ed., 2000) 14

Deborah A. Prentice & Dale T. Miller, *When Small Effects Are Impressive*, 112 Psychol. Bull. 160 (July 1992) 20

Robert Rosenthal, *How Are We Doing in Soft Psychology?*, 45 Am. Psychol. 775 (June 1990) .. 20

Robert Rosenthal, *Methodology, in* Advanced Soc. Psychol. 17 (Abraham Tesser ed., 1995) 21

Robert Rosenthal & Donald B. Rubin, *A Note on Percent Variance Explained as A Measure of the Importance of Effects*, 9 J. Applied Soc. Psychol. 395 (1979) 20

Paul R. Sackett *et al.*, *High-Stakes Testing in Employment, Credentialing ,and Higher Education: Prospects in a Post-Affirmative-Action World*, 56 Am. Psychol. 302 (Apr. 2001) 22

Howard Schuman *et al.*, Racial Attitudes in America: Trends and Interpretations (1988) 5

Denise Sekaquaptewa *et al.*, *Stereotypic Explanatory Bias: Implicit Stereotyping as a Predictor of Discrimination*, 39 J. Experimental Soc. Psychol. 75 (2003) 9

Steven J. Spencer *et. al., Automatic Activation of Stereotypes: The Role of Self-Image Threat,* 24 Personality & Soc. Psychol. Bull. 1139 (Nov. 1998) 7, 8

Stanley Sue *et al.*, *Ethnicity, Gender, and Cross-Cultural Issues in Clinical Research*, *in* Handbook of Research Methods in Clinical Psychology 54 (Philip C. Kendall *et al.* eds., 1999) 27

Stanley Sue, *In Search of Cultural Competence in Psychotherapy and Counseling*, 53 Am. Psychol. 440 (1998) 24

Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 Am. Psychol. 613 (June 1997) 11

Steering Committee of the Physician's Health Study Research Group, *Preliminary Report: Findings From The Aspirin Component Of The Ongoing Physicians' Health Study (Special Report)*, 318 New Eng. J. Med. 262 (Jan. 1988) 20

Derwald Wing Sue & David Sue, Counseling the Culturally Different: Theory and Practice (3d ed. 1999) 26

Shelly E. Taylor *et al., Categorical and Contextual Bases of Person Memory and Stereotyping*, 36 J. Personality and Soc. Psychol. 778 (July 1978) 10, 13

Stephen Thernstrom & Abigail Thernstrom, America In Black and White: One Nation, Indivisible (1997) 5

U.S. Bureau of the Census, Statistical Abstracts of the United States: 1995 (115th ed. 1995) 23

U.S. Dep't of Health & Human Services, Mental Health: Culture, Race, and Ethnicity – A Supplement to Mental Health: A Report of the Surgeon General (2001) 24-25, 26

William von Hippel *et al., The Linguistic Intergroup Bias as an Implicit Indicator of Prejudice*, 33 J. Experimental Soc. Psychol. 490 (1997) 9, 10

Michele A. Wittig, *Taking Affirmative Action in Education and Employment*, 52 J. Soc. Issues 145 (1996) 12

J. Yoder, *Looking Beyond Numbers: The Effects of Gender Status, Job Prestige, and Occupational Gender-Typing on Tokenism Processes*, 57 Soc. Psychol. Q. 150 (1994) 10

BRIEF OF THE
AMERICAN PSYCHOLOGICAL ASSOCIATION
AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENTS [1/]

INTEREST OF *AMICUS CURIAE*

The American Psychological Association ("the APA") is a voluntary, nonprofit, scientific and professional organization founded in 1892. It is the major association of psychologists in the United States, with more than 155,000 members and affiliates. The objects of APA include advancing psychology as a means of promoting human welfare, diffusing psychological knowledge, and encouraging the application of research findings to the promotion of health and public welfare.

The APA has 55 divisions representing the full array of areas of emphasis within the field of psychology. APA's governing body, the APA Council of Representatives, includes representatives of all its divisions. In 1999, the APA Council of Representatives adopted a resolution in strong support of affirmative action.

The work of two of APA's divisions is particularly focused on areas relevant to the issues before the Court. Division 9 of the APA, the *Society for the Psychological*

[1/] The parties have consented to the filing of this brief in letters of consent on file with the Clerk. No counsel for any party had any role in authoring this brief, and no one other than the *amicus curiae* provided any monetary contribution to its preparation or submission.

Study of Social Issues (SPSSI), is an international group of over 3500 psychologists, allied scientists, students, and others who share a common interest in research on the psychological aspects of important social issues. SPSSI seeks to bring theory and practice into focus on human problems of the group, the community, and nations, as well as global problems. It does so by supporting both research and educational activities concerned with social problems. For almost 70 years, SPSSI has supported scientific research on the causes and consequences of racial and ethnic prejudice.

Division 45 of the APA, the *Society for the Psychological Study of Ethnic Minority Issues*, is the representative body for psychologists who conduct research on ethnic minority concerns or who apply psychological knowledge and techniques to ethnic minority issues. With over 1,000 members, Division 45 seeks to advance psychology as a science and to promote public welfare through research, to apply research findings towards addressing ethnic minority issues, and to encourage professional relationships among psychologists with these interests.

The APA places a high priority on issues related to the education of racial and ethnic minorities. See APA Resolution on Ethnic Minority Recruitment and Retention (Feb. 1994), *at* http://www.apa.org/pi/oema/oemares.html. That is because the APA recognizes that racial and ethnic minorities are underrepresented among the "students, faculty, practitioners, and researchers in the field of psychology," and that the psychology profession "will need to become increasingly conversant on issues relevant to an increasingly diverse student population and pluralistic society." *Id.* Accordingly, diversity in higher education is of paramount importance to the APA and, as we shall demonstrate, research by our members bears directly on the

question whether diversity also constitutes a compelling governmental interest.[2/]

INTRODUCTION AND SUMMARY

This brief makes three points. In Part I below, we show that racial and ethnic discrimination and prejudice persist in American society and that numerous recent studies prove that many people who believe themselves unbiased and disclaim racist attitudes continue to harbor and act in response to implicit (unconscious) but demonstrable racial and ethnic stereotyping. We then discuss recent psychological studies showing that such stereotyping may be ameliorated through contact between students of different racial and ethnic backgrounds, thereby strongly supporting the conclusion of the courts below that diversity in higher education is a compelling governmental interest.

Our support for diversity in higher education reflects the view that the government has a compelling interest in promoting future harmonious and productive relations among different racial and ethnic groups as they must increasingly interact in a shrinking global community.

We show in Part II that the methodology of the Gurin Report, relied on by the University of Michigan to support its diversity in admissions program, is consistent with scientific standards for research and has been unfairly and incorrectly

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[2/] The APA wishes to acknowledge the assistance in the preparation of this brief of Mahzarin R. Banaji, PhD, Irene Blair, PhD, Faye Crosby, PhD, John Dovidio, PhD, Jeffery Mio, PhD, Louis Penner, PhD, Paul Sackett, PhD, Stanley Sue, PhD, Sam Bagenstos, Esq., Heather Gerken, Esq., and Margo Schlanger, Esq.

assailed, in particular by the National Association of Scholars.

In Part III we address the issue of cultural competence. Focusing first on the profession of psychology, we show that, as American society becomes increasingly diverse, the profession needs to become culturally competent as clinicians, researchers, consultants, and educators. We also urge, however, that the concept of cultural competence is not limited to the psychology profession, but extends across the spectrum of American professional and business endeavors. Diversity in higher education is critical to the acquisition of cultural competence, for there is no substitute for interaction among students from diverse backgrounds who can teach each other about the concerns and values of their different communities, and whose intermingled presence itself will lower the barriers to an understanding and acceptance of each other.

I.
DIVERSITY IN HIGHER EDUCATION PROMOTES HARMONIOUS AND PRODUCTIVE INTERGROUP RELATIONS

A. Discrimination And Prejudice Persist In Significant And Demonstrable Ways, Even In Many Who Believe That They Are Not Prejudiced And Do Not Discriminate

1. **Discrimination**. Although the Nation has made remarkable strides in eliminating overt discrimination against racial and ethnic minorities, numerous studies over the past twenty years demonstrate that discrimination persists in almost all aspects of American life. Many of these studies are summarized in Faye J. Crosby, Affirmative

Action Is Dead; Long Live Affirmative Action (Yale Univ. Press) (forthcoming) at 225-228 ("Crosby").[3/] In addition, the brief *amicus curiae* in this case of the American Sociological Association *et. al.*, to which we respectfully refer the Court, reviews at some length the large body of research that demonstrates that racial and ethnic minorities continue to have unequal access to jobs, housing, and education.

2. **Prejudice**. Whereas the term "discrimination" describes unequal treatment, "prejudice" has to do with thoughts and feelings. See Crosby, at 20. Research "shows a dramatic decrease in the proportion of White Americans who express overtly hostile feelings or overtly derogating thoughts about people of color." Crosby, at 229.[4/] That has led some scholars to discount racism as an explanation for the serious inequalities that beset racial and ethnic minorities.[5/] But in fact a series of recent studies show that prejudice is tenacious and pervasive even among those who

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[3/] We are prepared to lodge a copy of the manuscript with the Clerk of the Court.

[4/] In 1948, for example, 63% of White respondents objected to having a Black neighbor, and 41% objected to having Mexican or Mexican American neighbors. By 1987, the objectors had dropped to 13% and 9%. John F. Dovidio *et al.*, *Cognitive and Motivational Bases of Bias: Implications of Aversive Racism for Attitudes toward Hispanics*, *in* Hispanics In The Workplace 75, 90-91 (Stephen B. Knouse *et al.* eds., 1992). Support for integrated schooling grew from 32% in 1942 to 90% in 1983. Howard Schuman *et al.*, Racial Attitudes in America: Trends and Interpretations (1988).

[5/] See, *e.g.*, Stephen Thernstrom & Abigail Thernstrom, America In Black and White: One Nation, Indivisible (1997).

maintain explicit attitudes of equality. Thus, many people who firmly believe that they have open and favorable attitudes about people of various races and ethnicities will demonstrate that they implicitly (unconsciously) harbor a variety of racial and ethnic prejudices that can translate into subtle discriminatory behaviors.

These unconscious prejudices have been described as "aversive racism" – so-called because those who harbor prejudice would find it aversive to recognize their own racism. "* * * [R]acial bias is expressed in indirect ways that do not threaten the aversive racist's non-prejudiced self-image. * * * [D]iscrimination occurs when [that] bias is not obvious or can be rationalized on the basis of some factor other than race." John F. Dovidio & Samuel L. Gaertner *et al.*, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 Psychol. Sci. 315 (2000).

Aversive racism has been demonstrated by (among others) a series of carefully designed experiments among young, liberal Whites. In 1989, the researchers asked White college students to evaluate candidates for a position of resident counselor. One third of the candidates were highly qualified, one third were distinctly unqualified, and the middle third were strong candidates but not unambiguously so. The students regularly endorsed the candidates who were clearly well qualified, whether the candidates were White or Black.[6/] Similarly, the students rejected the unqualified candidates equally without regard to race. But when the candidates were of intermediate quality, White students recommended hiring the White candidate significantly more often than the Black candidate and felt more strongly about

[6/] Throughout this brief "Black" and "African-American" are used interchangeably.

their recommendations for the Whites than for the Blacks. Ten years later the researchers repeated the experiment with a new crop of students and got exactly the same results. During those ten years, the students showed a noticeable decrease in the direct verbal expression of racial prejudice – but their actual behavior remained unchanged.[7/]

One reason for the existence and persistence of prejudice is straightforward. We need categories to absorb and understand our world. Prejudice and stereotypes are the natural by-products of ordinary perception, categorization, learning, memory, and judgment. There is, accordingly, widespread agreement among social scientists that social categorization processes – including racial and ethnic stereotyping – are virtually automatic, operating at perhaps a more basic level and often independent of conscious attitudes, beliefs, and perceptions.[8/]

Social scientists have devised a number of tests for measuring the strength of unconscious stereotyping in different individuals. One, widely used, is the Implicit

[7/] John F. Dovidio & Samuel L. Gaertner *et al.*, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 Psychol. Sci. 315 (2000). Dovidio and Gaertner are not the only experimental social psychologists to document the persistence of racial preferences. See, *e.g.*, Monica Biernat & Theresa K. Biernat, *Categorization and Stereotyping: Effects of Group Context on Memory and Social Judgment*, 29 J. Experimental Soc. Psychol. 166 (1993).

[8/] See, e.g., Steven J. Spencer *et. al., Automatic Activation of Stereotypes: The Role of Self-Image Threat,* 24 Personality & Soc. Psychol. Bull. 1139 (Nov. 1998); J. Blascovich *et al.*, *Racism and Racial Categorization*, 72 J. Personality & Soc. Psychol. 1364 (June 1997).

Association Test (IAT).[9/] It is a reaction time experiment, measuring the speed with which two concepts can be associated. Not surprisingly, people quickly complete the task when "insects" and "bad" are paired together, and respond to the pairing of "insects" and "good" much more slowly. Because reaction times are mapped in milliseconds, the associative process is automatic and therefore not subject to the kind of conscious control that otherwise makes it difficult to know whether experiment participants are producing results according to consciously desired outcomes.

The results of the research on associative processes conclusively demonstrate that unconscious stereotyping and prejudice, including race stereotyping, is widespread.[10/] To take but one example, test respondents consistently make more ready associations between, on the one hand, faces of African Americans and words having negative concepts (*e.g.*, bomb, devil, awful) and, on the other, faces of Whites and positive concepts (*e.g.* peace, joy, love). Hundreds of thousands of individuals have taken the test producing similar results.

[9/] Anthony G. Greenwald *et. al.*, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. Personality & Soc. Psychol. 1464 (1998).

[10/] See, e.g., Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. Personality & Soc. Psychol. 5 (Jan. 1989); Steven J. Spencer *et. al.*, *Automatic Activation of Stereotypes: The Role of Self-Image Threat*, 24 Personality & Soc. Psychol. Bull. 1139 (Nov. 1998). See also, John F. Dovidio *et al.*, *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. Experimental Soc. Psychol. 510 (1997).

3. Unconscious Stereotyping And Biased Behavior.

Although implicit prejudices operate in the unconscious mind, they can have significant real-world effects. Recent empirical research indicates that automatic prejudice plays an important role in producing discriminatory behavior and judgments[11/] and that measures of implicit prejudice are significant predictors of the level of discriminatory behaviors and judgments.[12/] For example, people high in implicit prejudice are unfriendly towards African American interaction partners,[13/] and form negative and stereotypical impressions of minorities.[14/]

[11/] Russell H. Fazio & Michael A. Olson, *Implicit Measures in Social Cognition Research: Their Meaning and Use*, 54 Ann. Rev. Psychol. 297, 306, 310 (2003).

[12/] See, e.g., Allen R. McConnell & Jill M. Liebold, *Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 J. Experimental Soc. Psychol. 435 (2001); William von Hippel *et al.*, *The Linguistic Intergroup Bias as an Implicit Indicator of Prejudice*, 33 J. Experimental Soc. Psychol. 490 (1997); Denise Sekaquaptewa *et al.*, *Stereotypic Explanatory Bias: Implicit Stereotyping as a Predictor of Discrimination*, 39 J. Experimental Soc. Psychol. 75 (2003).

[13/] John F. Dovidio *et al.*, *Implicit and Explicit Prejudice and Interracial Interactions*, 82 J. Personality & Soc. Psychol. 62 (Jan. 2002); John F. Dovidio *et al.*, *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. Experimental Soc. Psychol. 510 (1997); Russell H. Fazio *et al.*, *Variability in Automatic Activation as an Unobtrusive Measure of Racial Attitudes: A Bona Fide Pipeline?*, 69 J. Personality & Soc. Psychol. 1013 (Dec. 1995); Allen R. McConnell & Jill M. Liebold, *Relations among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 J. Experimental Soc. Psychol. 435 (2001).

Research shows that implicit prejudice and stereotypes become exaggerated for token minorities in groups. Psychologists have identified a number of negative processes associated with token representation, one of which is increased visibility and the likelihood that tokens are treated in terms of their group identity rather than personal qualities.[15/] As a consequence, people with token status are frequently "encapsulated" in roles stereotypic of their group in employment settings.[16/] Moreover, people who feel that they are tokens of their group experience negative feelings of

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[14/] See Robert C. Dunton & Russell H. Fazio, *An Individual Difference Measure of Motivation to Control Prejudiced Reactions,* 23 Personality Soc. Psychol. Bull. 316 (1997); Florak *et al., When Do Associations Matter? The Use of Automatic Associations Toward Ethnic Groups in Person Judgments*, 37 J. Experimental Soc. Psychol. 518 (2001); William von Hippel *et al., The Linguistic Intergroup Bias As an Implicit Indicator of Prejudice*, 33 J. Experimental Soc. Psychol. 490 (1997); Russell H. Fazio & Laura E. Hilden, *Emotional Reactions to a Seemingly Prejudiced Response: The Role of Automatically Activated Racial Attitudes and Motivation to Control Prejudiced Reactions*, 27 Personality and Soc. Psychol. Bull. 538 (May 2001).

[15/] Shelly E. Taylor *et al., Categorical and Contextual Bases of Person Memory and Stereotyping*, 36 J. Personality and Soc. Psychol. 778 (July 1978).

[16/] E.g., women in nurturing roles; *see* J. Yoder, *Looking Beyond Numbers: The Effects of Gender Status, Job Prestige, and Occupational Gender-Typing on Tokenism Processes*, 57 Soc. Psychol. Q. 150 (1994).

distinctiveness,[17/] associated with sensitivity to being stereotyped, and a loss of self-confidence,[18/] which can interfere with cognitive performance.[19]

Feelings of distinctiveness can also invoke "stereotype threat" whereby students behave in ways that conform to the negative cultural stereotype of their group, even when it has an adverse effect on cognitive performance.[20/]

These findings demonstrate that implicit prejudices can be a major factor in limiting both the opportunities of members of minority groups and the effectiveness of culturally diverse work groups.[21/]

[17/] Yolanda F. Niemann & John F. Dovidio, *Tenure, Race/Ethnicity and Attitudes Toward Affirmative Action: A Matter of Self-Interest?*, 41 Sociological Perspectives 783 (1998).

[18/] Laurie L. Cohen and Janet K. Swim, *The Differential Impact of Gender Ratios on Women and Men: Tokenism, Self-Confidence, and Expectations*, 21 Personality & Soc. Psychol. Bull. 876 (Sept. 1995).

[19/] Charles G. Lord & Delia S. Saenz, *Memory Deficits and Memory Surfeits: Differential Cognitive Consequences of Tokenism for Tokens and Observers*, 49 J. Personality & Soc. Psychol. 918 (Oct. 1985).

[20/] *See generally* Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and performance*, 52 Am. Psychol. 613 (June 1997).

[21/] Decades of discrimination have left ethnic minority students disproportionately condemned to be educated in under-funded or impoverished schools where they have less opportunity than students at affluent schools to demonstrate that they are capable of

B. Diversity In Higher Education Reduces Unconscious Stereotyping And Promotes Productive Intergroup Relations

Automatic biases cannot be eliminated merely by conscious efforts to develop racially tolerant attitudes. Rather, there is "abundant evidence that stereotypes that operate unconsciously defend their territory fiercely, influencing social interactions even when perceivers are consciously vigilant and motivated to defeat them."[22/]

But it does not follow that unconscious biases cannot be combated and defeated. Rather, one promising strategy for attacking unconscious biases is to "create the social conditions that allow new associations and new learning about social groups that blur the bright line that demarcates

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performing well in challenging courses. Jonathan Kozol, Savage Inequities: Children in America's Schools (1991). "[B]ecause racism targets and injures individuals based on their group membership, its antidote must also target the group if its individual members are to overcome barriers to equal opportunity." Michele A. Wittig, *Taking Affirmative Action in Education and Employment*, 52 J. Soc. Issues 145, 157 (1996).

[22/] Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Gender Stereotyping in Judgments of Fame*, 68 J. Personality & Soc. Psychol. 181, 197 (1995); Irene V. Blair, & Mahzarin R. Banaji, *Automatic and Controlled Processes in Stereotype Priming*, 70 J. Personality & Soc. Psychol. 1142 (1996); Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 Psychol. Review 4 (1995).

social groups."[23/] After all, if stereotypes represent our classification strategy for making sense of a complex world, then they are necessarily shaped by the world we are classifying.[24/] If we meaningfully change that world – "the larger societal context that controls these phenomena"[25/] – we can thereby change individuals' classification strategies and thus reduce both unconscious bias and its behavioral effects.

In keeping with these premises, considerable research has been undertaken recently into the malleability of unconscious stereotyping. It proves, as Justices of the *Bakke* Court understood and as our intuitive instincts might predict, that positive exposure to members of other racial groups helps reduce such biases.[26/] That research is consistent with,

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[23/] Mahzarin R. Banaji *et al.*, *The Social Unconscious*, *in* Blackwell Handbook of Social Psychology (A. Tesser & N. Schwartz eds., 2001)

[24/] Shelly E. Taylor *et al.*, *Categorical and Contextual Bases of Person Memory and Stereotyping*, 36 J. Personality and Soc. Psychol. 778 (July 1978); Charles G. Lord & Delia S. Saenz, *Memory Deficits and Memory Surfeits: Differential Cognitive Consequences of Tokenism for Tokens and Observers*, 49 J. Personality & Soc. Psychol. 918 (Oct. 1985). Indeed, there is "clear evidence that automatic responses to category cues depend on the surrounding context." Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 Personality & Soc. Psychol. Rev. 242 (2002).

[25/] Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, *in* 2 The Handbook of Soc. Psychol. (D. Gilbert *et. al.* eds., 1998).

[26/] Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 Personality & Soc. Psychol. Rev. 242 (2002); see *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 314 (1978) (Opinion of Powell, J.)

and reinforces, the long-standing finding that positive contact between people of different races and ethnicities "typically reduces intergroup prejudice."[27/] For example, in one recent study White students who interacted with a Black experimenter showed significantly reduced automatic race prejudice, compared to interaction with a White experimenter.[28/]

Indeed, a thorough review of the field suggests that "face to face interaction * * * is importantly related to reduced prejudice."[29] The beneficial effects of such contact with other groups emerge across many prejudice measures, outgroup targets, and contact settings.

These recent findings give even more credence to the testimony of leading educators and psychologists advanced by the University of Michigan in the District Courts below, which demonstrated that attending college in a diverse setting reduces stereotyping and results in "more diverse friends, neighbors, and work associates." Expert Reports, 115. Moreover, the research we have described helps to explain why simply taking diversity workshops without minorities participating or reading great works by minority leaders (which are alternative approaches recommended by

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[27/] Thomas Pettigrew & Linda R. Tropp, *Does Intergroup Contact Reduce Prejudice? Recent Meta-Analytic Findings, in* Reducing Prejudice and Discrimination 93 (Stuart Oskamp ed., 2000).

[28/] Brian S. Lowery *et. al.*, *Social Influence Effects On Automatic Racial Prejudice*, 81 J. Personality & Soc. Psychol. 842 (Nov. 2001)

[29] Thomas Pettigrew & Linda R. Tropp, *Does Intergroup Contact Reduce Prejudice? Recent Meta-Analytic Findings, in* Reducing Prejudice and Discrimination 93, 109 (Stuart Oskamp ed., 2000).

opponents of race conscious admissions policies) will be ineffective in removing prejudice and stereotypes and allowing the kind of deep and complex multi-cultural thinking that the University wishes to foster.

In sum, extensive recent psychological research demonstrates that unconscious racial and ethnic stereotyping and prejudice are pervasive and persistent in our society. Other research shows, however, that these implicit attitudes and responses can be ameliorated when students from diverse racial and ethnic backgrounds live and work with each other intensively, both in and out of the classroom. We recognize that "societal discrimination" has been ruled an inadequate basis for raced-based classifications designed to provide "raced-based relief." *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989). But we believe that, putting aside the consideration of remedies for past wrongs, diversity may constitute a compelling governmental interest because it is critical to promoting future harmonious and productive relations among different racial and ethnic groups as they must increasingly interact in a shrinking global community. Accordingly, the research results we have described above strongly support the conclusion of the Sixth Circuit below that the government has a compelling interest in creating a racially diverse student body in higher education.

II.

THE GURIN REPORT PROVIDES SOUND EVIDENCE TO SUPPORT THE CONCLUSION THAT THE GOVERNMENT'S INTEREST IN EDUCATIONAL DIVERSITY IS COMPELLING

The District Court in *Gratz* concluded, based upon the record before it, that "a racially and ethnically diverse student body produces significant educational benefits such

that diversity, in the context of higher education, constitutes a compelling governmental interest under strict scrutiny." *Gratz* v. *Bollinger*, 122 F. Supp. 2d 811, 824 (E.D. Mich. 2000), *cert. granted*, 123 S. Ct. 602 (2002). In reaching that conclusion, the court relied in part on research undertaken by Dr. Patricia Y. Gurin, professor of psychology and women's studies at the University of Michigan.[30/] The court quoted with approval the report's conclusion that "students learn better in a diverse educational environment, and they are better prepared to become active participants in our pluralistic, democratic society once they leave such a setting." Id. at 822.

Dr. Gurin's work analyzed three databases. The first contained initial, 4-year, and 9-year national data involving 184 colleges and universities from the Cooperative Institutional Research Program conducted by UCLA's Higher Education Research Institute. The other two provided a more in-depth look at diversity experiences at the University of Michigan. One was the Michigan Student Survey, conducted prior to these lawsuits and involving initial and 4 year data from the 1990 entering undergraduate class. The other contained pre-participation, class completion, and 4 year data from a study of those in the 1990 entering class who took an introductory course in the Intergroup Relations, Conflict and Community Program at the University. By examining these three databases, Dr. Gurin was able to take both a "macro" and "micro" look at

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[30/] Expert Report of Patricia Y. Gurin, *Gratz v. Bollinger,* No. 97-75321 (E.D. Mich.) & *Grutter v. Bollinger,* No. 97-75928 (E.D. Mich.), *in* The Compelling Need for Diversity in Higher Education 99, 100 (1999) ("Gurin Report").

how diversity experiences in higher education are related to educational and citizenship outcomes.[31/]

Dr. Gurin's analysis of the three databases found consistent, statistically-significant results. In particular, she found that opportunities for enrollment in ethnic studies courses and classes dealing with issues of race and ethnicity, and for informal interactions with racial and ethnic minorities, including both friendships and more general interactions, were directly linked to such favorable outcomes as less automatic, improved active thinking; more active engagement in the learning process; increased ability to understand the perspectives of others; and greater motivation and engagement in society. Gurin Report at 146.

Amici supporting petitioners have attacked Dr. Gurin's research with more vigor than accurate scientific criticism. But as we now show, the critiques themselves depend on numerous flawed assumptions and methods that render them unpersuasive.

First, the Gurin Report has been wrongly criticized for not comparing the levels of diversity in student bodies at various universities ("structural diversity") directly with educational outcomes. Brief for *Amicus Curiae* National Association of Scholars ("NS") in Support of Petitioners in *Gratz v. Bollinger*, No. 02-516, at 7. But Dr. Gurin's research was not focused on structural diversity by itself. What her research shows is that structural diversity is one

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[31/] In all three sets of analyses, to the extent possible, Dr. Gurin statistically accounted for or "controlled" for other variables which were "known or expected to contribute" to the outcomes in order to account for these variable's possible effects so as not to overestimate the effects. Gurin Rpt. App C. at 1.

factor making possible campus diversity experiences that are associated with learning outcomes.[32/] A campus could be full of minority students yet still have a segregated environment without meaningful interactions between different racial and ethnic groups. Dr. Gurin finds that interactions between groups are needed to produce educational benefits, and posits that a university must foster such interactions.[33/] In Dr. Gurin's words, "Structural diversity is essential but, by itself, usually not sufficient to produce substantial benefits; in addition to being together on the same campus, students from diverse backgrounds must also learn about each other in the courses they take and in informal interaction outside of the classroom." Id. at 6.[34/]

Second, National Association of Scholars attacks the Gurin Report on the ground that, for the vast majority of her measures, she reported that even extremely large increases in her diversity measures account for less than 1 percent of student learning outcomes. NS Gratz Br. at 18. Labeling these measures as showing either no effects or "only a miniscule effect on students," NS argues that the Gurin report

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[32/] Evidence for the Educational Benefits of Diversity in Higher Education: Response to the Wood & Sherman Critique by the National Association of Scholars of the Expert Witness Report of Patricia Gurin in *Gratz* v. *Bollinger* and *Grutter* v. *Bollinger*, by Patricia Gurin, May 30, 2001, *at* http://www.umich.edu/~urel /admissions/research/ ("Gurin Supp. Report").

[33/] For further insight into why this may be so, see the discussion of the malleability of implicit stereotypes at 12-13 *supra*.

[34/] See also, Patricia Gurin *et. al., Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 Harv. Educ. Rev. 330, 333 (2002) ("[S]tructural diversity is a necessary but insufficient condition for maximal educational benefits * * *.").

is irrelevant to the case. Id. at 18-19. But the small effects reported by Dr. Gurin are due, in part, to her separate consideration of each individual experience or outcome in order to show "a remarkable consistency of results." Gurin Supp. Rep. at 8. The effect size for any single measure will often be small because a measure of an individual experience or outcome will typically have low reliability; and reliability will set limits on effect size. However, replicating findings across several measures suggests a consistent and stable set of results unlikely to be due to chance.

While Dr. Gurin's approach is an acceptable research strategy, psychologists often aggregate individual measures into indices when multiple measures examining a common theme are studied (*e.g.*, combining five measures dealing with citizenship behaviors into an overall index of citizenship). Such indices or aggregations are commonly used because they increase reliability,[35/] thus minimize the impact of measurement error or "noise" for any one measure. When Dr. Gurin's individual measures are aggregated, subsequent findings using these indices show stronger relationships than are observed with the individual measures, thus refuting the claim that the effects in her research are trivial. These indices provide further evidence of the statistically significant relationship between both classroom/informal interactions and learning/democracy outcomes. Gurin Supp. Rep. at Table 1.

The NS critique also fails to recognize that although effect size is widely used in social and behavioral research as a measure of the strength of a relationship, "a large effect size is not the only way to demonstrate that an effect is

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[35/] Seymour Epstein, *Aggregation and Beyond: Some Basic Issues on the Prediction of Behavior*, 51 J. Personality 360 (1983).

important."[36/] The key point is that the importance of the findings depends upon the context in which they are made. Small effect sizes may have enormous impact over time.[37/]

For example, today, physicians routinely advise men over a certain age to take an aspirin each day to prevent heart attacks. In the original study that led to this advice, the effect size between taking an aspirin and having a heart attack was .0011 -- which resulted in almost twice as many heart attacks in the placebo group as in the aspirin group.[38/] The effect was considered so important that the study was discontinued early because it was determined that aspirin could no longer ethically be withheld from the placebo-control group.[39/]

[36/] Deborah A. Prentice & Dale T. Miller, *When Small Effects Are Impressive*, 112 Psychol. Bull. 160 (July 1992).

[37/] See, e.g., Douglas G. Mook, *In Defense of External Invalidity*, 38 Am. Psychol. 379 (Apr. 1983); Robert P. Abelson, *A Variance Explanation Paradox: When a Little is a Lot*, 97 Psychol. Bull. 129 (Jan. 1985); Robert Rosenthal & Donald B. Rubin, *A Note on Percent Variance Explained as A Measure of the Importance of Effects*, 9 J. Applied Soc. Psychol. 395 (1979).

[38/] Robert Rosenthal, *How Are We Doing in Soft Psychology?*, 45 Am. Psychol. 775 (June 1990).

[39/] Steering Committee of the Physician's Health Study Research Group, *Preliminary Report: Findings From The Aspirin Component Of The Ongoing Physicians' Health Study (Special Report)*, 318 New Eng. J. Med. 262 (Jan. 1988). See also, Deborah M. Barnes, *Promising Results Halt Trials of Anti-AIDS Drug AZT*, 234 Science 15 (Oct. 1986). (The clinical trials of the drug AZT, now widely prescribed for people with AIDS, were cancelled because it was felt that the benefits of AZT (an effect size of .073) were too great to deny it to the patients in the control condition); Robert Rosenthal, *Methodology, in* Advanced Soc. Psychol. 17, 35 (Abraham Tesser ed., 1995) (The effect size in the

Moreover, in higher education, involving some 15 million college students plus additional graduate students every year, even small benefits can yield substantial rewards.

Third, National Association of Scholars erroneously accuses Dr. Gurin of having replaced the accepted standard for categorizing a finding as statistically significant (5%) with one that allowed her to exaggerate the importance and size of her results. NS Gratz Br. at 19-20. Dr. Gurin did use the 5% level of significance for her analyses of the large samples of White students. But due to the small numbers of students in the minority samples, she chose a different level (10%). Gurin Report at 115. That decision reflects a methodologically sound balancing of concerns for "Type I" error (finding significance when the result is in actuality by chance) and "Type II" error (finding no significance when in fact there is a significant relationship). Dr. Gurin's decision to use a less strict level of significance for her small sample was an eminently reasonable research decision. See, e.g., Jacob Cohen, Statistical Power Analysis for the Behavioral Sciences (1988).

Fourth, the National Association of Scholars asserts that Dr. Gurin's findings are flawed because they rely upon self-reports instead of more objective outcome measurements. NS Gratz Br. at 16. But in fact use of self-report measures is common practice in social science research that involves large data bases. Moreover, a focus on what National Association of Scholars terms "traditional measurements of academic outcome," such as "grades, graduation rates, admissions to graduate school, and performance on seven standardized tests," NS Gratz Br. at

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original trials of Cyclosporine, a drug that reduces the likelihood of organ rejection, was .0225).

13, takes an unrealistically narrow view of academic achievement and fails to capture a broad range of outcomes widely valued by educational institutions, such as, for example, continuous learning, intellectual interest and curiosity, multicultural tolerance and appreciation, interpersonal skills, and social responsibility, citizenship, and involvement.[40/]

Fifth, the National Association of Scholars faults Dr. Gurin's research on the ground that various classroom diversity experiences she finds relevant to her conclusions (such as enrollment and participation in ethnic studies courses and attending racial/cultural awareness workshops) could be equally beneficial to White students without the "presence on campus of *any* students of another race." NS Gratz Br. at 10. But it should be obvious that, in the real world, discussing racial and ethnic issues in all-White settings is bound to have a different impact on the students than if racial and ethnic minorities were also present and participating. Indeed, even National Association of Scholars concedes that "informal interaction" such as having close friends of another race, interracial socializing, and sharing personal feelings and problems with members of other races, "presuppose[s] the presence of *some* students of another race on campus." NS Gratz Br. at 10.

In sum, the methodology of the Gurin Report is consistent with scientific standards for research. Moreover,

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[40/] Such outcome criteria can be identified through a web search of colleges and universities; from university resources; and from related research. See Paul R. Sackett *et al.*, *High-Stakes Testing in Employment, Credentialing, and Higher Education: Prospects in a Post-Affirmative-Action World*, 56 Am. Psychol. 302 (Apr. 2001).

Dr. Gurin's research confirms numerous studies brought to the Court's attention by other amici and respondents which demonstrate that diversity experiences in college and graduate school are associated with a variety of important educational objectives, such as the ability to think in "deeper, more complex ways" (Gurin Report at 100); to develop "more positive views of conflict, and the perception that diversity is not inevitably divisive in our society" (*id.* at 127); and to become more motivated and competent to live and work in a complex and diverse society" (*id.* at 101, 127).

III.

DIVERSITY IN HIGHER EDUCATION LEADS TO CULTURAL COMPETENCE, WHICH IS CRITICAL TO THE PSYCHOLOGY PROFESSION AND TO SOCIETY AT LARGE

A. Psychologists Must Be Culturally Competent In An Increasingly Diverse Society.

Our daily experience teaches us that our society is becoming increasingly diverse, and the studies tell us that the trend will continue apace. By one estimate, 47% of all Americans by 2050 will be African American, Latino, Asian, or Native American. See Minority Business Development Agency, U.S. Dep't of Commerce, Dynamic Diversity (1999), at 8. The U.S. Bureau of the Census has put the figure at 50%. U.S. Bureau of the Census, Statistical Abstracts of the United States: 1995 (115th ed. 1995).

Delivering appropriate care to this burgeoning population will be a major concern to the Nation's health care institutions and professions. A recent report by the Department of Health and Human Services "documents the existence of striking disparities for minorities in mental health services and the underlying knowledge base. *A major*

finding of this [study] is that racial and ethnic minorities bear a greater burden from unmet mental health needs and thus suffer a greater loss to their overall health and productivity."[41] Given that racial and ethnic minorities will soon comprise half of the country's population, "the future mental health of America as a whole will be enhanced substantially by improving the health of racial and ethnic minorities." HHS Report at 168.[42]

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[41] U.S. Dep't of Health & Human Services, Mental Health: Culture, Race, and Ethnicity – A Supplement to Mental Health: A Report of the Surgeon General (2001) (hereinafter "HHS Report"), at 3 (emphasis in original). Despite the need for treatment, many ethnic clients tend to avoid using services or prematurely terminate, once in therapy. For example, Latinos and Asians have been found to consistently underutilize mental health services. African Americans have been found to have high dropout rates from treatment. Stanley Sue, *In Search of Cultural Competence in Psychotherapy and Counseling*, 53 Am. Psychol. 440 (1998). The HHS Report echoes other findings regarding health care generally. See, Institute of Medicine, Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care (Smedley *et al.* eds., 2002); special issue of Health Psychology, Vol 14(7), Dec. 1995.

[42] Due to the critical importance of the issue to the nation's health, nearly all institutes of NIH have developed research agendas on minority health and health disparities. See, e.g., the strategic plans for the National Cancer Institute, *at* http://plan.cancer.gov/public/disparities.htm; National Heart, Lung, and Blood Institute, *at* http://www.nhlbi.nih.gov/resources/docs/plandisp.htm; National Institute of Diabetes and Digestive and Kidney Diseases, *at* http://www.niddk.nih.gov/federal/planning/mstrathealthplan.htm; and National Institute of Mental Health, *at* http://www.nimh.nih.gov/strategic/healthdisparities.pdf. This issue was considered so important that Congress recently created a national center at NIH, the National Center on Minority Health and Health Disparities ("NCMHD"), the mission of which is "to promote minority health and to lead, coordinate, support, and assess the

The consequences for the profession of psychology are several. For one, the profession needs to achieve the diversity that is reasonably representative of those it serves. "Racial and ethnic minorities continue to be badly underrepresented * * * within the core mental health professions – psychiatry, psychology, social work, counseling, and psychiatric nursing," and "the shortage of providers and researchers equipped to address the needs of minority populations will contribute to the disproportionate burden of mental illness on racial and ethnic minorities." *Id.* at 67.[43]

But it is equally or more important that all psychologists are culturally competent in their work. The HHS Report notes that the barriers to better mental health treatment of racial and ethnic minorities "include clinicians' lack of awareness of cultural issues [and] bias." *Id.* at 4.[44]

NIH effort to reduce and ultimately eliminate health disparities." See, National Center on Minority Health and Health Disparities, *at* http://www.ncmhd.nih.gov/about_ncmhd/ mission.asp.

[43] The APA has made it a formal policy priority to increase the recruitment and training of racial and ethnic minorities as psychologists. See the APA Resolution on Ethnic Minority Recruitment and Retention (Feb. 1994), *at* http://www.apa.org/pi/oema/oemares.html.

[44] See also *id.* at 10 ("[T]he interaction between clinician and patient is rife with possibilities for miscommunication and misunderstanding when they are from different cultures."), and 31 ("Clinicians may be more likely to ignore symptoms that the patient deems important, or less likely to understand the patient's fears, concerns, and needs. The clinician and the patient also may harbor different assumptions about what a clinician is supposed to

Indeed, in his Preface to the Report, the Surgeon General declares that its "main message" is "that culture counts" – that is, the culture of both the patient and the service provider. *Id.*, Preface.

In treatment, "cultural competency" describes an approach "driven by widespread awareness of treatment inadequacies for minorities." *Id.* at 36. It emphasizes the importance of patients' cultures and seeks to develop responsive skills and policies to deliver effective treatments to racial and ethnic minority groups.[45/] As the HHS Report states (at 36):

> Underlying cultural competence is the conviction that services tailored to culture would be more inviting, would encourage minorities to get treatment, and would improve their outcome once in treatment. Cultural competence represents a fundamental shift in ethnic and race relations (Sue *et al.*, 1998). The term *competence* places the responsibility on mental health services organizations and practitioners – most of whom are white (Peterson et al., 1996) – and challenges them to deliver culturally appropriate services.

The challenge is posed not simply to clinicians but to the psychology profession across the board. Thus, cultural competence is crucial to the ability of researchers to

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do, how a patient should act, what causes the illness, and what treatments are available.").

[45/] Derwald Wing Sue & David Sue, Counseling the Culturally Different: Theory and Practice 224-27 (3d ed. 1999).

understand and gain the confidence of research participants; to design valid and effective questionnaires and measures; and to understand and interpret results.[46/] Similarly, cultural competence is ever more necessary to psychologist consultants as corporate America and private and public institutions become increasingly diverse. And psychology professors, as much or more than any other group within the profession, must achieve cultural competence so that they may foster it in their students.

Recognizing the importance of these issues, the APA has issued two guidelines addressing multicultural issues. The first, "APA Guidelines for Providers of Psychological Services to Ethnic, Linguistic, and Culturally Diverse Populations," was enacted in 1990 to inform "all areas of service delivery." See http://www.apa. org/pi/oema/guide. html. It encourages psychologists in their practices to incorporate "an understanding of the client's ethnic and cultural background," to "consider not only different diagnostic issues but also cultural beliefs and values of the clients and his/her community," and to " work to eliminate biases, prejudices, and discriminatory practices." *Id.*[47/]

More recently, the APA's 2002 Guidelines on Multicultural Education, Training, Research, Practice, and Organizational Change for Psychologists reflect "the

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[46/] Stanley Sue *et al.*, *Ethnicity, Gender, and Cross-Cultural Issues in Clinical Research*, *in* Handbook of Research Methods in Clinical Psychology 54 (Philip C. Kendall *et al.* eds., 1999).

[47/] The APA's revised Ethical Principles of Psychologists and Code of Conduct, adopted in August 2002, also includes provisions concerning an awareness of, and competence involving, issues of race, ethnicity, and culture. See Ethical Principles of Psychologists and Code of Conduct, 57 Am. Psychol. 1060 (Dec. 2002), and especially Principle E and Standard 2.01(b).

continuing evolution of the study of psychology, changes in society at large, and emerging data about the different needs for particular individuals and groups * * * based on their ethnic/racial heritage * * *." The Guidelines seek to provide psychologists across the profession with the rationale "for addressing multiculturalism and diversity in education, training, research, practice, and organizational change," as well as the basic information and "current empirical research from psychology and related disciplines" on which the Guidelines are based. See www.apa.org/pi/multicultural guidelines.pdf, Preface, p. 1.

B. Diversity In Higher Education Is Critical To The Acquisition Of Cultural Competence.

A psychologist may strive to acquire cultural competence through professional education and training, but there is tremendous value in actual contact and interaction among students from diverse racial and ethnic backgrounds, who can teach each other about the concerns and values of their different communities, and whose intermingled presence will diminish the barriers to an understanding of each other's cultures. What Justice Powell said about medical students is no less true of psychology students:

> Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background – whether it be ethnic, geographic, culturally advantaged or disadvantaged – may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.

Regents of the University of California v. *Bakke*, 438 U.S. 265, 314 (1978) (Opinion of Powell, J.). The same point had earlier been made with respect to law schools in *Sweatt* v. *Painter*, 339 U.S. 629, 634 (1950):

> The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.

These observations about the importance of diversity in higher education, based on self-evident lessons of human experience, are now bulwarked by the studies conducted and reviewed by Dr. Gurin, which show that students who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes and growth in intellectual engagement and motivation. College is a period of great growth and development and a training ground providing preparation for entry into the diverse workforce. Thus the exposure to diversity during the years spent in higher education is particularly important.

In sum, racial and ethnic minorities will by mid-century account for half of America's population; they face a demonstrably greater burden from unmet mental health needs than the rest of the population; to meet those needs, the mental health community must attain cultural competence in approaches to diagnosis and treatment. Psychologists must also be culturally competent in all other facets of their work including research, industrial and organizational consulting,

and education. Diversity in higher education is critical to the goal of achieving cultural competence.

Our point about cultural competence is not limited to the profession of psychology, or even to the field of mental health generally, or of physical health, either. See, *e.g.*, Association of American Medical Schools, Cultural Competency in Medical Education and Practice (Mar. 2002); and T.K. Bikson & S.A. Law, Rand Report on Global Preparedness and Human Resources: College and Corporate Perspectives (1994) (the "Rand Report"). The Rand Report states (at 24) that "cross-cultural competence" is "the critical new human resource requirement for corporations that have espoused a global business strategy," and (at 51) "is the most important new attribute for future effective performance in a global marketplace." Hence the Nation itself, let alone its colleges and universities, has a compelling interest in providing all of its students with an educational environment sufficiently diverse to prepare them adequately for the future.

CONCLUSION

The judgment of the Court of Appeals in *Grutter* and of the District Court in *Gratz* should be affirmed.

Respectfully submitted,

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Nos. 02-241 & 02-516

In The
Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, *et al.*,

Respondents.

JENNIFER GRATZ and PATRICK HAMACHER,

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v.

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On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE NEW AMERICA ALLIANCE AS AMICUS CURIAE SUPPORTING THE RESPONDENTS

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Brian Bucks, *Affirmative Access Versus Affirmative Action: How Have Texas' Race-Blind Policies Affected College Outcomes?* http://www.ssc.wisc.edu/~scholz/Seminar/Bucks_Raceblind.pdf (Dec. 3, 2002) 13

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INTEREST OF THE AMICUS CURIAE[1]

The New America Alliance is a not-for-profit organization of American Latino[2] business leaders who seek to promote the advancement of the American Latino community through economic and political empowerment and public advocacy. The NAA achieves these objectives by development of human capital, enhancement of education, and promotion of strategic philanthropy.

Affirmative action programs at many of the nation's leading universities are vital to the NAA's mission because they have provided Latino Americans of all races meaningful access to higher education. Education has enabled talented Latinos to assume positions in the business world that otherwise would have been denied them. For example, the chairman of the NAA, Moctesuma Esparza, benefited from the affirmative action program at the University of Southern California. Esparza's father had come to the United States from Jalisco, Mexico, in 1918 to escape the turmoil wrought by the Mexican Revolution. In the United States, he migrated as a farm worker and a railroad hand from Texas to Utah to California where he settled in Los Angeles. There, he worked his way up from dishwasher to chef. His son Moctesuma took the opportunity

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[1] This brief is filed with the written consent of all parties that have been filed separately with the Court. No counsel for any party authored this brief in whole or in part, nor did any person or entity, other than amicus or its counsel, make a monetary contribution to the preparation of this brief.

[2] Although "Latino" generally refers solely to males, it is used in this brief to refer both to males and females in the interest of brevity.

that USC provided him and became one of the country's most successful motion picture producers. His film credits include *Gods and Generals, Gettysburg, The Milagro Beanfield War,* and *Selena.* Moctesuma has won over 200 awards, including an Emmy and an Academy Award nomination.

Other members of the NAA have similar success stories that illustrate that affirmative action has the effect of contributing to this nation's ability to provide opportunities for people with talent to succeed where they might otherwise have been excluded, that is, of insuring that people who are capable of succeeding are given the opportunity to succeed, regardless of racial or ethnic background. Harvard University's affirmative action program gave Tom Castro the opportunity to develop the skills and alliances that enabled him to become the chairman and chief executive officer of El Dorado Communications, Inc., a Houston-based Hispanic communications firm grossing $14 million in revenues by 1999. Castro also serves on the board of directors of Infotec, Inc., ranked by *Hispanic Business* as one of the twenty largest Hispanic firms in the nation. NAA member Jorge G. Castro was also able to earn Ivy League accolades because of the affirmative action program of Princeton University and graduated *magna cum laude*. That early success gained him access to Goldman, Sachs & Company and J.P. Morgan in New York City, where he worked before ultimately becoming the chief executive officer and founding principal of Los Angeles-based CIC/HCM Asset Management, which manages $550 million of equity and fixed income investments. NAA member Frank Sánchez benefited from affirmative action at UCLA. He is now chairman and chief executive officer of the Sánchez Family Corporation, which owns and operates McDonald's franchises in East and Downtown

Los Angeles. He also serves on the McDonald's Operators Association of Southern California and the Global Board of Trustees of the Ronald McDonald House Charities. All of these NAA members are actively involved as leaders in civic, charitable, and community affairs.

USC, Harvard, Princeton, and UCLA can boast about the successes of these individuals. These institutions can also boast that their admissions process successfully achieved the desired result: enrollment of those students who are most likely to succeed.

It is precisely this result that the NAA wants to continue to foster and believes that admissions programs such as that at the Law School of the University of Michigan do indeed foster. The NAA supports the Law School in its goal of admitting winners irrespective of race or ethnic origin and, like the Law School, recognizes that competitive consideration of race or ethnic background among many other factors is essential to producing a law school class of winners. Historical as well as current admissions statistics show that when admissions programs fail to give competitive consideration to race and ethnic background along with traditional admissions criteria, schools fail to identify those candidates who are most likely to succeed and instead admit disproportionate numbers from certain races and ethnic groups.

SUMMARY OF THE ARGUMENT

The petitioners, the United States, and all of their *amici curiae* have urged the Court to scrutinize the policy at issue under strict scrutiny because it gives explicit consideration to race and ethnic origin. The respondents

and their *amici curiae* in the courts below accepted the use of this standard, but disagreed regarding the consequences of doing so. The parties now invite this Court to settle their differences regarding the application of the strict scrutiny standard. Doing that – however the case is decided – will launch the federal judiciary into a rigorous inspection of decisions by the States and their employees regarding a complex and vital State function: education. That inspection will be fueled by the promise of damage awards to those who show that *any* explicit consideration of race in admissions policies prevented their enrollment without serving compelling goals or being the most racially neutral means of achieving those goals.

The parties' invitation to turn strict scrutiny on programs such as that here should be rejected because the competitive consideration of race and ethnicity in admissions policies – unlike racial classifications, preferences, and distinctions – is race neutral notwithstanding its explicit reference to race and ethnicity.[3] The University of Michigan policies here for review easily survive such scrutiny. In addition, Our Federalism and the First Amendment prohibit invocation of Title VI of the Civil Rights Act to override race neutral State admissions policies such as those here.

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[3] The terms "race based" and "race neutral," as used herein, are intended to encompass "ethnic based" and "ethnic neutral" respectively. This brief solely discusses the Law School admissions policy. The undergraduate admissions policy appears to be race neutral for the same reasons that the Law School policy is race neutral.

ARGUMENT

I.

The Policy is Race Neutral and Should be Upheld Under Intermediate Scrutiny

While the NAA agrees with the respondents that the policy can survive strict scrutiny, it also contends that the parties and the government err in their agreement that the policy is race based. The policy at issue in fact is race neutral because it considers race solely in an effort to temper the failure of traditional admissions criteria to identify the applicants who are most likely to succeed.

A. The Policy's "Competitive Consideration" of Race is Not a Classification or Preference on the Basis of Race

An intermediate standard of review is appropriate in this case because the policy does not aim to discriminate on the basis of race; rather, it aims to identify those applicants who are most likely to succeed[4] and it permissibly assumes that race will not have any effect on the likelihood that any individual will succeed.[5] On the basis

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[4] For the sake of brevity, this brief uses the verb "to succeed" to mean "to succeed in law school" as well as "to succeed in life." This definition of "succeed" comports with the Law School's definition of "success." According to a memorandum published by the Law School's former dean of admissions, indicators of "success," are " 'intellectual talent, leadership ability, and academic acumen which augers for a lively intellectual community and important contributions to the profession.' " *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 828 (E.D. Mich. 2001), *rev'd*, 288 F.3d 782 (6th Cir. 2002) (en banc).

[5] The Fourteenth Amendment prohibits, of course, governmental discrimination on the basis of race or ethnicity. It does not prohibit

(Continued on following page)

of this assumption, the Law School concludes that race neutral selection criteria should produce a class that proportionally mirrors the races and ethnic origins of its applicants because its criteria are designed to identify those who are most likely to succeed. When consideration of traditional admissions criteria begins to produce a class that is racially or ethnically disproportionate, the Law School recognizes that the traditional admissions criteria are not identifying those who are most likely to succeed, but rather are favoring certain race and ethnic groups over others. At that point, it then gives race and ethnic origin consideration to ensure that traditional criteria do not include, on the basis of race or ethnicity, students who the Law School believes are less likely to succeed. The admissions policy excludes Barbara Grutter not because of her race, but because it has determined that she is less likely to succeed. The admissions policy simply has neutralized the undesired effect of erroneous selection of a student who is less likely to succeed.

The race neutrality of the admissions policy is analogous to the content neutrality of many speech regulations that reference content but which are directed at regulating the secondary effects of speech. Last term, for example, in *City of Los Angeles v. Alameda Books, Inc.*, 122 S. Ct. 1728 (2002), a plurality of the Court held that a zoning ordinance that prohibits operation of more than one adult entertainment business at a single location, such as a bookstore and an arcade of open viewing booths, might be

governmental action based upon an assumption that all people are created equal – that race and ethnicity alone will not affect an individual's likelihood of success.

content neutral even though it "considered" the content of the regulated speech at issue.[6] In reaching this conclusion, the plurality relied on *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). The *Renton* ordinance was aimed not at the content of the films shown at adult theaters, but rather at the secondary effects of such theaters on the surrounding community, namely at crime rates, property values, and the quality of the city's neighborhoods. Therefore, the ordinance was deemed content neutral. *Id.* at 47-49. Justice O'Connor, writing for the plurality, noted that an ordinance would not be deemed content neutral merely because a city claimed that it was aimed at curbing secondary effects; the city would be required to prove a link showing that the secondary effect was caused by the regulated speech. "While the city certainly bears the burden of providing evidence that supports a link between concentrations of adult operations and asserted secondary effects, it does not bear the burden of providing evidence that rules out every theory for the link between concentrations of adult establishments that is inconsistent with its own." *Alameda Books*, 122 S. Ct. at 1735 (O'Connor, J.).

[6] *See also Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (regulation targeted at secondary effects of speech is subject to intermediate scrutiny); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (same); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (same); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (same); *Members of City Council of Los Angeles v. Taxpayers for St. Vincent*, 466 U.S. 789 (1984) (same); *Young v. Amer. Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (plurality opinion) (same); *but see Virginia v. Black*, 262 Va. 764 (Va. 2001) (invalidating ban on cross burning although statute targeted intimidation), *cert. granted*, 122 S. Ct. 2288 (U.S. May 28, 2002) (No. 01-1107).

Justice O'Connor emphasized that in *Renton*, the Court "specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech. We held that a municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." *Alameda Books*, 122 S. Ct. at 1736 (O'Connor, J.) (citations omitted). She indicated that a municipality would not be allowed to "get away with shoddy data or reasoning," but that its decision would stand if the evidence "fairly support[ed] the municipality's rationale for its ordinance."[7] *Id.*

The same approach can and should be taken here. As long as the evidence fairly supports the respondents' racially neutral rationale for their admissions policy – selection of those who are most likely to succeed – it

[7] Justice Scalia concurred that the plurality's opinion "represents a correct application of our jurisprudence concerning regulation of the 'secondary effects' of pornographic speech." 122 S. Ct. at 1738. Justice Kennedy concluded that the regulation should be labeled content based, but subjected to intermediate scrutiny because it was aimed at regulation of secondary effects. *See id.* at 1740. Justice Souter's dissent in *Alameda* books, joined by Justices Stevens and Ginsburg, pointed out that the majority had classified a regulation as content neutral notwithstanding its explicit reference to speech content and made the interesting observation that there perhaps should be a different label given to such regulations. He wrote: "It would in fact make sense to give this kind of zoning regulation a First Amendment label of its own, and if we called it *content correlated*, we would not only describe it for what it is, but keep alert to a risk of content-based regulation that it poses." *Id.* at 1746 (Souter, J., dissenting) (emphasis added). Justice Souter disagreed with the majority only in whether the evidence before him passed intermediate scrutiny standard and not with the use of that level of scrutiny. *See id.* The race neutral policy here for review could be referred to as race correlated.

should be subjected to intermediate scrutiny.[8] The evidence showing that the Law School's consideration of race is designed to enroll those students who are most likely to succeed is fully discussed by the respondents and the other *amici* in their briefs and therefore will not be repeated here.

The Court's reapportionment cases also provide a framework that shows that the Law School admission policy is race neutral. In *Bush v. Vera*, 517 U.S. 952, 958 (1996), Justice O'Connor, in an opinion joined by Chief Justice Rehnquist and Justice Kennedy, observed:

> Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. Nor does it apply to all cases of intentional creation of majority-minority districts. . . . For strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were "subordinated" to race. By that, we mean that race must be "*the predominant* factor motivating the legislature's [redistricting] decision."

517 U.S. at 958-59 (citations omitted). The Law School plainly has not subordinated legitimate admissions principles to race. Rather, it uses such principles as its primary

[8] Many other government decisions, policies and resource allocations that take race into consideration also plainly should be subjected to intermediate scrutiny because they also consider race, but only for race neutral purposes. *See, e.g.*, 20 U.S.C. ch. 33 (providing support for minority education); 29 U.S.C. § 718 (providing vocational rehabilitation and other rehabilitation programs for traditionally underserved populations, including African Americans, Latinos, and Native Americans); 42 U.S.C. § 247b-12 (authorizing expansion of research relating to higher rates of mortality among African American women).

admissions criteria and then resorts to race or ethnic group only to attempt to eliminate the deleterious effect of application of traditional criteria alone.

The Law School's conclusion from the results of grade and test score based screens is that use of such selection criteria alone will exclude applicants who are most likely to succeed and that this impact prevents it from achieving its educational mission. While such an impact may not itself violate the Fourteenth Amendment in the absence of an intent to use it for a discriminatory purpose,[9] there is no requirement in the Fourteenth Amendment that such a disproportionate impact must be allowed to stand. Federal, state, and local governments are free to end or modify regulations that prevent them from achieving race neutral objectives, if they choose to do so through a method that is not simply a discriminatory quota system, but rather that gives "competitive consideration" to race. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1973) (Powell, J.). Under the law school's policy "the guarantee of equal protection" does not "mean one thing when applied to one individual and something else when applied to a person of another color." *Bakke*, 438 U.S. at 289-90. The Law School's policy is simply an acknowledgment that mechanical admissions policies are not adequate to achieve the race neutral objective of selecting "winners" – those who will succeed in law school according to the many indicators of success that the Law School relies upon.

[9] *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (holding that a facially neutral regulation that has a disproportionate racial or ethnic impact will be upheld in the absence of discriminatory intent).

Indeed, the policy will operate at all times to counteract the tendency of facially neutral traditional admissions criteria to overlook some candidates who are most likely to succeed.

A policy such as that at issue here does nothing to stigmatize any individuals on the basis of race or ethnic origin because it does not teach that "because of chronic and apparently immutable handicaps, minorities cannot compete with [the majority] without their patronizing indulgence." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring). Just the opposite, the policy here teaches that all racial and ethnic groups are equal, that all groups are equally likely to succeed, and that race neutral admissions policies should produce proportionate racial diversity. The policy at issue here teaches that "In the eyes of the government, we are just one race here." *Id.* at 239 (Scalia, J.).

The race neutrality of the Law School admissions policy is further demonstrated by the petitioners' assertion that other admissions policies that will achieve the same level of diversity are themselves race neutral. A close review of those policies demonstrates that while they do not make explicit reference to race or ethnicity, they pose a far greater danger that they will exclude on the basis of race applicants who are most likely to succeed.[10] If the

[10] A far stronger case can be made for subjecting these alternative policies to strict scrutiny. *See Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 471 (1982) (although referendum "nowhere mentions 'race' or 'integration' " and therefore was "facial[ly] neutral[ ]," the Court concluded the referendum left "little doubt that the initiative was effectively drawn for racial purposes").

Court accepts that these alternatives are race neutral, it should treat the Law School policy as race neutral as well.

The petitioners and the Government focus primarily on the "percentage plans" adopted in Florida, California, and Texas as "race neutral" alternatives that are available to achieve the same racial diversity as race based programs. These plans ensure the admission to state universities of a certain percentage of all students graduating from each high school. The plans are based on the theory that high schools are so racially and ethnically segregated that admission of a certain percentage of the students who received the best grades and standardized test scores will result in admission of a higher percentage of minority students than if grades and test scores were used as the sole determining factors. "Given the racial and economic segregation in the state's high schools, the assumption was that blacks and Hispanics would be given a fairer chance to enroll, without having to compete directly with non-Hispanic whites who lived in richer districts."[11] Put differently, these programs are able to achieve diversity "only if secondary education remains firmly racially segregated."[12] The "percentage plans" are based upon the "current day educational apartheid" existing in these states and throughout the country.[13] Nevertheless, these plans are touted as "race neutral"

[11] Jacques Steinberg, *Asian-American Students Rise as Affirmative Action Ends*, N.Y. Times, Feb. 2, 2003, at WK3.

[12] Michelle Adams, *Isn't it Ironic? The Central Paradox at the Heart of "Percentage Plans"*, 62 Ohio St. L.J. 1729 (2001).

[13] *Id.*

because they make no explicit reference to race.[14] Because the plans were designed specifically to achieve the same racial diversity as those that they have supplanted,[15] they are no more race neutral than the policy here under review. In fact, they are far less race neutral because of their abhorrent reliance on racial segregation in high schools to achieve diversity in colleges and post-graduate schools and in their failure even to deliver the diversity that they promise. Moreover, they teach individuals that they can increase their odds of admission by attending a racially segregated school because that is where the lowest grades and test scores are expected to be found. Fundamentally, these plans are based on the erroneous assumption that there is nothing discriminatory about facially

[14] Whether a policy makes "explicit reference" to race should not be determinative of whether the policy is a race based classification. *See Bush v. Vera*, 517 U.S. 952, 958 (1996) (O'Connor, J.). As an examination of the so-called race neutral alternatives demonstrates, a facially race neutral policy can be far more racially discriminatory than a policy that facially gives race consideration but achieves a nondiscriminatory objective such as enrolling those students who are most likely to succeed. *See Miller v. Johnson*, 515 U.S. 900, 905 (1995) (equal protection principles apply not only to legislation that contains explicit racial distinctions, but also to laws neutral on their face, but " 'unexplainable on grounds other than race' ") (quoting *Arlington Heights*, 429 U.S. at 266).

[15] *See, e.g.*, Brian Bucks, *Affirmative Access Versus Affirmative Action: How Have Texas' Race-Blind Policies Affected College Outcomes?* at 2, http://www.ssc.wisc.edu/~scholz/Seminar/Bucks_Raceblind.pdf (Dec. 3, 2002) ("The Ten Percent Plan seeks to promote diversity by ensuring college access for high-achieving students from across the state's highly segregated high schools, especially those from schools that have traditionally sent few graduates to Texas' flagship universities").

neutral admissions criteria that have the effect of admitting a class of entirely one race.

The Law School's admissions policy is unlike "affirmative action" plans that this Court has previously invalidated as involving impermissible racial classification. In fact, characterization of the Law School policy as an "affirmative action" plan is something of a misnomer because it is not attempting to remedy the effects of its own or society's past discrimination or to advance the members of any racial or ethnic group over another. The policy is used simply to try to find those students who best enable the Law School to fulfill its educational mission and the policy is based on a permissible assumption that a successful search for these students will produce a proportionally diverse class.

By contrast, the admissions policies under review in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1973), simply reserved a number of spaces in its entering class for minority students, irrespective of whether they were the most likely to succeed. The rigid quota system in *Bakke* precluded non-minority students from competing with those minority students for whom seats at the university's medical school had been set aside. The Court correctly subjected this simple system of favoring minority over non-minority applicants to strict scrutiny. *Id.* at 287. The Law School policy here does not favor any race over another. It assumes that there are no distinctions based on race and that if an admissions policy fails to produce a class that is proportionately diverse, that policy must be excluding applicants on the basis of race.

Significantly, Justice Powell contemplated that an admissions policy designed to ensure that students were

not excluded from admissions on the basis of race and ethnicity would be subjected to intermediate scrutiny when he wrote that the courts below erred in enjoining the University of California "from ever considering the race of any applicant" because "the State has a *substantial interest* that legitimately may be served by a properly devised admissions program involving the *competitive consideration* of race and ethnic origin." *Id.* at 320 (emphasis added). By using the term "substantial interest" Justice Powell recognizes that "a properly devised program involving competitive consideration of race and ethnic origin," as opposed to a set-aside program such as that at issue in *Bakke*, is subject to intermediate, not strict, scrutiny.

In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1996), the Court reviewed whether a school board could adopt race based preferences in determining which teachers to lay off. A collective bargaining agreement between the school board and a union provided that if it became necessary to lay off teachers, those with the most seniority would be retained, except that no teacher would be laid off if that teacher's lay off would decrease the percentage of minority teachers employed below the percentage employed prior to the lay off. The policy did not seek to preserve the most qualified teachers, those that might be classified as the "winners," but rather it sought to protect minority teachers. This was an attempt to favor minority teachers solely on the basis of their race, rather than an attempt to fulfill a race neutral goal such as maintaining the best teachers available.

The school board sought to justify this discriminatory classification by its interest in "providing minority role models for its minority students, as an attempt to alleviate

the effects of societal discrimination." *Id.* at 274. Justice Powell's plurality opinion correctly observed that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination." *Id.* at 273 (Powell, J.). Justice O'Connor agreed, observing that racial classifications that work to the disadvantage of 'nonminorities' should be reviewed applying the strictest scrutiny. *Id.* 476 U.S. at 283 (O'Connor, J.).

This Court concluded that the goal advanced by the school board was not compelling because the board had not shown prior discrimination by the board itself. The Court found that the school board's role model theory had no stopping point at which the purported remedy would be achieved. Moreover, the Court found a lack of relationship between the role model theory and past discrimination in society generally because "societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Id.* at 276.

The Law School policy, by contrast, is not designed to provide minority role models nor to attempt to alleviate the effects of societal discrimination, and it does not set aside a number of positions based solely on the race of applicants. Rather, it is designed to select those students who are most likely to succeed. It correctly assumes that race neutral admissions criteria will produce a racially diverse class and that criteria that produce substantial under-representation are not, in reality, race neutral. The *Wygant* policy was not based on an assumption of equality, but rather based on an assumption that remedial measures should be taken to remedy past discrimination and the Court correctly held that if that was the objective, the

school board's policy must be regarded as race based and that it must have a compelling justification for that policy.

Following its decision in *Wygant*, the Court invalidated yet another affirmative action plan applying the strictest standard of review in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Richmond's implemented quota system required prime contractors who received city construction contracts to subcontract at least 30% of the dollar amount of each contract to one or more "minority business enterprises." An attempt to remedy the effects of past discrimination in the construction industry in Richmond formed the basis for the race based classification – not an attempt to find the most qualified contractors. Justice O'Connor, writing for a plurality, observed that the "Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based *solely* upon their race." *Id.* at 493. This policy, like the policy stricken in *Wygant*, was premised on the assumption that minorities needed race based assistance to overcome the effects of past discrimination. It was not premised, as is the Law School policy, on the assumption that race neutral selection criteria will produce a racially diverse result and that selection criteria that do not do this are flawed. The Court also correctly subjected the *Croson* policy to strict scrutiny because it imposed "a rigid rule erecting race as the *sole* criterion in an aspect of public decisionmaking." *Id.* (emphasis added). The Law School policy does not use race as the sole criterion, but rather relies predominantly on traditional, legitimate admissions criteria.

In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), this Court considered the federal government's "practice of giving general contracts on government

projects a financial incentive to hire subcontractors controlled by 'socially and economically disadvantaged individuals,' and in particular, the Government's use of race-based presumptions in identifying such individuals." *Id.* at 204. The government urged that "'[t]he Subcontracting Compensation Clause program is . . . a program based on *disadvantage,* not on race," and thus that it is subject only to the most relaxed judicial scrutiny." *Id.* at 212-13. The Court agreed that provisions of the program were race neutral, but that a "'race-based rebuttable presumption used in some certification determinations under the Subcontracting Compensation Clause'" were not race neutral and held they would be subject to strict scrutiny. *Id.* The presumptions required contractors to "'presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities.'" *Id.* at 205. The Law School makes no such presumptions. Rather, it presumes that race and ethnic origin are not determinative of the likelihood that one will succeed and that an admissions policy that does not produce proportional representation is eliminating those that are most likely to succeed. Thus, the strict scrutiny applicable to the race based policy in *Adarand* is not applicable to the race neutral policy now before the Court.

Bakke, Wygant, Croson, and *Adarand* are good examples of cases where the Court correctly categorized programs as imposing race and ethnic origin classifications on individuals and correctly subjected those classifications to the strictest judicial review. By contrast, the Law School admissions policy is unlike any of the race based policies in those cases and so a different standard of review is appropriate. Under the Law School's admissions policy no

individual is favored or disfavored on account of the individual's race or ethnic origin. A line is never drawn between groups or individuals on account of their race or ethnic origin and no special token is reserved for a specific racial or ethnic group or individual. Rather, the Law School's admissions policy allows for "competitive consideration of race" under which all applicants, both minority and non-minority alike, have an equal opportunity to prove that their qualifications and unique experiences make them "winners."

B. The Policy is a Properly Devised Program that Legitimately Serves a Substantial Interest

A race neutral regulation that nevertheless makes reference to race should be subjected to intermediate scrutiny to ensure that it is not being used for discriminatory purposes. The first prong of the intermediate scrutiny test is to determine whether the policy was adopted to serve a substantial interest. The interest of the law school was "'to pick winners.'" *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 828 (E.D. Mich. 2001), *rev'd*, 288 F.3d 782 (6th Cir. 2002) (en banc). That interest is a traditional interest served by many law school admissions policies and generally recognized as a substantial interest.[16]

The evidence established that the Law School's consideration of race directly advanced that interest

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[16] *See generally* W. Scott Van Alstyne, Jr., Joseph R. Julin & Larry D. Barnett, *The Goals & Missions of Law Schools* 35 (Peter Lang 1990) (setting forth traditional factors for creating a prestigious law school and arguing that striving to obtain that goal "may well be an educational and professional disservice to the citizenry").

because it resulted in both the admission of students who met traditional admissions criteria and diversity of the student body closely proportionate to the diversity of the applicant pool – the two critical components of a class that includes those applicants who are most likely to succeed. *Id.* at 821. The evidence showed that if the Law School had considered median undergraduate GPA and LSAT scores alone, the admitted class would have lacked the diversity indicating that those most likely to succeed had been selected. *Id.* The evidence further showed that under the policy, race was "not a 'primary consideration' in making admissions decisions." *Id.* at 831. Therefore, the policy legitimately and directly served the substantial interest for which it was adopted.

II.

Federal Laws Cannot Restrict Race Neutral State Experimentation with Educational Admissions

The petitioners and the United States ask this Court to direct the federal judiciary to eradicate hundreds of affirmative action programs that have been implemented in every State in the country and to award both compensatory and punitive damages to each individual who has been denied admission to these State schools as a consequence of the schools' "consideration" of race. The Court should be reluctant to interpret federal law as so intrusive on the sovereignty of the States. Moreover, federal law may not so restrict the First Amendment right of academic freedom.

A. Congress Lacks Power to Compel States to Adopt Admissions Policies that Do Not Give Race Consideration

An inquiry into whether Congress has the power to abrogate unilaterally the States' immunity from suit under the Eleventh Amendment focuses on whether the Act in question was passed pursuant to a constitutional provision granting Congress the power to abrogate. *See, e.g., Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56 (1976). Authority to abrogate plainly exists under the Fourteenth Amendment, which explicitly expands federal power at the expense of state autonomy, altering the balance of state and federal power struck by the Constitution. *See id.* at 455. Section 1 of the Fourteenth Amendment contains prohibitions expressly directed at the States, and section 5 expressly provides that "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." *Id.* at 453 (internal quotation marks omitted).

Not all legislation purporting to rest on the Fourteenth Amendment successfully abrogates State sovereignty, however. This Court held in *Alden v. Maine*, 527 U.S. 706 (1999), that only "[w]hen Congress enacts *appropriate legislation* to enforce this Amendment, see *City of Boerne v. Flores*, 521 U.S. 507 (1997), federal interests are paramount, and Congress may assert an authority over the States which would be otherwise unauthorized by the Constitution." 527 U.S. at 756 (emphasis added).

In *Flores*, this Court invalidated the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.*, as a statute that exceeded Congress's powers under section 5 of the Fourteenth Amendment. Congress enacted RFRA in reaction to *Employment Div., Dep't of Human Resources of Ore. v. Smith*, 494 U.S.

872 (1990), in which the Court upheld an Oregon statute of general applicability that made use of peyote criminal. The plaintiffs, members of the Native American Church, had claimed that the law abridged their Free Exercise rights under the First Amendment because their practice was to ingest peyote for sacramental purposes. The stated purpose of RFRA was to extend federal protection to that practice because the Court had found that the Fourteenth Amendment did not protect the practice. In holding that RFRA violated State sovereignty, the Court held that Congress could not rely on section 5 of the Fourteenth Amendment. "Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is." *Flores*, 521 U.S. at 519. "It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the 'provisions of [the Fourteenth Amendment].'" *Id.* (citation omitted). Preventive measures enacted pursuant to section 5 are appropriate when there is reason to believe that many of the laws affected by the measure are unconstitutional.[17] But,

[17] *See, e.g., City of Rome v. United States*, 446 U.S. 156, 161 (1980) (upholding 7-year extension of the Voting Rights Act's requirement that certain jurisdictions preclear any change to a "'standard, practice, or procedure with respect to voting'"); *Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding 5-year nationwide ban on literacy tests and similar voting requirements for registering to vote); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding several provisions of the Voting Rights Act of 1965); *Katzenbach v. Morgan*, 383 U.S. 641 (1966) (upholding ban on literacy tests that prohibited certain people schooled in Puerto Rico from voting).

remedial legislation under section 5 "should be adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against."[18]

A law enacted pursuant to section 5 of the Fourteenth Amendment to prohibit a state university from using race neutral admissions criteria that give proper consideration to race is not appropriate legislation pursuant to the Fourteenth Amendment for it does nothing to carry out the mandate of the due process found in the Fourteenth Amendment. Instead, it simply imposes on state universities the view of Congress that different admissions criteria should be used. States ought not have the power to decide how they will educate stripped from them in this fashion. "Congress has vast power but not all power. When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations. Congress must accord States the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central Government and the separate States. Congress has ample means to ensure compliance with valid federal laws,

[18] *Civil Rights Cases*, 109 U.S. 3, 13 (1883); *see also Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (Americans with Disabilities Act of 1990 exceeded authority of the Fourteenth Amendment by authorizing damages actions against States); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 72-73 (2000) (Age Discrimination in Employment Act exceeded authority of the Fourteenth Amendment by authorizing damages actions against States); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank & Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 627 (1999) (invalidating Florida statute as not enacted to enforce the guaranties of the Fourteenth Amendment).

but it must respect the sovereignty of the States." *Alden*, 527 U.S. at 758.

The Court's obligation, of course, is to interpret federal legislation, wherever possible, as consistent with the Constitution. That can be easily accomplished in this case by holding that Title VI simply does not require state universities to abandon race neutral admissions policies that merely give race consideration for the purpose of achieving race neutral objectives.

B. Federal Laws Would Violate the First Amendment if They Imposed Liability for All Admissions Policies that Give Race Consideration

The federal laws upon which the plaintiffs base their claims should be interpreted consistently with the Fourteenth Amendment. As importantly, they should not be interpreted as compromising the fundamental right of academic freedom guaranteed by the First Amendment. The Court's "understanding of academic freedom has included not merely liberty from restraints on thought, expression, and association in the academy, but also the idea that universities and schools should have the freedom to make decisions about how and what to teach."[19] In *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985), the Court recognized that "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by

[19] *Bd. of Regents, Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 236, 237 (2000) (Souter, J., concurring).

the academy itself." *Id.* at 226, n.12 (citations omitted). In *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), Justice Frankfurter, concurring and joined by Justice Harlan, explained the importance of a university's ability to define its own mission as follows: "'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'" *Id.* at 263 (citations omitted).

Petitioners urge the Court to interpret Title VI as cutting deeply into this important First Amendment freedom. The actions of state educators in giving effect to race neutral admissions policy should be considered unlawful, if at all, only upon a showing that, although the policy was race neutral, the actions of the respondents were nonetheless a sham designed to further unlawful discrimination. Such a standard would be consistent with that employed by this Court in other contexts to avoid drawing a federal statutory scheme into unnecessary conflict with First Amendment rights.

Most notably, in the antitrust context this Court has held that "the Sherman Act does not prohibit . . . persons from associating . . . in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly."[20]

[20] *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961).

The Court later made clear that this antitrust immunity "shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose."[21] This immunity, however, does not extend to "illegal and reprehensible practice[s] which may corrupt the . . . judicial process[ ],"[22] or to lobbying "ostensibly directed toward influencing governmental action [that] is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor."[23] As this Court recently explained, "[t]his line of cases thus establishes that while genuine petitioning is immune from antitrust liability, sham petitioning is not."[24]

Because of the First Amendment rights involved, the respondents' burden of proving a "sham" is a heavy one. In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60-61 (1993) the Court held that the action "must be objectively baseless" and the litigant's motivation must conceal a prohibited intent. This "sham" standard reflects this Court's recognition that the First Amendment requires that protected activities be given some "breathing space."[25]

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[21] *Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965); *see Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972) (extending *Noerr-Pennington* immunity principles to situations where groups "use . . . courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-à-vis their competitors").

[22] *Cal. Motor Transp.*, 404 U.S. at 513.

[23] *Noerr*, 365 U.S. at 144.

[24] *BE&K Constr. Co. v. NLRB*, 122 S. Ct. 2390, 2396 (2002).

[25] *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341-342 (1974) (noting the need to protect some falsehoods to ensure that "the freedoms of speech

(Continued on following page)

In light of the vital First Amendment rights involved in the educational process, this Court should apply a similar standard to this case. Title VI of the Civil Rights Act of 1964 and, *a fortiori*, the Fourteenth Amendment safeguard critically important rights. But when a challenge is brought to a race neutral admissions policy, the resulting legal analysis should take account of the important First Amendment interests at stake. The resulting test would not immunize the admissions process from scrutiny, but it would force a party challenging a neutral admissions policy to meet a demanding standard by showing that actions that purport to be protected First Amendment conduct are, in fact, a sham.

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and press [receive] that 'breathing space' essential to their fruitful exercise") (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

CONCLUSION

The decision of the Sixth Circuit should be affirmed because the respondents' policies are race neutral, supported by substantial interests, and legitimately serve those interests. In addition, the Court should affirm dismissal of all claims under Title VI because Congress lacks the power to compel states to adopt admissions policies that do not give race consideration and because plaintiffs have not demonstrated that the race neutral policies at issue were a sham.

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IN THE

Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, ET AL.,

Respondents.

JENNIFER GRATZ AND PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, ET AL.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF HARVARD UNIVERSITY, BROWN UNIVERSITY, THE UNIVERSITY OF CHICAGO, DARTMOUTH COLLEGE, DUKE UNIVERSITY, THE UNIVERSITY OF PENNSYLVANIA, PRINCETON UNIVERSITY, AND YALE UNIVERSITY AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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John F. Kain and Daniel M. O'Brien, "Hopwood and the Top 10 Percent Law: How Have They Affected the College Enrollment Decisions of High School Graduates," presented at the National Bureau of Economic Research Meeting on Higher Education (Boston: Nov. 9, 2001; revised Dec. 2002) 24
Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions*, in THE BLACK-WHITE TEST SCORE GAP (Brookings, 1998) 23
Glenn Loury, THE ANATOMY OF RACIAL INEQUALITY (2002) 28
Percent Plans in College Admissions: A Comparative Analysis of Three State Experiences,
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INTEREST OF AMICI CURIAE

Harvard University, Brown University, the University of Chicago, Dartmouth College, Duke University, the University of Pennsylvania, Princeton University, and Yale University respectfully submit this brief amici curiae in support of respondents.[1] For the last two-and-a-half decades, highly selective institutions have relied on the approval by five Justices of the favorable consideration of race and ethnicity in the admissions process in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). *See id.* at 320 (opinion of the Court per Powell, J.); *id.* at 328 (opinion of Brennan, J., joined by White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part) (joining in Part V-C of Justice Powell's opinion). In *Bakke*, a number of private universities had filed a brief stressing the importance of admissions programs that treat "an applicant's membership in a minority racial group as a favorable factor in the consideration of his application." Brief of Columbia Univ. *et al.* as *Amici Curiae*, No. 76-811, at 4. Under this model, amici and other highly selective educational institutions consider an academically qualified student's race or ethnicity as one among many factors in a carefully designed, competitive admissions process that views each applicant as an individual and weighs the capacity of each to contribute to the class as a whole.

The 25 years since *Bakke* have seen extensive efforts by amici and other selective universities to encourage minority applications and expand minority admissions. The principle underlying *Bakke* has become the basis of well-settled reliance not only by amici, but also by students, alumni, high schools, and businesses. To abandon *Bakke* now would trigger wrenching disruption.

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[1] Pursuant to Rule 37.6, amici certify that no counsel for any party authored this brief in whole or in part. No persons other than the amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief. Letters reflecting the parties' consent to the filing of this brief have been filed with the Clerk.

Amici's experience during the quarter century since *Bakke* has confirmed the wisdom of that decision. Amici's admissions policies have served compelling pedagogical interests by contributing to a diverse and inclusive educational experience, teaching students to view issues from multiple perspectives, and helping to break down prejudices and stereotypical assumptions. The policies prepare students to work productively in a multiracial environment after they graduate, and the policies meet the demands of business and the professions by preparing a generation of public and private leaders for an increasingly pluralistic national and global economy.

To be sure, the admissions process must not be used to separate, subordinate, or stigmatize students, or to exclude any student from any place in an entering class on account of that student's race. But a prohibition on such illegitimate practices does not justify jettisoning the genius of federalism or replacing the benefits of competition, experimentation, and heterogeneity with the dead hand of a stifling uniformity. So long as they do not employ these illegitimate practices, different universities should be free to craft their own distinctive approaches. Such a course would be especially appropriate if there were any uncertainty or ambiguity about the best means for promoting racial diversity. It is vital that the Constitution be understood to protect – not to eviscerate – the capacity of universities thoughtfully to determine how to fulfill their profound responsibility: educating a diverse array of talented students to reason rigorously, to bridge differences both real and imagined, and to emerge as effective citizens and leaders in a multiracial society.

Because Title VI of the Civil Rights Act of 1964 forbids institutions that receive federal funds from engaging in racial "discrimination," the ability of private colleges and universities to exercise their institutional competence could well be dramatically compromised by any new limits this Court might place on state university admissions criteria or procedures. Accordingly, amici urge this Court to interpret the Constitution

and federal statutes to leave amici and other selective educational institutions with latitude to take race and ethnicity into account as positive factors in their individualized admissions processes.

SUMMARY OF ARGUMENT

Academically selective universities have a compelling interest in ensuring that their student bodies incorporate the experiences and talents of the wide spectrum of racial and ethnic groups that make up our society. Amici should be free to compose a class that brings together many different kinds of students; that includes robust representation of students from different races and ethnicities; and that prepares graduates to work successfully in a diverse nation. Indeed, highly selective universities have long defined as one of their central missions the training of the nation's business, government, academic, and professional leaders. By creating a broadly diverse class, amici's admissions policies help to assure that their graduates are well prepared to succeed in an increasingly complex and multi-racial society. The policies also make certain that no racial or ethnic group is excluded from that vital process. Nor have amici been educating students to meet a merely imagined need. Every major profession in America has made known a desire for diversity within its ranks. Businesses demand that the graduates of highly selective universities both be diverse and be prepared to work with colleagues from different backgrounds.

There is widespread agreement on these fundamental principles. Thus, even while opposing the particular programs in these cases, the United States recognizes that universities have an important – what it calls "paramount" (U.S. Grutter Br. 16) – interest in attracting students from a wide range of backgrounds, explicitly endorsing the "laudable goals of educational openness and diversity." U.S. Gratz Br. 16. The United States accepts that it is entirely legitimate for universities to concern themselves with "ensur[ing] that [they] are open to all individuals and that student bodies are educationally diverse and

broadly representative of the public." *Id.* at 17. In particular, the United States acknowledges that "universities may adopt admissions policies that seek to promote experiential, geographical, political, or economic diversity . . ." U.S. Grutter Br. 10.

The United States, to be sure, does not expressly include "racial diversity" within its general endorsement. But that reticence cannot reflect any sound limitation on the reach of the "diversity" that is relevant in these cases. It would be a strange, almost otherworldly, version of diversity that recognized the importance of all kinds of differences *except* racial ones. Certainly, American businesses, the professions, and the remaining elements of our society consider racial diversity to be of central importance. This Court should adhere to the principle of *Bakke*, which has been inextricably woven into the American social fabric over the past quarter century.

None of us favors a return to de facto segregation, or anything like it, in our leading universities. The principal issue in this case is the *means* by which racial and ethnic diversity should be achieved. This Court should respect the institutional competence and academic freedom of amici and of other highly selective universities, public and private, regarding the most appropriate means to achieve these agreed-upon ends. Rather than imposing a unitary, top-down model of how to be race-conscious *enough* without being *too* race-conscious, the Court should preserve the flexibility of universities to pursue carefully calibrated admissions policies designed to promote student diversity and the vital educational benefits that flow from it.

It is instructive to contrast the minority broadcast licensing preferences at issue in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990). Those preferences necessarily depended for their success on the assumption that differences in the race of station owners would lead to differences in speech; otherwise, the programming at issue would have been unchanged. But the purposes of amici's admissions policies are served whether the

views held by individual minority students, or by minority students on average, turn out to be very different or virtually indistinguishable from those of other students. The policies contemplate simply that being of a particular race, especially a race subject to historical and continuing prejudices, entails experiences that people of other races have not had and ought to understand better. These differences will vary from individual to individual, thus resulting in substantial differences within racial groups as well. Far from reflecting and perpetuating stereotypes, amici's admissions policies are consciously designed to dissolve them.

The critics of Michigan's admissions programs insist that mechanistic approaches – such as guaranteed admission for a specified percentile of high school graduates (as in California, Florida, and Texas) – or softer "race-neutral" proxies (like economic disadvantage) can be deliberately adjusted to replicate the racial and ethnic mix that explicit consideration of race in the admissions process would have achieved. According to the critics, the Constitution forbids overt consideration of race or ethnicity, even as part of a highly individualized admissions process. Instead, the university must be relegated to a purportedly "race-blind"approach – whose very aim, however, is to achieve the same diverse racial and ethnic mix.

Petitioners' proposed alternatives would be infeasible and ineffective. Although petitioners suggest that universities should consider factors like economic circumstances and personal hardships, the truth is that those factors are already taken into account in the typical selective admissions process. Petitioners' proposals for guaranteed admissions plans for the top GPA-achievers among the applicant pool are unworkable for relatively small private universities, which simply cannot promise to admit the top ten percent (or even the top one per cent) of graduating high school seniors. Nor could graduate schools, with fewer available spaces and even more selective criteria, feasibly operate under such formulas.

Petitioners' proposals would also compromise the quality of student populations at selective universities. Thus, even if a policy of guaranteed admission for students graduating in a specified percentile of their high school class succeeded in admitting a certain number of minority students, it would likely compel the admission of so many other, non-minority applicants as to eliminate available spaces in the college class for those with unusual backgrounds, experiences, and other talents to contribute. Such alternatives are therefore fundamentally incompatible with the commitment to consider each applicant on his or her individual merit, taking into account *all* factors, not just test scores or class rank, that would militate for or against admission to a selective university. Whatever strict scrutiny properly requires, it should not force universities to achieve one vital interest (racial diversity) to the exclusion of another (treatment of students as individuals) and thereby compromise the constitutional imperative of academic freedom.

Nor should strict scrutiny be distorted to require amici to adopt disingenuous admissions policies – policies that would seek to accomplish with a wink and a nod the very diversity that petitioners contend amici are forbidden to achieve directly. Far more consistent with our constitutional traditions is an application of strict scrutiny that honors candor and transparency, that respects individualized evaluation, that recognizes the institutional competence of our nation's many and diverse educational institutions in framing their own learning strategies, and that can, as this Court has put it, distinguish between a "No Trespassing sign" and a "welcome mat." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229 (1995). Such an application of strict scrutiny would regard the asserted ability of alternative methods to approximate the racial diversity that a sensibly designed program of race-based affirmative action can achieve not as proof that such a program should be struck down but as an inadvertent concession that the program is indeed constitutionally justified. Just as imitation is at times the sincerest form of flattery, so in this context petitioners'

argument helps establish the breadth of the fundamental consensus that seeking a racially diverse student body, and attempting to graduate a class of future leaders able to operate effectively within a diverse and pluralistic society, represent neither "reverse discrimination" nor the patronizing use of race to perpetuate stereotypes of inferiority but simply educational measures within the competence and familiar domain of American universities.

Because petitioners' constitutional challenges to the admissions policies in both cases ignore these basic lessons and are deficient as a matter of law, the judgments of the court of appeals in No. 02-241 and of the district court in No. 02-516 should be affirmed.

ARGUMENT

I. CONSIDERATION OF RACE AND ETHNICITY IN AN INDIVIDUALIZED ADMISSIONS PROCESS SERVES COMPELLING INTERESTS.

A. There Is a Broad Consensus On The Important Educational Benefits of Diversity.

It is appropriate to begin with the substantial common ground in this case: the United States acknowledges that "[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a *paramount government objective*." U.S. Grutter Br. 16 (emphasis added). Indeed, almost twenty-five years ago, this Court held that a university "has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978) (Part V-C, opinion of Powell, J.); *see id.* at 272 (Brennan, White, Marshall, Blackmun, J.J., joining Part V-C); *see also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 276, 286, 289 n.* (1986) (O'Connor, J., concurring in part and concurring in the judgment) (*Bakke* recognized the "compelling" nature of "a state interest in the promotion of racial diversity * * * in the

context of higher education").

Tellingly, the United States does not ask this Court to overturn *Bakke*. U.S. Grutter Br. 15 n.4. In fact, the United States maintains that "this case requires this Court to break no new ground." *Id.* at 12. The best way to achieve that objective is to adhere to the core principle of *Bakke*. Since that decision, universities across the country have operated on the well-founded belief that they are free to give favorable consideration to race and ethnicity as part of their individualized admissions programs. To reverse course now, after a quarter century of reliance – to repudiate the importance of seeking racial inclusiveness through a carefully designed program consistent with *Bakke* – would be to upset deeply grounded expectations in a way utterly contrary to the doctrine of *stare decisis*. *See Dickerson v. United States*, 530 U.S. 428, 442-44 (2000); *Planned Parenthood v. Casey*, 505 U.S. 833, 861-69 (1992).

Amici's experience in the two-and-a-half decades since 1978 confirms the wisdom of *Bakke*'s premise. Selective universities across the country have built their communities mindful of the pedagogical value of multiracial diversity in educational programs. Students are both recipients and providers of the learning that takes place at universities, and amici thus have a vital interest in what students bring to the task of educating each other. In a recent survey, for example, 69 percent of Harvard Law School students and 73.5 percent of Michigan Law School students reported that having "students of different races and ethnicities" was a "clearly positive element of their educational experience."[2] Diversity helps students confront perspectives other than their own and thus to think more rigorously and imaginatively; it helps students learn to relate better to people from different backgrounds; it helps students become better citizens. The educational benefits of student diversity include

[2] Gary Orfield and Dean Whitla, DIVERSITY IN LEGAL EDUCATION 16 (1999). *See also* Richard J. Light, MAKING THE MOST OF COLLEGE 9-10, 129, 132-35 (2001).

the discovery that there is a broad range of viewpoint and experience *within* any given minority community – as well as learning that certain imagined differences at times turn out to be only skin deep.

It is surely fitting for universities to undertake to prepare their students to live and work in a global economy within a multiracial world. The challenges of contemporary life demand that students acquire not just traditional forms of knowledge regarding science and the arts, but also techniques of bridging differences in perspective and in personal experience. Amici have concluded, as a matter of reasoned educational judgment, that their admissions policies are well adapted to such learning. This Court has no reason to distrust that judgment or to impose a set of uniform rules on the university admissions processes of the fifty states and of countless private institutions.

Amici have adopted admissions programs seeking racial and ethnic diversity as a natural part of a long and expanding policy of inclusion. Harvard, for example, has been pursuing the idea of student diversity for a period that dates to the nineteenth century. *See* Neil Rudenstine, THE PRESIDENT'S REPORT 1993-1995: DIVERSITY AND LEARNING 3-13. In its early stages, the concept of diversity was rooted primarily in geography. Thus, George Washington's will bequeathed funds for a national university so that "the youth of fortune and talents from all parts" might, "by associating with each other," be "enabled to free themselves in a proper degree" from "local prejudices and habitual jealousies."[3]

Ultimately, amici embraced a broader vision of diversity. Thus, President Charles Eliot declared that students need to "feel that very wholesome influence which comes from observation of and contact with larger numbers . . . from different nations, States, schools, families, sects, parties, and conditions of life." THE PRESIDENT'S REPORT 1993-1995 at 10. As Eliot saw it,

[3] Available at http://gwpapers.virginia.edu/will/text.html.

Harvard students should be children of the "rich and poor," the "educated and uneducated," rather than representing just one segment of American society. *Id.* Throughout the twentieth century, therefore, the University increasingly accepted students from public, rather than private, schools, and became increasingly, and then fully, coeducational. It also undertook to expand the enrollment of students from different ethnic groups, primarily of European origin, that had previously been represented at Harvard, if at all, in only small numbers. *Id.* at 24-25.

It is against this historical backdrop that selective universities ultimately developed their admissions policies with respect to African-Americans and other minority groups that have been subject to targeted exclusion from many of the benefits of American life. Far from adopting a theory for the convenience of the moment, amici simply recognized, as they had in the past, that students from these minority groups would bring valuable new experiences to the university community.

B. Consideration of Race and Ethnicity Grows Naturally Out Of The Needs Of The Professions and Of American Business.

Amici have a special interest in this pair of cases stemming from their distinctive responsibility, since colonial times, to educate leaders in all walks of life. As the United States has explained, "[a] university degree opens the doors to the finest jobs and top professional schools, and a professional degree, in turn, makes it possible to practice law, medicine and other professions." U.S. Grutter Br. 16. Highly selective academic institutions are keenly aware of a responsibility to train not only doctors, lawyers, and accountants, but also corporate, government, social, and academic leaders.

Every major profession in this country has sought greater diversity within its ranks.[4] Businesses have demanded more

[4] *See* ABA REPORT OF THE COMMITTEE ON DIVERSITY IN LEGAL EDUCATION 7-8 (1998); AMA BOARD OF TRUSTEES REPORT, DIVERSITY IN MEDICAL EDUCATION 2,4 (1999); Derek Bok, *The Uncertain Future of Race-Sensitive Admissions* 4-8 (Jan. 2003) (available at www.nacua.org/documents).

minority managers and executives, as well as non-minorities who can work well with colleagues from diverse backgrounds. Leading corporations, business groups, professional organizations, and executives have repeatedly called for consideration of race and ethnicity in university admissions.[5] In adopting their admissions policies, universities are responding to "the clearly articulated needs of business and the professions for a healthier mix of well-educated leaders and practitioners from varied racial and ethnic backgrounds. . . . [B]usinesses depend heavily on their ability to recruit broadly trained individuals from many racial backgrounds who are able to perform at the highest level in settings that are themselves increasingly diverse."[6]

Commentators across the political spectrum have recognized and applauded the fact that "[t]he level of affirmative action in the United States in the private sector on grounds of race goes far beyond what is needed to keep firms out of hot water. It represents a sustained and consistent effort to change the dominant practices in the United States." Richard A. Epstein, *A Rational Basis for Affirmative Action: A Shaky But Classical Liberal Defense*, 100 MICH. L. REV. 2036, 2053 (2002). That is why there is broad support in the business community for consideration of race in university admissions. Holman W. Jenkins, Jr., *Why the Michigan Case Matters to Business,* Wall Street Journal, Jan. 22, 2003, at A15 (noting the "dozens of companies" filing briefs in support of Michigan in this case).

Empirical data have confirmed the value of amici's admissions programs in serving this interest. In a study of

[5] Derek Bok, *The Uncertain Future of Race-Sensitive Admissions* 8-10.

[6] William G. Bowen & Neil L. Rudenstine, *Race-Sensitive Admissions: Back to Basics*, CHRONICLE OF HIGHER EDUCATION 87 (Feb. 7, 2003).

45,000 students who matriculated in 1976 and 1989, Derek Bok, former president of Harvard, and William G. Bowen, former president of Princeton, have shown that minority students admitted under these programs were highly successful in completing rigorous academic programs, securing good jobs, and contributing to community life.[7]

As this Court has noted, "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (D.D.C. 1943)). Amici's admissions programs are well adapted to achieving this paramount interest.

C. The Interests in Diversity and Inclusion That Support Well-Designed Programs of Race-Specific Affirmative Action in University Admissions Do Not Reflect Impermissible Stereotyping.

The interests asserted by amici do not rest on a stereotypical assumption that all members of the same race have had the same or similar experiences, much less that they have the same fixed set of perceptions or beliefs. The interest in ensuring that minorities are not excluded from the professions and positions of future leadership does not hinge at all on any prediction that they will have particular views or philosophies, let alone that

[7] The study found that approximately 90 percent of all graduates in 1976 were involved in such civic activities as community service, youth organizations, or cultural and arts activities. The rate of participation for black men is even higher, and black men and women are more likely to serve in a leadership position. *See* THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 6-11 (2000). These professionals "are the backbone of the emergent black . . . middle class . . . . [T]hey can serve as strong threads in a fabric that binds their own community together and binds those communities into the larger social fabric as well." *Id.* at 116.

such views are monolithic.

Nor do the pedagogical benefits of diversity depend on stereotypical assumptions. Instead, those benefits rest upon a quite different expectation: that minority students will have had formative experiences that they would not have had as identically situated students of a different race. In the context of higher education, recognition of this real-world difference should be no more impermissible than recognition that gender plays a role, one that differs from individual to individual, in how young men and women grow up.

What those experiences are, and how each student has reacted to them, is part of what amici hope students will explore. Both minority and non-minority students will have the opportunity to reconsider preconceptions and prejudices in the course of obtaining a university education in a diverse environment. Indeed, one of the valuable lessons for non-minorities to discover is that members of a minority group do not all share the same views and opinions; far from it. Thus, amici's admissions policies are central elements in their strategy for *breaking down* racial and ethnic stereotypes. Openness to differing life experiences and perspectives, and the capacity to rethink what has been previously thought, are critical objectives of educational diversity in the first place.

The assumptions underlying the FCC station-ownership program in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), were very different. As devised, that program depended for its very existence on a conclusive presumption that minority station owners would make different broadcast programming choices from those that nonminority owners would make. *See id.* at 566-71. The FCC program also assumed that the views of minority owners about desirable programming would remain static – that is, remain distinctly "minority" views – during the entire period of ownership. Indeed, the FCC's presumption about minority tendencies was so rigid that it expected minority station owners, by reason of their race alone, to resist the market forces

that had shaped broadcast programming up to that point. *See id.* at 626 (O'Connor, J., dissenting). Nothing approaching that sort of presumption is present in amici's admissions programs.

D. Advancing The Interests In Diversity and Inclusion Is Not Tantamount to Attempting to Remedy Societal Discrimination.

Petitioners seek to equate the promotion of educational diversity with the pursuit of remedies for "societal discrimination," Grutter Br. 40; Gratz Br. 33, a mission this Court has described as too "amorphous" to support a number of race-based measures. *See Adarand Constructors*, 515 U.S. at 220; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 497-99 (1989) (plurality opinion); *Wygant*, 476 U.S. at 267 (plurality opinion). That the two goals are distinct is shown by the fact that Justice Powell rejected the interest in remedying societal discrimination in both *Bakke* and *Wygant*, but said in *Bakke* that he found educational diversity to be a compelling justification for considering race in university admissions. *See* 438 U.S. at 314. It has been suggested that the remedial interest is backward-looking and may at times even be punitive, while the educational diversity interest is forward-looking and inclusive. *See* Kathleen M. Sullivan, *The Supreme Court, 1985 Term – Comment: Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986). And, most importantly, the educational diversity interest is contextually limited by its link to the teaching mission of the university in a way that an interest in remedying societal discrimination could never be.[8]

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[8] The same distinction was evident in *Wygant*. *See* 476 U.S. at 276-77 (plurality opinion); *id.* at 288 (O'Connor, J., concurring in part and concurring in the judgment). Importantly, the Court in *Wygant* did not rule out all consideration of race for educational purposes: to the contrary, in her separate opinion, Justice O'Connor expressly distinguished the asserted "remedial" role model justification from the (unasserted) justification in having a racially diverse faculty. *See id.* at 289 & n.* (O'Connor, J., concurring in part and concurring in judgment).

II. STRICT SCRUTINY IS SATISFIED BY PROPERLY DESIGNED UNIVERSITY ADMISSIONS POLICIES THAT CONSIDER RACE AND ETHNICITY.

Strict scrutiny is, of course, a two-part test. Having established a compelling reason for consideration of race in decisionmaking as part of carefully calibrated procedures, an institution must also demonstrate that its use of race is "narrowly tailored" to the identified interest. *See Adarand Constructors*, 515 U.S. at 227; *see also Metro Broadcasting*, 497 U.S. at 617 (O'Connor, J., dissenting). This test is met by properly designed university policies that take race and ethnicity into account as part of the individualized and competitive admissions process.

A. The Distinctive Educational Role of Universities Must Be Accommodated in The Application of Strict Scrutiny.

In addressing a university's choice of a specific admissions process, this Court should accord significant respect to the variety of ways in which our nation's institutions choose to compose their student bodies. Differences over the optimal means for promoting racial diversity suggest that the proper course is to allow each university to pursue its own admissions policy within constitutional constraints that are not so tight as to suffocate all possibilities for variation.

The judicially recognized and constitutionally grounded tradition of academic freedom, and the deeply ingrained practice of deference to educators' judgments on educational matters, combine to make it especially appropriate to defer to amici's well supported assessment that individualized consideration of race and ethnicity in the admissions process is essential for selective universities to perform their broad educational function. *See Board of Regents v. Southworth*, 529 U.S. 217, 233 (2000); *University of Pennsylvania v. EEOC*, 493 U.S. 182, 199 (1990) (noting "importance of avoiding second-guessing of

legitimate academic judgments"); *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226 n.12, 227 (1985) ("Academic freedom thrives on . . . autonomous decisionmaking by the academy itself").

This Court has previously acknowledged "the vital role in a democracy that is played by those who guide and train our youth." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Academic freedom can and should be accorded a role in supporting a degree of judicial deference, particularly with respect to questions regarding the precise fit of the interests in diversity with the universities' other choices about their mission and the availability of alternative means to serve those interests. *See Bakke*, 438 U.S. at 314 (opinion of Powell, J.). Although strict scrutiny is properly demanding, it should not be applied so as to deprive university officials of responsibly exercised discretion to define what the university shall be, "what may be taught, how it shall be taught, and who may be admitted to study." *Id.* at 312 (opinion of Powell, J.) (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring in result).

Nor have this Court's decisions created a paradigm of "strict scrutiny" so rigid as to rule out careful consideration of context. To be sure, this Court has at times spoken as though literally all decisions that consider an individual's race – even for such laudatory purposes as combatting or offsetting the lingering effects of discrimination against racial minorities – are to be equated with the constitutional anathema of racial segregation. In reality if not always in rhetoric, however, the Court has been far more nuanced in its understanding of the many and varied uses of race, making clear that strict scrutiny does not mean that all race-conscious measures are nearly certain to be doomed. "The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in government decisionmaking." *Adarand Constructors*, 515 U.S. at 227.

Thus, in *Adarand Constructors*, this Court distinguished between uses of race that literally segregate people into different physical locations or applicant pools on the basis of their race (a "No Trespassing" sign) and uses of race that serve principally to broaden and diversify the set of those who are invited in by rounding out a multi-variabled assessment of individuals (a "welcome mat"). 515 U.S. at 229. In this pair of cases, giving favorable consideration to minority race and ethnicity in individualized admissions processes that *exclude no one from any place in an entering class on account of race* is the proverbial "welcome mat" that does not use race in a segregative or constitutionally offensive way.[9]

In this regard, there is an instructive parallel between legislative redistricting and university admissions. Each activity is part of a process for the formation of groups in the operation of a pluralistic system – whether for lawmaking or for the composition of a diverse student class. Moreover, just as there is usually no way for those drawing legislative district lines to avoid knowing the race and party affiliation of the residents of the voting districts that will be created, so too there is often no way for amici to avoid learning the race and ethnicity of their applicants as part of the individualized admissions processes on which amici rely. Through alumni interviews, application essays, and campus visits, amici gain a keen appreciation for the talents and backgrounds of their prospective students. To

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[9] The members of this Court have drawn similar distinctions in other contexts, recognizing that use of sometimes problematic classifications does not invariably trigger a uniformly heightened level of constitutional alarm. *See, e.g., United States v. Virginia*, 518 U.S. 515, 533-34 (1996) ("Sex classifications may be used . . . to advance full development of the talent and capacities of our Nation's people."); *Johnson v. Transportation Agency*, 480 U.S. 616, 656 (1987) (O'Connor, J., concurring in the judgment) (gender may be used as a "'plus' factor" in affirmative action plan); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982) ("In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened.").

demand that amici close their eyes to the race and ethnicity of those students – alone among their many relevant characteristics – is as unrealistic as it is unjustified.

There are basic differences, of course, between forming a new legislative district and forming an entering college or law school class. Yet the two processes have enough in common that it is notable that this Court has not merely *upheld* redistricting that takes conscious and deliberate account of race but has actually concluded that "[s]trict scrutiny does not apply" invariably to such redistricting. *Bush v. Vera*, 517 U.S. 952, 958 (1996); *see also Easley v. Cromartie*, 532 U.S. 235, 241 (2001); *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999). In view of this approach to redistricting, it would be surprising to conclude at the same time that, whenever a university class is formed with consciousness of race, strict scrutiny not only *applies* but proves *fatal*. That no such conclusion does follow, and that the contrasts in legal doctrine are not so surprisingly stark after all, is entailed by what is special about universities as places that educate their students, and expect their students to educate each other, to take their place in a multiracial world. This mission enables universities' individualized and competitive consideration of race to satisfy strict scrutiny, while similar uses of race by most other institutions would presumably fail to pass that test.

B. Explicit Consideration of Race and Ethnicity in an Individualized Admissions Process Is Fully Capable of Satisfying the Narrow Tailoring Requirement.

The arguments raised by petitioners and their amici are beset by intractable contradictions. On the one hand, they complain that university admissions policies have impermissible collateral effects on those displaced by supposedly less qualified minorities. On the other, they contend that supposedly race-neutral alternatives can advance the same compelling interests in producing equally diverse and racially inclusive student populations. But if petitioners are correct that the alternatives

will result in essentially the same levels of minority enrollments, then the impact on displaced non-minorities will, at minimum, be the same (and may even be worse, given the imprecise and overbroad nature of petitioners' alternatives). And if petitioners are not correct, as amici's experience strongly suggests, then their alternatives will not suffice. Either way, petitioners' arguments fail.

Moreover, petitioners' mechanistic, by-the-numbers proposals would threaten the ability of selective universities to ensure *non*-racial diversity in their student bodies – whether in terms of musical talents, unusual personal experiences, or other kinds of contributions. These proposals are anti-meritocratic and utterly contrary to amici's individualized admissions philosophies. Under petitioners' approach, the composition of an entering class will be changed for the worse, to the detriment of every student and the educational objectives of amici.

1. *Petitioners' Arguments Rest on a Misunderstanding of the Admissions Process at Selective Universities.*

An understanding of amici's admissions programs makes clear why petitioners' arguments are fundamentally misguided. The purpose of a university admissions process is not simply to identify the students who, if admitted, would be likeliest to earn the highest grade-point averages. Quite apart from the impossibility of reliably making that prediction, pursuit of so narrow a goal would be unlikely to yield a student body that any sensible university would wish to enroll. While amici continue to place the highest priority on academic rigor, they have always sought to enroll a broad cross-section of students who can bring a critical mix of experiences and perspectives into the university community and who can leave it well prepared to serve as future leaders of our society.

The factors considered in amici's individualized admissions programs are extraordinarily varied, wide-ranging, and notoriously difficult to quantify. Although petitioners and the United States sometimes give the impression that university

admissions officers consider just test scores, class rank, and race, little could be more misleading. At Harvard College, for example, every application is read individually by at least one admissions officer and often two or more. All applicants are further considered, and any who are serious contenders for admission are discussed by a multi-member admissions subcommittee.[10] Candidates are reviewed and discussed yet again by the entire admissions committee, consisting of approximately 30 members, often supplemented by faculty members in relevant departments. All this review and discussion is necessary precisely because the admissions process seeks to form a class that is diverse along multiple dimensions, of which race is but one – a class that is more than the sum of its individual student parts.

Admission factors begin, of course, with the core academic criteria, including not just grades and test scores but teacher recommendations and state, regional, national, and international awards. In some cases, those criteria will be all but decisive, either positively (very rarely) or negatively (more often). In the vast majority of cases, however, they are not themselves decisive, and the process continues. Admissions officials give special attention to, among others, applicants from economically and/or culturally disadvantaged backgrounds, those with unusual athletic ability, those with special artistic talents, those who would be the first in their families to attend any college, those whose parents are alumni or alumnae, and those who have overcome various identifiable hardships. The committee also extends favorable consideration to applicants who write exceptionally well, to applicants who show a special dedication to public service, and to those who demonstrate unusual promise in a wide variety of fields.

These factors have a common feature: they provide evidence

[10] Well before they begin reviewing applications, amici engage in extensive recruiting efforts to encourage talented students, including those from minority backgrounds, to apply.

that particular students – all of whom have academic records very similar to many other highly capable students – are likely to add something distinctive to the university and, post-graduation, to the larger society. The decisions about whom to admit are typically made not head-to-head but sequentially, with an eye to the composition of the overall class. Each factor becomes part of the case for a particular applicant, just as other factors increase the chances for competing applicants. No one factor, including race, is dispositive, as empirical data make clear.[11]

By the same token, the individualized admissions process means that simply eliminating the consideration of minority race and ethnicity would not significantly increase any given non-minority student's odds of gaining admission to an academically selective university. Data from a representative sample of selective colleges and universities demonstrate that the admissions rate for white students would rise by less than two percentage points, from roughly 25 percent to 26.5 percent.[12]

[11] Analysis of data from leading private research universities for the undergraduate class entering in 1999 indicates that, among male minority applicants with combined SAT scores in the 1200-1299 range (within the top 10 percent of minority test-takers and the top 20 percent of all test-takers), the probability of admission was only about 35 percent. In other words, roughly two in three of these minority candidates were denied admission. At the very top of the SAT range (1400+), nearly two out of five were rejected. Indeed, the data show that recruited athletes at many selective colleges are far more likely to be admitted at a given SAT level than are minority candidates. *See* William G. Bowen & Sarah A. Levin, RECLAIMING THE GAME (forthcoming).

[12] Bowen and Bok, THE SHAPE OF THE RIVER 26, 36.

2. *The Interest In Racial Diversity Cannot Be Served By Race-Neutral Reliance On Factors, Such As Economic Disadvantage, That Are Already Carefully Considered.*

Petitioners argue that race-conscious admissions decisions are unnecessary because suitable attention to race-neutral factors will do just as well. The United States urges (as one solution) that universities look to such factors as special economic hardship instead of race. *See* U.S. Grutter Br. 24-25. But the decisive fact is that all of the suggested race-neutral factors, and many more besides, already enter into admissions decisions.[13] Consideration of those factors alone does not achieve the distinctly *racial* diversity that amici seek in their student bodies. To accomplish that goal, admissions committees must give favorable consideration to minority race *in addition* to those other factors, not *instead* of them.

To "tweak" the race-neutral factors emphasized by petitioners – for example, by deliberately tilting individual admissions toward "hardship" students in the hope of thereby selecting a large enough increment of minority students to make up for the losses that would result from race-blind admissions – would be disingenuous at best. Such an approach would in truth be a race-based policy and not a race-neutral alternative at all. Indeed, such programs, if adopted to assure increased minority enrollment, would be based on race in a causal sense and would thus raise obvious constitutional questions of their own. *See Shaw v. Reno*, 509 U.S. 630, 643-44 (1993); *Hunter v. Underwood*, 471 U.S. 222, 228-33 (1985). And no one is well

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[13] The United States cites, as possible factors, "a history of overcoming disadvantage, geographic origin, socioeconomic status, challenging living or family situations, reputation and location of high school, volunteer and work experiences, exceptional personal talents, leadership potential, communication skills, commitment and dedication to a particular cause, extracurricular activities, extraordinary expertise in a particular area, and individual outlook as reflected by essays." U.S. Grutter Br. 25. Amici already give significant favorable consideration to all of these factors.

served, especially in a university setting animated by respect for truth, by preferring covert processes to those that are candid, open, and forthright.

In any event, such programs would interfere with or profoundly alter what a university is seeking to achieve, not merely serve the goal in an alternative way. A race-neutral preference for economically disadvantaged students, for example, would admit many more whites than non-whites, because of sheer demographic realities.[14] And, of course, the university interest in admitting minority students goes well beyond just admitting minority students from disadvantaged backgrounds.

3. *The Interest in Racial Diversity Cannot Be Served By The Newer Alternatives Involving Non-Individualized Guaranteed Admissions.*

There are related, and no less serious, problems with plans – like those in Florida, Texas, and California – that guarantee admission to students who graduate in a certain percentile of their class. Available research suggests that the impact of these plans on minority admissions is quite limited and due in significant part to lingering racial segregation in secondary schools – itself a deeply problematic state of affairs.[15]

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[14] *See* Columbia Brief in *Bakke* at 19; *see also* STATISTICAL ABSTRACT OF THE UNITED STATES 2001, at 442-43, Tables 679, 682 (1999 figures: 21.9 million Whites below poverty line; 8.36 million Blacks; 1.16 million Asians and Pacific Islanders; 7.4 million Hispanics); Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions*, in THE BLACK-WHITE TEST SCORE GAP 448 (Brookings, 1998).

[15] *See Appearance and Reality in the Sunshine State*, Harvard Civil Rights Project (Feb. 2003) (available at www.civilrightsproject.harvard.edu); *Percent Plans in College Admissions: A Comparative Analysis of Three State Experiences*, Harvard Civil Rights Project (Feb. 2003) (available at www.civilrightsproject.harvard.edu); Derek Bok, *The Uncertain Future of Race-Sensitive Admissions* at 34 (reporting that while the number of black applicants to the University of Texas (Austin) rose by more than 20 percent between 1996 and 2001, the number of blacks admitted fell by more than 15

Moreover, these proposals would plainly be impractical for relatively small, academically selective universities. For example, even if a college were to guarantee admission only to valedictorians in high schools across the country, the program simply could not work: according to the U.S. Department of Education, there are well over 30,000 high schools in the United States. In 2002, almost 2,900 valedictorians applied to Harvard, but the number of applicants offered admission to the freshman class was only 2,066. Over 1,600 applicants scored a perfect 800 on their verbal SATs, and over 2,100 scored a perfect 800 on the math portion. Harvard College could not accept all applicants in either category and would not wish to do so.

Nor could guaranteed admissions plans feasibly operate at the graduate level, where the pools of applicants are very different and the entering classes much smaller. Applicants to graduate schools are competing for far fewer spaces, making the problems of guaranteeing admission slots all but insurmountable. Notably, while petitioners and the United States endorse these plans, they make no real effort to show how the experience of a handful of large States would be transferable to other, very different, public and private institutions.

Practicalities aside, the allocation of guaranteed places is incompatible with the long-standing policies and practices of any truly selective university. Guaranteed admission plans would deny admissions officers the critical capacity to consider each applicant as an individual on his or her overall merits in the context of the admitted group as a whole. For example, a black student with lower class standing from a rigorous urban school may well be academically superior to black students who

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percent and that while the number of Hispanic applicants rose by 20 percent, the number admitted dropped by almost 12 percent); John F. Kain and Daniel M. O'Brien, "Hopwood and the Top 10 Percent Law: How Have They Affected the College Enrollment Decisions of High School Graduates," presented at the National Bureau of Economic Research Meeting on Higher Education (Boston: Nov. 9, 2001; revised Dec. 2002).

graduate at the top of smaller and less rigorous high schools. In Texas, for example, the average SAT scores of the top 10 percent of University of Texas students dropped from 1242 in 1996 to 1211 in 2000. The percentage of the class with scores under 1000 virtually doubled.[16] In principle, a sensibly selective admissions program should take the strongest students, including the strongest minority students, a result that can be achieved only by amici's genuinely individualized procedures.

A practice of awarding of guaranteed places would thus diminish the ability of selective universities to achieve excellence and non-racial forms of diversity. Even if a "top 10 percent" program succeeded in admitting a significant number of minority students, it would likely compel the admission of so many other "guaranteed" students that it left too few places for those with more unusual talents and experiences to contribute. Squeezing the admissions process into so Procrustean a bed would conflict with the basic approach of selective university admissions as amici understand and have long embraced it. Whatever strict scrutiny properly requires, it should not force public *or* private universities to serve one vital interest (racial diversity) at the expense of another (individualized selection of students) and in the process sacrifice the constitutional imperative of respecting academic freedom.

C. Consideration of Race Does Not Make An Admissions Plan A Quota.

Properly tailored admissions programs differ from quotas in the critical sense that they do not bar any slot to any individual based on his or her race but fully preserve "individual" consideration (*Bakke*, 438 U.S. at 319-20 (opinion of Powell, J.)), consistent with traditional principles of university admissions. Although amici *consider* minority race and ethnicity, the *impact* of that consideration always depends on the qualifications of all other applicants, including those who receive

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[16] Derek Bok, *The Uncertain Future of Race-Sensitive Admissions*, at 35.

consideration for being, for instance, the first in their families to attend college or for having persevered in the face of illness or after losing a parent. The consideration of race remains at all times within the bounds of the overall, individualized admissions process.[17]

The California-Davis policy in *Bakke* was quite different. As Justice Powell made clear, *see* 438 U.S. at 315-19, the problem with the California-Davis minority admissions program was not that it sought to enroll an increased number of minority students, or even that it quantified its aspiration candidly, but that the goal of admitting a particular number of qualified minority students effectively became the tail that wagged the dog. Because California-Davis established a prescribed floor for the number of qualified minority students to be admitted, the central admissions question became not how well a particular minority applicant matched up to the overall pool of medical school applicants, but whether he or she was qualified for one of the fixed number of slots set aside for minority applicants alone. No matter how outstanding the competing applicants from those groups might have been in a given year, they still could not gain admission to

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[17] Even in those settings where "[w]e know that, like . . . gender," "race . . . matters," *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 148 (1994) (O'Connor, J., concurring) – where, to offer one suggestive instance, "there is substantial reason to believe" that "minority representation" in a "racially mixed" group "may help to overcome . . . racial bias" on the part of non-minority members of that group, *Georgia v. McCollum*, 505 U.S. 42, 68 (1992) (juries) (O'Connor, J., dissenting from holding that criminal defendants, like the state itself, may not peremptorily strike jurors on the basis of race) – state action to exclude someone altogether from a given position or opportunity on account of the individual's race or gender is ordinarily impermissible as an affront to the equal dignity of the excluded individual. *See J.E.B.*, 511 U.S. at 142 & n.14 (majority opinion); *id.* at 153-54 (Kennedy, J., concurring); *Batson v. Kentucky*, 476 U.S. 79 (1986). It is for this special situation that one should reserve the pejorative term, "quota." But no such dignitary concern is properly triggered when minority race is simply given due consideration as one of many factors in a setting where the fact of the individual's race is no proxy but is itself an independently relevant variable.

any of the reserved seats unless the university first found an absence of qualified minority candidates to admit.

A properly individualized admissions program does not suffer from this "set-aside" defect. Nor does an individualized admissions process become a "quota" simply because the number of admitted minority students may not vary radically from year to year. Amici's admissions committees do not have fixed targets for any group of admitted students, and the percentages for different groups change over time. Thus, over the past four years at Harvard College, the number of admitted students whose fathers did not attend any college has ranged from 220 to 228 – or from a low of 10.6% of admitted students to a high of 11.0%, or a variation of approximately 3.8%. For the same academic years, the percentage of African-American students among the admitted applicants was as low as 8.76% and as high as 9.92% – approximately a 13% variation. That said, the makeup of any given class does tend to be relatively predictable, simply because the applicant pool tends to be relatively consistent. One would expect, for example, that the number of redheaded students in the entering class would be relatively constant from year to year – but that hardly demonstrates the existence of an "redhead quota."

D. Race-Conscious Admissions Programs Are Not Open-Ended Commitments.

Petitioners contend that consideration of race and ethnicity will create an ever-expanding precedent that can have no temporal stopping point and that will lead to claims by other groups – whether social, religious, or ideological – for "fair" representation on our university campuses. That misconstrues amici's argument. Amici are not asserting that any group, including African Americans, has a "right" to proportionate representation either in academia or in the professions – only that action by universities to achieve substantial and meaningful inclusion, if carefully tailored, violates no right on the part of others and no constitutional or statutory commitment of our

society. The decision of a university as to which minority groups deserve favorable consideration in an individualized admissions process designed to foster such diverse representation, and the weight of such consideration, are necessarily and appropriately decisions to be made as a matter of educational judgment, taking into account both the university's sense of its mission and its best estimate of the leadership needs it will address – not as a matter of conflicting "rights."

Petitioners and their amici object, finally, that race-conscious university admissions programs have no identifiable time limit. *See* U.S. Grutter Br. 32-34. We question whether this is a cognizable constitutional complaint. Although this Court has at times expressed concern about temporal indefiniteness, it has never held that measures necessary to reach an intended objective – that is, measures otherwise properly tailored to serve a compelling interest – were to be struck down simply because such measures lack a clear exit strategy or a definite "sunset" provision. *See, e.g., Burson v. Freeman*, 504 U.S. 191 (1992) (First Amendment context). The proper constitutional concern would thus seem to be whether the selected means outlast the interest they are designed to serve, not whether they go on "too long" in some abstract, undefined sense. *Cf. Eldred v. Ashcroft*, 123 S. Ct. 769 (2003) (20-year extension of copyright terms held permissible).

In any event, even if there must be an ultimate end to the consideration of race in university admissions, it is surely premature to declare that the end is upon us. We are not so far removed from the days when segregation by race in education, and race discrimination in all sorts of vital opportunities relevant to educational performance, were for many a matter of law. *Brown v. Bd. of Education*, 347 U.S. 483 (1954); *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1 (1971); *Hills v. Gautreaux*, 425 U.S. 284 (1976). However devoutly we might wish it were otherwise, the effects of that history cannot be expected to play themselves out within a single generation. *See* Glenn Loury, THE ANATOMY OF RACIAL INEQUALITY 4

(2002). Progress toward a goal does not mean that the goal has been reached.

But progress there has been. Amici have seen a sharp rise in the number of applications filed by minority students during the past few decades. At the same time, the overall credentials of minority applicants – including the raw numbers on which others place so much emphasis – have increased as well. This is so, in fact, both on an absolute basis and in comparison with other applicants.

Average SAT test scores for minority students rose roughly 130 points at a group of liberal arts colleges studied in 1976 and 1995, and approximately 150 points at a group of research universities.[18] Test scores for non-minority students rose as well, but by much smaller increments (about 30 points at the liberal arts colleges and 70 points at the research universities). If these trends continue, the interest in a racially diverse student body might gradually become decoupled from policies that give favorable consideration to minority race and ethnicity. But hoping that day will come sooner rather than later cannot be translated into a constitutional imperative that the nation's universities act as though that day has already arrived.

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[18] William G. Bowen & Sarah A. Levin, RECLAIMING THE GAME (forthcoming).

CONCLUSION

This Court should affirm the judgments of the court of appeals in No. 02-241 and of the district court in No. 02-516.

Respectfully submitted.

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IN THE

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BARBARA GRUTTER,
Petitioner,
v.
LEE BOLLINGER, *et al.*,
Respondents.

JENNIFER GRATZ AND PATRICK HAMACHER,
Petitioners,
v.
LEE BOLLINGER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION, *ET AL.*, IN SUPPORT OF RESPONDENTS

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CASES — Page

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 3, 26
Ambach v. Norwick, 441 U.S.68 (1979) 6, 8
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 4, 27
Eisenberg v. Montgomery County Public Schools, 197 F.3d 123 (4th Cir. 1999) 5
Ho v. San Francisco Unified School Dist., 147 F.3d 854 (9th Cir. 1998) 5
McCollum v. Board of Education, 333 U.S. 203 (1948) 15
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Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) 4
Tuttle v. Arlington County School Bd., 195 F.3d 698 (4th Cir. 1999) 5
Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998) 5
Wisconsin v. Yoder, 406 U.S. 205 (1972) 7, 8
Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) 4

BOOKS AND ARTICLES

Gordon W. Allport, *The Nature of Prejudice* (1954) 12
Yehuda Amir, *The Role of Intergroup Contact in Change of Prejudice and Ethnic Relations, in* TOWARDS THE ELIMINATION OF RACISM 240 (Phyllis A. Katz ed., 1976) 16, 17

TABLE OF AUTHORITIES—Continued

Page

Elliot Aronson & Diane Bridgeman, *Jigsaw Groups and the Desegregated Classroom: In Pursuit of Common Goals*, 5 Personality & Soc. Psychol. Bull. 438 (1979) 16
Carl Bankston III & Stephen J. Caldas, *Majority African American Schools and Social Injustice: The Influence of De Facto Segregation on Academic Achievement*, 75 Soc. Forces 535 (Dec. 1996) 25
Jomills Henry Braddock II & James M. McPartland, *Social-Psychological Processes that Perpetuate Racial Segregation*, 19 J. Black Studies 267 (1989) 18, 26
Marilyn B. Brewer & Norman Miller, *Contact and Cooperation: When Do They Work?, in* ELIMINATING RACISM: PROFILES IN CONTROVERSY 315 (Phyllis A. Katz & Delmas A. Taylor eds., 1988) 14, 16
Charles S. Bullock III, *Contact Theory and Racial Tolerance among High School Students* 86 School Rev. 187 (Feb. 1978) 14
Mitchell J. Chang, *Is it More Than About Getting Along? The Broader Educational Relevance of Reducing Students' Racial Biases*, 42 J. College Student Dev. 93 (Mar./Apr. 2001) 24
The Civil Rights Project-Harvard University, *The Impact of Racial and Ethnic Diversity on Educational Outcomes: Cambridge, MA School District* (Jan. 2002) 19, 21
Robert Crain & Jack Strauss, *School Desegregation and Black Occupational Attainments: Results from a Long-Term Experiment* (N.I.E. July 1985) 26

TABLE OF AUTHORITIES—Continued

Page

Robert L. Crain & Rita E. Mahard, *School Racial Composition and Black College Attendance and Achievement Test Performance*, 51 Soc. Educ. 81 (1978) 26

Marvin P. Dawkins & Jomills Henry Braddock II, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. Negro Educ. 394 (1994) 19

Susanne E. Dutton, Jefferson A. Singer & Ann Sloan Devlin, *Racial Identity of Children in Integrated, Predominantly White, and Black Schools*, 138 J. Soc. Psychol. 41 (1998) 13, 15

Christopher Ellison & Daniel A. Powers, *The Contact Hypothesis and Racial Attitudes Among Black Americans*, 75 Soc. Sci. Q. 385 (June 1994) 13, 14

Samuel L. Gaertner et al., *How does Cooperation Reduce Intergroup Bias?*, 59 J. Personality & Soc. Psychol. 692 (1990) 17

Samuel L. Gaertner et al., *The Contact Hypothesis: The Role of a Common Ingroup Identity on Reducing Intergroup Bias*, 25 Small Group Res. 224 (May 1994) 17

William J. Genova & Herbert J. Walberg, *A Practioners' Guide for Achieving Student Integration in City High Schools* (1980) 16

Carole G. Goldstein, Elizabeth J. Koopman & Harold H. Goldstein, *Racial Attitudes in Young Children as a Function of Interracial Contact in the Public Schools*, 49 Am. Orthopsychiatric Ass'n 89 (Jan. 1979) 15

TABLE OF AUTHORITIES—Continued

Page

Bernadette Gray-Little & Robert A. Carels, *The Effect of Racial Dissonance on Academic Self-Esteem and Achievement in Elementary, Junior High, and High School Students*, 7 J. Res. on Adolescence 109 (1997) 25

Mary R. Jackman & Marie Crane, *"Some of my best friends are black . . .": Interracial Friendship and Whites' Racial Attitudes*, 50 Pub. Opinion Q. 459 (1986) 13, 14

David W. Johnson & Roger T. Johnson, *Effects of Cooperative, Competitive and Individualistic Learning Experiences on Cross-Ethnic Interaction and Friendships*, 118 J. Psychol. 47 (1982) 16

Sandra Koslin *et al.*, *Classroom Racial Balance and Students' Interracial Attitudes*, 45 Soc. Educ. 386 (Fall 1972) 15

Michal Kurlaender & John T. Yun, *Is Diversity a Compelling Educational Interest?*, *in* DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 111 (Gary Orfield ed., 2001) 19, 21

Rita E. Mahard & Robert L. Crain, *Research on Minority Achievement in Desegregated Schools*, *in* THE CONSEQUENCES OF SCHOOL DESEGREGATION 103 (Christine H. Rossell & Willis D. Hawley eds., 1983) 25

Patricia Marin, *The Education Possibilities of MultiRacial/MultiEthnic College Classrooms*, *in* DOES DIVERSITY MAKE A DIFFERENCE? THREE RESEARCH STUDIES ON DIVERSITY IN COLLEGE CLASSROOMS 74 (American Association of University Professors 2000) 24

TABLE OF AUTHORITIES—Continued

Page

Poppy Lauretta McLeod, Sharon Alisa Lobel & Taylor H. Cox, Jr., *Ethnic Diversity and Creativity in Small Groups*, 27 Small Group Res. 248 (May 1996)..... 20

Bert Meltzer, *The Influence of the Duration of Interracial Classroom Contact on the Development of Interpersonal Cognitive Skills* 133-34 (Doctoral Dissertation, Clark University) (Ann Arbor, Mich., University Microfilms 1969, No. 69-20, 406)..... 22

Frederick D. Patterson Research Institute of the United Negro College Fund, *The African-American Education Data Book, Volume II: Preschool through High School Education* (1997)..... 10

Frederick D. Patterson Research Institute of the United Negro College Fund, *The African-American Education Data Book, Volume III: The Transition from School to College and School to Work* (1997)..... 10

Thomas F. Pettigrew, *The Intergroup Contact Hypothesis Reconsidered in Contact and Conflict, in* INTERGROUP ENCOUNTERS 169 (Miles Hewstone & Rupert Brown eds., 1986).. 14

Janet Schofield, *Black and White In School: Trust, Tension, or Tolerance?* (1981)..... 15

Janet W. Schofield & H. Andrew Sagar, *Peer Interaction Patterns in an Integrated Middle School*, 40 Sociometry 130 (1977)..... 12

Richard R. Scott & James M. McPartland, *Desegregation as National Policy: Correlates of Racial Attitudes* 19 Am. Educ. Research J. 397 (Fall 1982)..... 14

TABLE OF AUTHORITIES—Continued

Page

Lee Sigelman et al., *Making Contact? Black-White Social Interaction in an Urban Setting*, 101 Am. J. Soc. 1306 (Mar. 1996)..... 18

Lee Sigelman & Susan Welch, *The Contact Hypothesis Revisited: Black-White Interaction and Positive Racial Attitudes*, 71 Soc. Forces 781 (Mar. 1993)..... 13

Robert E. Slavin, *Cooperative Learning: Applying Contact Theory in Desegregated Schools*, 41 J. Soc. Issues 45 (1985)..... 16, 17

Robert E. Slavin, *Effects of Biracial Learning Teams on Cross-Racial Friendships*, 71 J. Educ. Psychol. 381 (1979)..... 16

William T. Trent, *Outcomes of School Desegregation: Findings from Longitudinal Research*, 66 J. Negro Educ. 255 (1997)..... 18

Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 Rev. Educ. Res. 531 (Winter 1994)..... 18, 26

Connie T. Wolfe & Steven J. Spencer, *Stereotypes and Prejudice: Their Overt and Subtle Influence in the Classroom*, 40 Am. Behav. Scientist 176 (Nov./Dec. 1996)..... 11

Peter B. Wood & Nancy Sonleitner, *The Effect of Childhood Interracial Contact on Adult Antiblack Prejudice*, 20 Int'l J. Intercultural Rel. 1(1990)..... 18

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BRIEF *AMICUS CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION, *ET AL.*, IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*

This brief *amicus curiae* is submitted, with the consent of the parties,[1] on behalf of the National Education Association

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[1] Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief.

("NEA") and 31 of its affiliated state education associations,[2] People For the American Way Foundation ("People For"), and the American Federation of State, County, and Municipal Employees, AFL-CIO ("AFSCME").

NEA is a nationwide employee organization of more than 2.7 million members, the vast majority of whom are employed by public school districts, colleges, and universities. NEA operates through a network of affiliated organizations at the state and local levels, including the state education associations that have joined in this brief. Founded in 1857 "to promote the cause of popular education in the United States," NEA continues to pursue the objective—as articulated in its mission statement—of "fulfill[ing] the promise of a democratic society" by "promot[ing] the cause of quality public education." This is likewise a basic objective of the *amici* state education associations.

People For is a nonpartisan, education-oriented, citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our

[2] The state education associations that join in this brief are the California Teachers Association (including specifically the California Faculty Association), Colorado Education Association, Connecticut Education Association, Federal Education Association, Florida Education Association, Georgia Association of Educators, Hawaii State Teachers Association, Idaho Education Association, Illinois Education Association-NEA, Indiana State Teachers Association, Kansas NEA, Maine Education Association, Maryland State Teachers Association, Michigan Education Association, Education Minnesota, Missouri NEA, Nebraska State Education Association, New Jersey Education Association, NEA-New Mexico, NEA-New York, North Carolina Association of Educators, Ohio Education Association, Oregon Education Association, Pennsylvania State Education Association, The South Carolina Education Association, South Dakota Education Association, Texas State Teachers Association, Vermont-NEA, Washington Education Association, Wisconsin Education Association Council, and Wyoming Education Association.

nation's heritage of tolerance, pluralism and liberty, People For now has more than 600,000 members and supporters nationwide. People For continues to seek to combat discrimination and its effects and to promote quality public education, including classroom diversity, through educational programs and participation in important litigation such as these cases.

AFSCME is a nationwide labor organization of some 1.3 million members, who are working men and women employed throughout the United States, Puerto Rico, and Panama. AFSCME is the largest union of public service and health care workers in the country. AFSCME's membership includes approximately 250,000 members who work in education, more than 100,000 of whom are employed by colleges and universities (including some 1,800 members at the University of Michigan). AFSCME is dedicated to fulfilling the promise of American life, including providing "education, protection and family preservation for all its children."

INTRODUCTION

Amici believe that racial diversity in America's classrooms not only helps to overcome our nation's unfortunate legacy of slavery, segregation, and discrimination, but also—and more to the point in the present context—enables education to fulfill its mission of preparing students to function in an increasingly multiracial society. Toward this end, it is essential in our view that educational institutions be allowed some latitude in making decisions that affect the composition of their classrooms—including the right to consider race as a factor in order to achieve racial diversity.

This Court has made it clear that any such use of race is, under the Equal Protection Clause, subject to the test of "strict scrutiny." *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 222 (1995). That test is intended to "'smoke

out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality op.).

It is also clear that racial diversity in the composition of classrooms can be "a goal important enough" to warrant consideration of race in making decisions. Years ago this Court recognized that, "in order to prepare students to live in a pluralistic society," local education authorities could justifiably determine that the racial composition of each of their schools should reflect the racial composition of the community at large. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). With specific regard to colleges and universities, this Court more recently noted that "a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (opinion of O'Connor, J.).

Justice O'Connor relied for the latter assessment on the opinion of Justice Powell in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), a case involving the use of race in admissions to a university's medical school. Justice Powell explained that the school's interest in attaining a "diverse student body" was one of "paramount" importance for fulfilling the school's educational mission. *Id.* at 311, 313. Because "a great deal of learning occurs informally . . . through interactions among students" of different races, religions, sexes, backgrounds, experiences, and interests, *Id.* at 312 n.48, Justice Powell reasoned that the school had a substantial and compelling interest in "select[ing] those students who [in its judgment] will contribute the most to the 'robust exchange of ideas'" central to its educational mission. *Id.* at 312-13. He further noted that the school's interest in doing so also promoted the national interest by ensuring that

future "leaders [are] trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples." *Id.* at 313 (quotations omitted).

Justice Powell's observations in Bakke as to the value of racial diversity in higher education are not only rooted in common logic, but are in addition supported by a substantial body of empirical evidence. Much of that evidence has been made part of the record in these cases, and additional studies will be cited in the briefs of respondents and other supporting *amici*. Although the instant brief is devoted to a review of empirical research, it is not our intent to duplicate the presentations of others. We will rather focus on empirical evidence of a somewhat different nature.

Although the specific issue now before this Court is the permissibility of considering race in making student admissions decisions in higher education, federal courts of appeals have in a number of recent cases considered whether and under what circumstances race can be taken into account in making similar decisions in public elementary/secondary education. *See, e.g., Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998) (admissions to high school); *Tuttle v. Arlington County School Bd.*, 195 F.3d 698 (4th Cir. 1999) (admissions to kindergarten program); *Ho v. San Francisco Unified School Dist.*, 147 F.3d 854 (9th Cir. 1998) (school assignment and transfer decisions); *Eisenberg v. Montgomery County Public Schools*, 197 F.3d 123 (4th Cir. 1999) (applications to transfer among elementary schools).

What this Court has to say about the permissibility of using race as a factor in the cases now before it undoubtedly will affect the ability of public elementary/secondary schools to consider race in making student admissions and assignment decisions as well. Because of this broader ramification, we think it is important for this Court to be aware of the substantial body of empirical evidence indicating that racially diverse classrooms produce significant societal and

educational benefits in elementary/secondary education. It is the purpose of this brief to present some of that evidence—and to demonstrate that what Justice Powell observed with respect to the value of racially diverse classrooms in higher education is equally applicable, if not more so, at the elementary/secondary level.[3]

SUMMARY OF ARGUMENT

A. Ours is not a color-blind society, and race still matters. When it comes to public elementary/secondary education, racial classifications continue to carry great weight—dividing educational opportunities inequitably and distorting perceptions with stereotypes and prejudice. In this context, the mission of public elementary/secondary education—to instill in all children "the values on which our society rests," *Ambach v. Norwick*, 441 U.S.68, 76 (1979), and provide them with the skills and knowledge necessary to

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[3] As indicated in text, we focus in this brief on public elementary/secondary education, and even in that context only on the first prong of the strict scrutiny test—*i.e.*, the value of racially diverse classrooms—as opposed to the "narrow tailoring" prong. Nonetheless, we feel compelled to say a word in response to the reliance of certain of petitioners' supporting *amici*, including notably the United States, on so-called "percentage plans"—which guarantee admission to a fixed percentage of graduating seniors from each high school in the state—as evidence that allegedly race-neutral alternatives exist through which respondents could ensure racially diverse classrooms. Quite apart from the practical problem of how such programs could be applied by institutions—whether kindergartens or law schools—that do not draw their students from a particular universe of feeder schools, such percentage plans at the higher education level depend entirely on the existence of segregated high schools, which in turn is bottomed on continued residential segregation. Indeed, because of the incentives these plans are likely to create, they may well work to perpetuate the existence of segregation in the public schools. It goes without saying that institutions of higher education should not be required, in order to achieve racial diversity, to use means that rely on and perpetuate segregation in the elementary/secondary schools.

realize their full potential, *Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972)—cannot adequately be fulfilled without racially diverse classrooms. Accordingly, achieving such diversity unquestionably serves a compelling state interest.

B. The societal and educational benefits of racially diverse classrooms in public elementary/secondary education are well documented.

1. Classroom contact among students of different races reduces stereotypes and prejudice, and has been found to be more effective in promoting tolerance and cross-racial understanding than any other pedagogical method—including a multicultural curriculum.

2. Racially diverse classrooms offer enduring benefits to a multiracial, democratic society and its citizens. Students who learn to interact with students of other races in school are far more likely to function in integrated environments and promote cross-racial understanding in later life than are students who do not have such interactions.

3. Classroom interactions among students of different races—with different vantage points, skills, and values—is of great consequence not only to the students' development as citizens in a multiracial democratic society, but also to their intellectual development as individuals. The impact of encountering and dealing with racial diversity as part of their education is positively linked to growth in intellectual and academic skills of all students, not only in school but in subsequent years as well. With regard to racial minority students themselves, racially diverse classrooms produce tangible and lasting improvements in academic achievement.

ARGUMENT

RACIALLY DIVERSE CLASSROOMS PRODUCE SIGNIFICANT SOCIETAL AND EDUCATIONAL BENEFITS IN PUBLIC ELEMENTARY/ SECONDARY EDUCATION

As this Court repeatedly has recognized, public elementary/secondary education is designed to achieve two interrelated purposes of paramount importance in our society—instilling in all children "the values on which our society rests," *Ambach v. Norwick*, 441 U.S. 68, 76 (1979), and providing them with the skills and knowledge necessary to realize their full potential by "expand[ing] their knowledge, broaden[ing] their sensibilities, kindl[ing] their imagination, foster[ing] a spirit of free inquiry, and increas[ing] their human understanding and tolerance." *Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972). A substantial body of empirical evidence indicates that racially diverse classrooms contribute significantly to the achievement of both of these purposes: such classrooms teach children to judge others as individuals, rather than according to stereotypes and prejudices; and learning in a racially diverse setting furthers students' cognitive and intellectual development—thus providing an important educational benefit to all students, of every race. We present some of this evidence in Section B below. In order to provide a context in which to judge the importance of the benefits produced by racially diverse classrooms, however, we first show—in Section A—the extent to which educational opportunities continue to be inequitably apportioned by race.

A. The Inequitable Apportionment of Educational Opportunities by Race

We doubt that there is anyone connected with these cases—on either side—who does not share the goal of attaining a society in which, in the words of Martin Luther

King, Jr., our children "will not be judged by the color of their skin, but by the content of their character." Notwithstanding intimations to the contrary in the briefs of petitioners and some of their supporting *amici*, we still have a long way to go to realize Dr. King's dream. Racial classifications continue to carry great weight in our country, dividing educational opportunities inequitably and distorting perceptions with stereotypes and prejudice.

A comparison of the educational opportunities available to black and white college-bound high school students during the mid-1990's—the most recent years for which comprehensive data are available, and years in which petitioners Jennifer Gratz and Patrick Hamacher were in high school—illustrates the point. Black college-bound high school students who graduated in 1996 received significantly less academic instruction then white college-bound high school students over the course of their high school careers: only 39% of black college-bound students received instruction in 19 or more year-long academic courses, as compared to 58% of white college-bound students, and black students were significantly less likely, in the academic courses they did receive, to have been enrolled in honors-level courses. Black students also were significantly less likely than white students to attend a school that offered a gifted and talented program: in the 1993-94 school year 40% of predominantly black public schools offered no such program, as compared to 29.2% of predominantly white schools. Even in schools where gifted and talented programs were offered, blacks were less likely to be enrolled in those programs: in that same school year 8.3% of students in predominantly black schools were enrolled in such programs as compared to 9.5% of students in predominantly white schools. Black students also were much more likely than white students to have been taught by a substitute rather than a full-time certificated teacher for an extended period of time: predominantly black schools used such substitutes to fill

long-term staffing needs 31.2% of the time, as compared to predominantly white schools which used substitutes for that purpose only 5.5% of the time. And, blacks were significantly less likely than whites to attend a regular academic high school as opposed to a vocational/technical or alternative school: 17.5% of predominantly black schools in the 1993-94 school year were vocational/technical or alternative schools as compared to less than 5% of predominantly white schools.[4]

Moving beyond the pool of college-bound high school students, the picture of racial inequities only worsens. Black students were far more likely than white students to drop out of high school (in 1990, 78.7% of black students completed high school as compared to 90.5% of white students); far less likely to pursue any higher education (in 1994, 47.3% of black students who had been enrolled in eighth grade six years earlier had pursued no postsecondary education, whereas only 34% of white students fell into that category); and far less likely if they pursued higher education to enroll in a four-year Bachelor's degree program as opposed to a two-year Associate degree program or an occupational certification program (in 1994, only 23.7% of black students who had been enrolled in eighth grade six years earlier were enrolled in a Bachelor's degree program, as compared to 33.7% of white students in that category).[5]

Even black students who receive the same tangible educational opportunities as white students may, due to their race, still have educational experiences that are qualitatively

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[4] Frederick D. Patterson Research Institute of the United Negro College Fund (hereinafter UNCF), *The African-American Education Data Book, Volume II: Preschool through High School Education* 63, 69, 73, 82 (1997); UNCF, *The African-American Education Data Book, Volume III: The Transition from School to College and School to Work* 13 (1997).

[5] UNCF, *Volume III*, at 118.

different than those of white students. People—even children—have been found to react to individuals differently based on whether they perceive them to be black or white. For example, a 1995 study found that children, when asked to read a list of names and decide whether the named individuals were politicians or criminals, were more likely to decide that African-American sounding names were the names of criminals.[6] Similarly, a 1989 study found that children when confronted with an ambiguous pattern of behavior "were significantly more likely to interpret the ambiguous behavior as aggressive or hostile" when they were told that the behavior was exhibited by an African-American.[7]

In sum, ours is not a color-blind society, and race still matters. When it comes to public elementary/secondary education, minority and nonminority students of equal ability do not, in the aggregate, have equal opportunities. In light of this inescapable fact, the mission of public elementary/secondary education cannot be fulfilled without affirmative efforts to achieve racially diverse classrooms. Such racial diversity in the classroom, as we now show, contributes significantly to the fulfillment of the public schools' educational mission.[8]

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[6] Connie T. Wolfe & Steven J. Spencer, *Stereotypes and Prejudice: Their Overt and Subtle Influence in the Classroom*, 40 Am. Behav. Scientist 176, 178 (Nov./Dec. 1996).

[7] *Id.* The research discussed in text—which focuses on the educational opportunities and experiences of black, as opposed to white, students—is illustrative only. Although the research is more extensive with regard to black students, there is ample evidence to indicate that students from other racial minority groups experience similar problems.

[8] Our use of the term "racially diverse classrooms"—as opposed to such alternative terms as racially diverse student bodies or racially integrated schools—is not without purpose. At the elementary/secondary school level, merely placing minority and nonminority students in the same school does not in itself necessarily create the conditions for

B. The Societal and Educational Benefits of Racially Diverse Classrooms

1. The theory that interracial contact reduces racial stereotypes and prejudice was first articulated by Gordon W. Allport in his seminal work, *The Nature of Prejudice*. Allport posited that racial isolation breeds stereotypes and prejudice, and that "equal status contact between majority and minority groups in the pursuit of common goals" is a critical ingredient in improving relations between members of those groups, especially if such contact "is of a sort that leads to the perception of common interests and common humanity between the members of the two groups."[9]

Subsequent empirical research has repeatedly and consistently confirmed the common-sense understanding that interracial contact can combat stereotypes and prejudice, and

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beneficial interactions among students of different races. Integrated schools often are resegregated, within classrooms due to tracking or ability grouping, and outside classrooms due to students' own choices. A study of voluntary student interactions in a prestigious middle school illustrates what may occur. In the school, no tracking was employed in the seventh grade, and classes were racially mixed. In the eighth grade, however, tracking based on standardized test scores was used, resulting in one group of classes composed of approximately 80% white students and another group of classes composed predominantly of black students. Voluntary peer interactions were studied by observing where students chose to sit in the school cafeteria. Over a five-month period, the number of seventh-grade students who sat next to, or across from, students of another race tripled. Over that same period of time, the number of eighth-grade students who sat next to, or across from, students of another race declined. The different racial preferences of seventh-grade and eighth-grade students illustrates how even integrated elementary/secondary schools can—in the absence of racially diverse classrooms—reinforce rather than lessen racial divisions. Janet W. Schofield & H. Andrew Sagar, *Peer Interaction Patterns in an Integrated Middle School*, 40 Sociometry 130, 135-37 (1977). *See also infra* note 13.

[9] Gordon W. Allport, *The Nature of Prejudice* 281 (1954).

make individuals more comfortable relating to members of other racial groups.[10] This research makes plain, however, that the conditions of contact are critical to its impact. In the first place, contact that occurs during key periods of personal development—for example, in a student's formative years—and that frequently recurs, is far more effective at promoting tolerance and cross-racial understanding than intermittent contact among persons whose social beliefs and identities are fully formed.[11]

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[10] *See* Christopher Ellison & Daniel A. Powers, *The Contact Hypothesis and Racial Attitudes Among Black Americans*, 75 Soc. Sci. Q. 385, 386, 395 (June 1994) (reviewing "considerable evidence [amassed over past four decades] that contact has salutary effects" and reporting, based on survey of 2,107 adults that blacks with close white friends had much "more favorable views of whites and race relations than those who lack such friends") (citing studies); Lee Sigelman & Susan Welch, *The Contact Hypothesis Revisited: Black-White Interaction and Positive Racial Attitudes*, 71 Soc. Forces 781, 788, 790 (Mar. 1993) (reporting, based on survey of 1,546 adults, that blacks with at least one white friend believed whites to be less hostile than blacks with no white friends and that whites "who live in less racially integrated areas also perceive blacks as somewhat more hostile"); Mary R. Jackman & Marie Crane, *'Some of my best friends are black . . .': Interracial Friendship and Whites' Racial Attitudes*, 50 Pub. Opinion Q. 459, 470 (1986) (reporting that "[t]he tendency [among whites] to prefer whites over blacks in basic feelings of warmth and closeness and in personal social predispositions in the workplace and neighborhood does decline quite markedly, . . . among whites who have both friends and acquaintances who are black").

[11] Such crucial stages of development include not only the college years (of those individuals who advance to that educational level) but, more broadly, children's very earliest educational experiences. Because "[t]he early school years are crucial for the formation of the child's own racial identity as well as an understanding of prejudice and fairness," Susanne E. Dutton, Jefferson A. Singer & Ann Sloan Devlin, *Racial Identity of Children in Integrated, Predominantly White, and Black Schools*, 138 J. of Soc. Psychol. 41, 42 (1998), interracial contact in early education has been linked to increased racial tolerance and increased interactions with individuals of other races over the course of one's

So too, contact with a number of different people of another race is more effective in breaking down racist attitudes than contact with just a few individuals of another race, because it forces people to "decategorize" those with whom they are dealing and to treat them as individuals rather than simply as members of a particular racial group.[12] This finding highlights the importance of respondents' recognition that, in the educational context, meaningful racial diversity requires a "critical mass" of minority students if it is to attain its goals.

Finally, contact must be among individuals of equal status, lest contact serve simply to reinforce rather than reduce racist attitudes and prejudices.[13]

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lifetime. *See* Richard R. Scott & James M. McPartland, *Desegregation as National Policy: Correlates of Racial Attitudes*, 19 Am. Educ. Res. J. 397, 399 (Fall 1982). *See also* Ellison & Powers, *supra*, at 392.

[12] Marilynn B. Brewer & Norman Miller, *Contact and Cooperation: When Do They Work?*, *in* ELIMINATING RACISM: PROFILES IN CONTROVERSY 315, 318-20 (Phyllis A. Katz & Dalmas A. Taylor eds., 1988) (explaining that process of decategorization works when frequent interactions with individuals of another group eliminate the "meaning and utility" of treating those individuals primarily as members of another group). *See also* Thomas F. Pettigrew, *The Intergroup Contact Hypothesis Reconsidered in Contact and Conflict*, *in* INTERGROUP ENCOUNTERS 169 (Miles Hewstone & Rupert Brown eds., 1986) (discussing benefits of repeated cross-racial interactions to breaking down stereotypes); Jackman & Crane, *supra*, at 468-71 (finding that whites who had both black acquaintances and friends displayed markedly less racist attitudes than whites with only a single black acquaintance or friend).

[13] Thus, for example, the mere fact that a school is integrated, standing alone, does not ensure improved cross-racial relations among students. Rather, the nature and number of interracial interactions in which students engage are the determinative factors. *See, e.g.*, Charles S. Bullock III, *Contact Theory and Racial Tolerance among High School Students*, 86 School Rev. 187, 201, 206, 210 (Feb. 1978) (reporting, based on survey of 5,800 southern high school students, that white students' tolerance of black students increased with their number of black friends, number of

Given these findings, it is not surprising that interracial cooperative contact among students of different races in our public schools—our "most powerful agency for promoting cohesion among a heterogeneous democratic people," *McCollum v. Board of Education*, 333 U.S. 203, 216 (1948)—has repeatedly been linked with increased levels of tolerance for children of other races,[14] and increased likelihood, "approach[ing] . . . that [which] would have been anticipated in a truly color-blind society," that children of

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contacts with black students in school, and number of contacts with black students outside of school); Janet Schofield, *Black and White In School: Trust, Tension, or Tolerance?* 157, 176-81 (1981) (reporting that desegregation alone generated "a definite, but relatively modest, improvement in relations between black and white students" but that cooperative activities among black and white students generated more significant improvements). *Cf. supra* note 8.

[14] For example, a 1998 study reports that white fourth graders in a predominantly white school were less likely than white fourth graders in integrated schools to choose a picture of a black child as someone with whom they wanted to be friends, and were more likely than the white students in the integrated schools to choose the picture of the black child as representing the child—among an array of pictures of children—that they disliked most. Dutton, *supra*, at 48. A similar racial aversion was found among black fourth graders in a predominantly black school, who more often picked the picture of the white child as the child they disliked most than did black fourth graders in integrated schools. *Id.* *See also* Sandra Koslin *et al.*, *Classroom Racial Balance and Students' Interracial Attitudes*, 45 Soc. Educ. 386, 405 (Fall 1972) (reporting a "clear[] relat[ion]" between classroom racial balance and the racial attitudes of third graders as evidenced "by lower levels of racial tension and less racial polarization" in the racially balanced classrooms than the unbalanced classrooms); Carole G. Goldstein, Elizabeth J. Koopman & Harold H. Goldstein, *Racial Attitudes in Young Children as a Function of Interracial Contact in the Public Schools*, 49 Am. Orthopsychiatric Ass'n 89, 94 (Jan. 1979) (reporting that "[w]hite children in interracial classrooms displayed a significant shift toward increased acceptance of blacks").

different races will become and remain friends.[15] Such one-on-one contact has been found to be more effective in promoting racial tolerance and cross-race interaction than any other pedagogical method—including a multicultural curriculum.[16] Moreover such contact has been linked to the

[15] Robert E. Slavin, *Effects of Biracial Learning Teams on Cross-Racial Friendships*, 71 J. Educ. Psychol. 381, 386 (1979). *See also* Brewer, *supra*, at 320 (reviewing "extensive literature documenting the positive effects of cooperative learning on improved interethnic acceptance within desegregated classrooms"); Robert E. Slavin, *Cooperative Learning: Applying Contact Theory in Desegregated Schools*, 41 J. Soc. Issues 45, 53, 59 (1985) (hereinafter Slavin II) (concluding, based on review of nineteen studies, "that when students work in ethnically mixed cooperative learning groups, they gain in cross-ethnic friendships"); David W. Johnson & Roger T. Johnson, *Effects of Cooperative, Competitive and Individualistic Learning Experiences on Cross-Ethnic Interaction and Friendships*, 118 J. Psychol. 47, 54 (1982) (reporting, based on five-month study of 4th graders, that cooperative learning in racially diverse classrooms "result[ed] in greater cross-ethnic liking that lasts for months" and resulted "in more frequent spontaneous cross-ethnic interaction" during free time); Elliot Aronson & Diane Bridgeman, *Jigsaw Groups and the Desegregated Classroom: In Pursuit of Common Goals*, 5 Personality & Soc. Psychol. Bull. 438, 441 (1979) (reporting that cooperative learning in racially diverse classrooms resulted in "significant increases in [the participating children's] liking for their groupmates both within and across ethnic boundaries").

[16] *See* William J. Genova & Herbert J. Walberg, *A Practioners' Guide for Achieving Student Integration in City High Schools* 30, 32 (1980) (finding, based on survey of 1,484 high school juniors in eighteen different schools, that "opportunities . . . to get to know students from other racial and ethnic groups" were more strongly correlated to students' willingness to interact with individuals of other races than the students' exposure to a multicultural curriculum); Yehuda Amir, *The Role of Intergroup Contact in Change of Prejudice and Ethnic Relations*, *in* TOWARDS THE ELIMINATION OF RACISM 240, 260, 266, 281 (Phyllis A. Katz ed., 1976) (reporting that direct interpersonal contact with blacks was more effective in changing white ethnic attitudes than participating in an educational program designed to raise awareness of black issues, and that a multicultural curriculum, standing alone, did little to improve the attitude of white students toward blacks).

formation of "close, reciprocated [interracial] friendship choices, the kind of friendships that should be [the] most difficult to change,"[17] and which social scientists have long viewed "as one of most potent agents for ethnic change."[18]

As the foregoing review of empirical research suggests, cooperative interracial contact reduces racial stereotypes and prejudice by teaching students that individuals hold a multitude of different viewpoints, experiences and attitudes, which cannot be meaningfully captured by reducing individuals to racial categories. By providing students the opportunity to individualize others with whom they interact, schools also provide students with the opportunity to identify the concerns they share in common with students of other races.

In the end, this process—far from resulting in the racial balkanization that petitioners and their supporting *amici* evoke—leads to precisely the opposite result. As one researcher explained, cooperative interaction between different groups "induces members [of different groups] to conceive of themselves as one (superordinate) group rather than as two separate groups, thereby transforming their categorized representations from *us* and *them* to a more inclusive *we*."[19]

2. These consequences of classroom diversity offer enduring benefits to a multiethnic, democratic society and its

[17] Slavin II, *supra*, at 55, 59.

[18] Amir, *supra*, at 272.

[19] Samuel L. Gaertner et al., *How does Cooperation Reduce Intergroup Bias?*, 59 J. Personality & Soc. Psychol. 692, 693 (1990). *See also* Samuel L. Gaertner et al., *The Contact Hypothesis: The Role of a Common Ingroup Identity on Reducing Intergroup Bias*, 25 Small Group Res. 224, 242 (May 1994) (reporting that study of students' interracial interactions "support[ed] the idea that [Allport's] Conditions of Contact reduce bias *in part* because they transform students' cognitive representations from 'us' and 'them' to a more inclusive 'we'").

citizens. Students who learn to interact with individuals of other races in elementary/secondary school are far "more likely to function in desegregated environments in later life. As adults, they more frequently live[] in desegregated neighborhoods, ha[ve] children who attend[] desegregated schools, and ha[ve] close friends of the other race[s] than did adults . . . who had attended segregated schools."[20] They are also more likely as adults to interact with individuals of other races than are students educated in racially homogeneous schools.[21]

Two recent studies of high school students in Louisville, Kentucky, and Cambridge, Massachusetts support these conclusions. These studies demonstrate that racially diverse schools and classrooms produce students who have very high levels of comfort in dealing and working with individuals of

[20] Jomills Henry Braddock II & James M. McPartland, *Social-Psychological Processes that Perpetuate Racial Segregation*, 19 J. Black Studies 267, 269 (1989) (discussing results of desegregation at the elementary and secondary school level based on national survey of 12,686 individuals). *See also* Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 Rev. Educ. Res. 531, 552 (Winter 1994) (concluding based on extensive review of the social science literature that "desegregated black [elementary and secondary school] students are more likely to have desegregated social and professional networks in later life"); William T. Trent, *Outcomes of School Desegregation: Findings from Longitudinal Research*, 66 J. Negro Educ. 255, 256 (1997) (finding that increased school racial diversity "has a strong, statistically significant, and positive effect on the likelihood that Blacks will have White coworkers and that Whites will have Black coworkers").

[21] *See, e.g.*, Lee Sigelman et al., *Making Contact? Black-White Social Interaction in an Urban Setting*, 101 Am. J. Soc. 1306, 1322 (Mar. 1996); Peter B. Wood & Nancy Sonleitner, *The Effect of Childhood Interracial Contact on Adult Antiblack Prejudice*, 20 Int'l J. Intercultural Rel. 1 (1990). *See also supra* note 20.

other races in later life—which they attribute in large part to their school experiences.[22]

These conclusions about the long-term benefits of racially diverse classrooms in public elementary/secondary schools are confirmed by the expert report of Professor Patricia Gurin that was submitted to—and unrebutted in—the trial court in these cases. Gurin found that "[w]hite students who attended colleges with 25% or more minority enrollment . . . were much more likely [than white students who attended colleges with very low minority enrollment] to have diverse friendships after leaving college and to live in diverse neighborhoods and work in settings where coworkers were diverse," and that the same general pattern held for black

[22] *See* The Civil Rights Project-Harvard University, *The Impact of Racial and Ethnic Diversity on Educational Outcomes: Cambridge, MA School District* 4, 6, 7 (Jan. 2002) (hereinafter *MA Survey*)(reporting, based on survey of 379 high school seniors in racially diverse school, that 90% of black students and 99% of white students said they were "comfortable" or "very comfortable" working with students of other races, that 94% of both black and white students felt prepared to work with individuals of other races after high school, and that 73% of black students and 82% of white students believed their school experiences had "helped a lot" or "somewhat" in teaching them to work with individuals of other races); Michal Kurlaender & John T. Yun, *Is Diversity a Compelling Educational Interest?*, *in* DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 111, 124-25, 130 (Gary Orfield ed., 2001) (hereinafter *KY Survey*) (reporting, based on survey of 1,164 high school juniors in Louisville, Kentucky, that 94.9% of black students and 92.6% of white students reported being "comfortable" or "very comfortable working with students of other races and that over 80% of both black and white students believed their school experience had helped them "a lot" or "somewhat" in working effectively with individuals of other races both in school and in the future). *See also* Marvin P. Dawkins & Jomills Henry Braddock II, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. Negro Educ. 394, 403 (1994).

students based on the extent of their informal interactions in college with students of other races.[23]

As the foregoing studies explain, racially diverse classrooms produce these long-range benefits because they break the cycle of segregation in neighborhoods, schools, social networks and occupations. Equally to the point, they demonstrate that by closing the door on racial diversity in the schools, we open the door to further racial prejudice and discrimination by perpetuating the racial isolation that breeds such prejudice and discrimination.

3. Teaching elementary/secondary school students to individualize the persons with whom they are dealing and identify common ground is of great consequence not only to the students' development as citizens in our democratic society, but also to their intellectual development as individuals.

(a) Social scientists have reported that heterogeneous groups—including groups that differ only with respect to the race of the participants—are better at creative problem-solving than homogeneous groups, due to the benefits of interactions between individuals with different vantage points, skills, or values.[24] Reflecting that reality,

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[23] Expert Report of Patricia Gurin submitted in *Gratz v. Bollinger*, No. 97-75321 (E.D. Mich.), and *Grutter v. Bollinger*, No. 97-75928 (E.D. Mich.) (hereinafter Gurin Report), *Empirical Results from the Analyses Conducted for this Litigation* (available at http://www.umich.edu/~urel/admissions/legal/ expert/empir.html at 2, 7-8) (hereinafter *Empirical Results*) (describing findings based on three separate surveys of college students, a national survey of 9,316 students at 184 different four year colleges and two separate surveys of University of Michigan undergraduates).

[24] *See* Poppy Lauretta McLeod, Sharon Alisa Lobel & Taylor H. Cox, Jr., *Ethnic Diversity and Creativity in Small Groups*, 27 Small Group Res. 248, 250 (May 1996) (summarizing "consistent empirical support" for the conclusion that heterogeneous groups—including groups that are diverse

high school students who are asked whether or not racial and ethnic diversity has enhanced their educational experience respond in the affirmative in overwhelming numbers.[25] Indeed, some even contend that greater classroom diversity would further improve the educational process.[26]

Other research provides further evidence of the cognitive benefits of interracial interactions in the educational context. For example, in one study, 250 high school students were asked to view a short film showing two boys (one black and one white) engaged in various activities—some positive, some negative and some ambiguous—both together and apart. The students were asked to describe what the boys had done in the film and predict what each would do in various

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only as to race or gender—generate more creative and feasible solutions to problems than do homogeneous groups).

[25] Recent surveys of public high school students in Louisville, Kentucky and Cambridge, Massachusetts, found that over 80% of students believed that their experiences in racially and ethnically diverse high schools "ha[d] helped them to work more effectively with and to get along with members of other races and ethnic groups." *KY Survey, supra*, at 132; *MA Survey, supra,* at 7. Students also gave strong responses to open-ended questions regarding the value of racial and ethnic diversity in the school, affirming once more the value to them of attending a racially and ethnically diverse school. *See MA Survey*, at 6 (student reporting that he had "learned a lot about how to deal with people who are different, respect them and be interested in their culture and heritage and learn from them. Living and working with people from different race and ethnic group[s] has become ordinary to me—it is not a big deal, and I think this will help me look beyond our differences and work and learn with them, throughout my life.").

[26] One white high school student voiced his view that "the AP classes would be much better with a more diverse group of students." *MA Survey, supra*, at 10. A black student made a similar point, voicing his discomfort as the only black student in his AP history class because "[w]hen we have discussions about the black community, I get offended and intimidated." *Id.*

specified situations. White students who had had the opportunity for more interracial classroom contact

> (1) described [the boys] in ways that were more differentiated, more integrated, and more multivalent; (2) made prediction of the future behavior of [the boys] that were less absolute; (3) inferred the presence of attributes in [the boys] with less certainty; and (4) were less likely to perceive [the black boy] as submissive and [the white boy] as domin[a]nt.[27]

The white students' greater ability to describe the film participants in meaningful, individualized ways applied not only to their description of the black boy but to their description of the white boy as well, "suggest[ing] that interracial contact had a facilitating effect on the development of interpersonal cognitive skills in general."[28]

Professor Gurin's study of college students once again buttresses the conclusions reached with regard to elementary/secondary education. As Professor Gurin posits, students engage more actively in the intellectual process when confronted with new situations with which they have no experience and for which, by definition, they have no set "script."[29] Gurin's report establishes that many University of Michigan students face just that situation when they arrive at college without any significant experience in dealing with individuals of other races.[30] The impact of encountering and

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[27] Bert Meltzer, *The Influence of the Duration of Interracial Classroom Contact on the Development of Interpersonal Cognitive Skills* 133-34 (Doctoral Dissertation, Clark University) (Ann Arbor, Mich., University Microfilms 1969, No. 69-20, 406).

[28] *Id.* at 133.

[29] Gurin Report, *Summary and Conclusions* (available at http://www.umich.edu/~urel/admissions/legal/expert/summ.html at 1).

[30] Gurin Report, *Appendix E* (available at http://www.umich.edu/~urel/admissions/legal/expert/gurinape.html at 2) (reporting that 83% of University of Michigan's white students graduated from predominantly white high-schools and that 40% of University of Michigan's black students graduated from predominantly black high-schools).

dealing with racial diversity as part of their higher education is positively linked to improved cognitive outcomes for these students—not just in college but subsequently. Specifically, Gurin reports that "[s]tudents who had experienced the most diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes . . . and growth in intellectual and academic skills," not only in school but for several years thereafter.[31]

It is important to note that Gurin's measures of active thinking processes and skills were broadly based, reflecting general educational benefits from interracial interaction—rather than merely benefits specific to the ability to discuss racial issues. Thus, for example, Gurin considered whether students' assessments of their progress over the course of college in developing core intellectual skills, such as the ability to think critically and engage in analytical problem-solving, were linked to the extent to which they had engaged in interracial interactions at school. Based on extensive data, Gurin concluded that those two factors were positively linked for white students.[32] Gurin also found that the extent to which white students engaged in informal interracial interactions in school was positively linked to their future intellectual development, as evidenced by the fact that white students who participated in relatively more such interactions

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[31] Gurin Report, *Empirical Results* at 3-4. Gurin's conclusion on this point is based on the three separate surveys described *supra* note 23.

[32] *See* Gurin Report, *Tables C1 & M1* (available at http://www.umich.edu/~urel/admissions/legal/expert/tablec1.html & tablem1.html). Gurin found similar, albeit more modest, linkages for black students as well. *See* Gurin Report, *Tables C2 & M2* (available at http://www.umich.edu/~urel/admissions/ legal/ expert/tablec2.html & tablem2.html).

placed a higher value on critical thinking and problem-solving skills nine years after college then did students who participated in fewer such interactions.[33]

(b) Further support for the proposition that integration itself yields educational benefits is found in the voluminous social science literature analyzing the impact of school desegregation on student performance. Although the results of studies in this area have been mixed, once one accounts for methodological differences a broad consensus emerges that school desegregation has resulted in tangible and lasting improvements in black student academic achievement. As one of the definitive reviews of the literature concludes, desegregation has been positively linked to increases in black student achievement levels, generating gains on average of .3 of a grade year in student performance at the elementary and secondary school level and gains of on average .57 of a grade

[33] *See* Gurin Report, *supra*, *Table C1*. Other studies at the higher education level are in accord with Gurin's findings. *See* Patricia Marin, *The Education Possibilities of MultiRacial/MultiEthnic College Classrooms, in* DOES DIVERSITY MAKE A DIFFERENCE? THREE RESEARCH STUDIES ON DIVERSITY IN COLLEGE CLASSROOMS 74 (American Association of University Professors 2000) (reporting, based on study of multiracial classroom interactions at University of Maryland, the assessment by students and faculty alike that classroom racial diversity has "a positive effect on student cognitive and personal development" by "challeng[ing] students' stereotypes, broaden[ing] their perspectives, and stimulat[ing] critical thinking"); Mitchell J. Chang, *Is it More Than About Getting Along? The Broader Educational Relevance of Reducing Students' Racial Biases*, 42 J. College Student Dev. 93, 101 (Mar./Apr. 2001) (reporting that students "with higher levels of racial biases against African Americans also reported that they were less likely to (a) change their opinion as a result of the knowledge or arguments presented by others, (b) develop their own values and ethical standards, [or] (c) learn to adapt to change" and that less prejudiced students were more likely to demonstrate all three cognitive skills).

year at the kindergarten level.[34] More recent studies also have demonstrated positive links between black student test achievement and school racial diversity.[35]

There is also a small but robust group of studies linking black student enrollment in predominantly white schools to significant gains in those students' long-term educational achievement. Black students enrolled in predominantly white high schools are more likely than black students enrolled in predominantly black schools to graduate from high school, more likely than those students to pursue higher education, and more likely when they do so to pursue higher-paying

[34] *See* Rita E. Mahard & Robert L. Crain, *Research on Minority Achievement in Desegregated Schools, in* THE CONSEQUENCES OF SCHOOL DESEGREGATION 103, 111, 113 (Christine H. Rossell & Willis D. Hawley eds., 1983) (reassessing results of 93 separate studies). Mahard and Crain also found that black student achievement fell off significantly in southern schools in which the student bodies were less than 19% minority, *id.* at 120, and fell off in Northern schools in which the student bodies were less than 9% minority, *id.*, providing yet further evidence of the educational benefit of enrolling a "critical mass" of minority students.

[35] *See* Carl Bankston III & Stephen J. Caldas, *Majority African American Schools and Social Injustice: The Influence of De Facto Segregation on Academic Achievement*, 75 Soc. Forces 535, 547-50 (Dec. 1996) (reporting that students who attended predominantly black schools performed less well than those who attended predominantly white schools on Louisiana graduation test and that this result held even after controlling for the socioeconomic status of the students' parents); Bernadette Gray-Little & Robert A. Carels, *The Effect of Racial Dissonance on Academic Self-Esteem and Achievement in Elementary, Junior High, and High School Students*, 7 J. Res. on Adolescence 109, 123, 125-26 (1997) (finding that black and white 11th graders had the highest achievement levels at racially balanced schools and that school racial composition exerted a more powerful influence on black student performance than it did on white student performance).

professions that traditionally have been dominated by whites.[36]

* * *

The sum of the matter is this: if we are to "hasten the day when 'we are just one race,'" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 275 (1995) (Ginsberg, J., dissenting), we must ensure that our children are educated in a racially diverse setting—using, if necessary, race-conscious measures as a means to that end.

Because racially diverse classrooms produce significant societal and educational benefits, educational institutions—

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[36] *See Wells & Crain, supra*, at 535 (summarizing results of 21 studies and concluding that school desegregation increases black students' occupational aspirations, *id.* at 540, likelihood of going to college (at least for students in the north), *id.* at 542, likelihood of majoring in nontraditional fields such as computer and information sciences, *id.* at 542-43, and likelihood of entering white collar and professional jobs upon graduation, *id.* at 552); Robert Crain & Jack Strauss, *School Desegregation and Black Occupational Attainments: Results from a Long-Term Experiment*, 24-30 (N.I.E. July 1985) (reporting that black students educated in racially diverse environment were more likely to pursue nontraditional careers); Braddock & McPartland, *supra*, at 271 (concluding that "[e]arlier desegregated schooling has a sizable direct effect on black attendance at desegregated two-year and four-year colleges in the South and on Black attendance at desegregated two-year colleges in the North"); Robert L. Crain & Rita E. Mahard, *School Racial Composition and Black College Attendance and Achievement Test Performance*, 51 Soc. Educ. 81, 98-99 (1978) (reporting, based on national study conducted for the Rand Corporation, that black students who graduated from predominantly white high schools in the North in 1972 were 7% more likely to go to college and more than twice as likely to stay in college than black students who did not; but also concluding that black students who graduated from predominantly white high schools in the South were less likely to attend college and less likely to stay in college than black students who did not and speculating that this was due to the extreme hostility such students encountered in newly desegregated Southern schools).

whether elementary/secondary or higher education—should be allowed to give some consideration to race in order to achieve such diversity. This is not an "illegitimate use[] of race," *Croson*, 488 U.S. at 493, but rather is fully justified under the standard of strict scrutiny by society's compelling interest in the education of all of its children.

CONCLUSION

The judgments of the court of appeals in No. 02-241 and the district court in No. 02-516, upholding respondents' limited consideration of race in making admissions decisions, should be affirmed.

Respectfully submitted,

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BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, *et al.*,

Respondents,

and

JENNIFER GRATZ and PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICI CURIAE* CITY OF PHILADELPHIA, PENNSYLVANIA, CITY OF CLEVELAND, OHIO AND THE NATIONAL CONFERENCE OF BLACK MAYORS, INC. IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

The City of Philadelphia, Pennsylvania ("Philadelphia"),[2] where our nation's first public school was established in 1698, is the birthplace of American education. Located in southeastern Pennsylvania, Philadelphia is a city of approximately 1.5 million people and has the seventh largest public school district in the nation, with a racially and ethnically diverse student enrollment of more than 200,000 students in its public school system. Philadelphia has taken the lead in sponsoring initiatives that attract, engage and retain students in Philadelphia and has established as its economic objective the creation of knowledge-based jobs. Each year, thousands of students graduate from Philadelphia schools seeking access to post-secondary education as a means to broaden their opportunities for meaningful careers. Philadelphia believes that participation in this case as *amicus curiae* is critical to ensuring access to higher education for all its public school students, recognizing that without these educational opportunities, Philadelphians will be ill-equipped to take advantage of the economic growth it envisions. Its political and business leaders of tomorrow will come from the ranks of those admitted to college and graduate school today.

The City of Cleveland, Ohio ("Cleveland") has the largest school district in Cuyahoga County, Ohio. Cleveland's

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[1] No counsel for any party authored any portion of this brief. No person or entity other than *amici*, members or their counsel contributed financially to the preparation and submission of this brief.

[2] Philadelphia's submission is made on behalf of its Administration and City Council, which expressed its support for such a filing in a resolution on January 28, 2003.

school system, the Cleveland Municipal School District, graduates thousands of students each year. Cleveland believes that participation in this case as *amicus curiae* is critical to ensuring access to higher education for its public school students, many of whom are African-American and Latino.

The National Conference of Black Mayors, Inc. ("NCBM"), is a nonprofit, nonpartisan 501(c)(3) service organization with a membership of approximately 500 mayors who represent over 20 million people throughout the nation. NCBM provides management and technical assistance to its members and articulates their concerns on national policy issues. NCBM as a whole, as well as its individual members, recognizes the relationship between gainful employment and higher education and thus believes that participation in this case as *amicus curiae* is critical to ensuring access to higher education for all public school students.

For decades, relying on their vast experience, colleges and universities have measured applicants from *amici*'s public schools as they do all applicants, not only by their standardized test scores, but also by countless other measures indicative of their potential to become leaders in tomorrow's society. In *amici*'s view, this type of admissions process has led to better and more inclusive leadership and greater competition in the business world.[3] *Amici* have

[3] There is a direct correlation between employment opportunities and access to post-secondary education. *See generally* NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS 2001, *Ch. 5: Outcomes of Education* (2001) (indicating that high school graduates

(Continued on following page)

a significant interest in ensuring that these public and private institutions retain the institutional autonomy to continue admitting their students.

SUMMARY OF ARGUMENT

Petitioners urge this Court to hold that "the consideration of race, even if considered along with other factors, constitutes the kind of intentional discrimination that requires strict scrutiny." Brief of Jennifer Gratz et al. [hereinafter "Gratz Br."] at 38. Their argument is misguided. First, this Court's precedents do not require that holding. The Fourteenth Amendment's Equal Protection Clause is not violated when applicants to a college or university are treated as individuals, and these institutions consider applicants' individual attributes in deciding whether to admit them.

Second, this proposed "no consideration of race" rule will either have a "chilling effect" on the college and university admissions process, or require federal courts to be the admissions office of last resort for nearly every college and university. This chilling effect, ironically, would result in minority students, who despite their test scores or grades are still qualified candidates for reasons *other* than their race, being denied admission *because* of their race so that colleges and universities can avoid constitutional scrutiny of their admissions processes. Alternatively, these institutions will follow court-imposed

without a college degree were twice as likely to be unemployed as college graduates).

admissions criteria based solely on standardized test scores and grades, to the disadvantage of *amici*'s students, a majority of whom are African-American and Latino. Otherwise, rejected white applicants will inundate federal courts with lawsuits, extending the jurisdiction of Article III judges far beyond anything this Court has ever deemed permissible. This Court has always recognized that the jurisdiction of Article III judges to interfere in the academic decision-making process is rather limited, even for the purpose of vindicating rights under the Fourteenth Amendment.

The perils of Petitioners' "no consideration of race" rule are best avoided by this Court's reaffirming the wise and well-reasoned opinion issued by Justice Powell in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). Justice Powell cogently set forth a guiding principle that respects both the institutional autonomy always afforded educational institutions and the principles set forth in this Court's long-standing Fourteenth Amendment jurisprudence. Petitioners' attempts to characterize Justice Powell's opinion as departing from this latter tradition are inaccurate. In fact, it is Petitioners who ask the Court to go down a path it has to date refused to take. This Court should reject that request, and instead reaffirm the guiding principles enunciated by Justice Powell.

ARGUMENT

I. THIS COURT SHOULD REJECT PETITIONERS' PROPOSED RULE.

Two fundamental principles have guided this Court in determining whether it is required to act under the Fourteenth Amendment. First, "federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation." *Milliken v. Bradley*, 433 U.S. 267, 282 (1977) (citing *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976)). Second, "[u]nlike Congress, which enjoys 'discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' federal courts have no comparable license and must always observe their limited judicial role." *Missouri v. Jenkins*, 515 U.S. 70, 113 (1995) (O'Connor, J., concurring) (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966))). Petitioners' proposed rule – that this Court hold that no consideration of race is ever permitted in college and university admissions, save as a remedy for past discrimination – violates both of these fundamental principles.

In Petitioners' scheme, the proposed "no consideration of race" rule would serve both as a basis for a court finding a Fourteenth Amendment violation and as a remedy for the very same violation. In their effort to achieve both, Petitioners fail at accomplishing either. The phrase "the consideration of race" is broad and the precise contours of a "no consideration of race" rule are largely undefined. It is clear, however, from how Petitioners have presented their case that the admission of minority applicants with standardized test scores and grade point averages lower

than those of rejected white students will guarantee litigation, regardless of whether a college or university otherwise considers the individual attributes of its applicants. Colleges and universities will have everything to lose and only a lawsuit to gain by admitting *amici*'s minority students, even if their race was never considered, if those students' standardized test scores or grade point averages are lower than *any* rejected white student. By effectively requiring colleges and universities to reject minority applicants they would ordinarily accept to avoid litigation, even though race was never considered, Petitioners' "no consideration of race" rule is overly broad and thus "exceeds appropriate limits." Moreover, Article III judges will become the final arbiters of who is qualified to receive an education at nearly every college and university in the nation – whether public or private – based on as-yet undetermined criteria. Enforcing this rule will require federal judges to go far beyond "their limited judicial role." For these reasons, this Court should reject Petitioners' "no consideration of race" rule.

A. Petitioners' Proposed Rule Would Inhibit Colleges and Universities from Treating *Amici*'s Students As Individuals.

Petitioners' proposed rule does not – indeed, cannot – offer any guidance to colleges and universities in how to avoid litigation, other than to rely solely on standardized test scores and grade point averages in the selection of their students. Colleges and universities, however, should not have to rely on those two criteria alone in order to

avoid litigation under Petitioners' proposed rule.[4] The resulting chilling effect in the admissions process is ample basis for this Court to reject that rule.

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. "The idea is a simple one: At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of racial, religious, sexual or national class." *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (citations and internal marks omitted). But nothing in the Equal Protection Clause forbids colleges and universities from evaluating all criteria it deems important to its educational mission and relevant about an individual applicant. This type of admissions process "treat[s] citizens as individuals."

Moreover, this Court has never held that any consideration of race necessarily constitutes a violation of the Equal Protection Clause. As the Court held in the context of voting:

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[4] The issue of litigation is relevant to both public and private colleges and universities. A private right of action for any acts of discrimination prohibited by the Fourteenth Amendment will exist under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, which bans any acts of discrimination practiced by educational institutions receiving federal funds. *See, e.g., United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992) ("Our cases make clear, and the parties do not disagree, that the reach of Title VI's protection extends no further than the Fourteenth Amendment.") (citations omitted).

> The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus. Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process. . . . The distinction between being aware of racial considerations and being motivated by them may be difficult to make.

Id. at 915-16 (citations omitted). As a result, in *Miller* this Court held that "[w]here [race-neutral districting principles] or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can 'defeat a claim that a district has been gerrymandered on racial lines.'" *Id.* at 916 (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)).

In contrast, Petitioners' proposed "no consideration of race" rule allows for no such flexibility. While Petitioners suggest that the "range of factors that a university may constitutionally consider in selecting its students . . . is virtually infinite," Gratz Br. at 37, and that "there is no limit to the viewpoints, perspectives, ideas, character traits, talents, and experiences that a university might consider in assembling its community," *id.*, their proposed rule operates under a far different assumption. Instead, they declare, "the consideration of race, even if considered along with *other* factors, constitutes the kind of intentional discrimination that requires strict scrutiny." *Id.* at 38 (emphasis added). Under Petitioners' formulation, there is no sensitivity to the "complex interplay of forces" involved in admitting students to colleges and universities. There is no "distinction between being aware of racial considerations and being motivated by them." Under Petitioners'

proposed rule, the mere consideration of race, even if that was not the rationale for an institution's admissions process, "requires strict scrutiny."[5]

Petitioners show no appreciation whatsoever for the impact of their proposed rule on the admissions process. By setting the standard for determining discrimination at a level so low that any consideration of race is banned, even if it is not the dominant factor, Petitioners undermine the ability of a university to defend its admissions decisions. As long as a disappointed applicant can allege some consideration of race somewhere in the admissions process of a college or university, the admissions process must be subject to strict scrutiny and cannot "defeat a claim," as this Court contemplated in *Miller*. How could an institution that favors face-to-face interviews, for instance, or otherwise receives information revealing an applicant's race, prove that race played no factor whatsoever in accepting an applicant with test scores or a GPA lower than any rejected white applicant's? Any allegation that race was considered somewhere in the process would condemn a university to go to trial. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (reversing a judgment as a matter of law because "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge") (citation and internal marks omitted). Similarly, so long as a jury can infer that an applicant's race somehow mattered to the university,

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[5] Significantly, an institution's "consideration of race" does not equate to a quota system, and does not mean that any particular student failed to gain admission because of race.

the allegedly aggrieved applicant stands a good chance of prevailing. In the end, colleges and universities will be vulnerable to endless litigation based on the whims of disappointed applicants, rather than their measured judgment and consideration of their own interests.

Having to operate an admissions program under such conditions will have a "chilling effect" on the entire process. In *University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182 (1990), this Court noted that there is just such a "chilling effect" on academic freedom where there is an effort "to control or direct the *content* of the speech engaged in by the university or those affiliated with it." 493 U.S. at 197. Petitioners concur with this proposition, citing it in support of their position, *see* Gratz Br. at 35, but apparently they are oblivious to its application to this case. Petitioners' proposed rule threatens "to control or direct the content of the speech engaged in by the university." Petitioners want to forbid colleges and universities from thinking about, talking about, or otherwise considering the race of any of its applicants or the ways in which race fits into their educational mission, no matter what form that consideration takes. The significant threat posed to academic freedom by Petitioners' proposed "no consideration of race" rule cannot be ignored.

Furthermore, this "chilling effect" will inevitably force colleges and universities to reject many of *amici*'s minority students, as these institutions try to avoid the very litigation that Petitioners' rule will spawn. *Amici*'s students will be caught in the crossfire between applicants with a penchant to sue and colleges and universities eager to minimize their exposure. In the past, these students, who may not fit Petitioners' notion of the proper academic profile, have been admitted by colleges and universities

who believed that they deserved admission for reasons having nothing to do with race, although a majority of *amici*'s students are African-American or Latino. If Petitioners' proposed rule is adopted, the spectre of litigation will result in colleges and universities denying them admission. For under Petitioners' scheme, applicants like Petitioners will be encouraged to bring lawsuits, even if the race of students such as *amici*'s was never considered.

Under Petitioners' proposed rule, colleges and universities can only ensure that they avoid litigation by adopting an admissions process based solely on standardized test scores and grade point averages. Colleges and universities, however, should not be required to "eliminat[e] a condition that does not violate the Constitution." *Milliken*, 433 U.S. at 282. Instead, Petitioners' proposed rule should be rejected for including within its purview activity both consistent with and protected by the Constitution.

B. Petitioners' Proposed Rule Would Disrupt the Delicate Balance Between Vindicating Fourteenth Amendment Rights and Interfering with the Educational Process.

This Court has always considered the Fourteenth Amendment interest in prohibiting racial discrimination with an eye to the limits of judicial competence, ever careful not to usurp the authority of educators. For example, throughout this Court's consideration of the issue of school desegregation, the Court has limited the scope, duration and reach of the Fourteenth Amendment, always stopping short of intruding into decisions about how students will best learn, the very heart of the educational process. Petitioners give no consideration to this issue at all. In fact, this Court *unanimously* ruled nearly twenty

years ago that it would not second-guess the academic decisions made by the University of Michigan. Tellingly, although Petitioners clearly want this Court to either overturn or modify this decision, there is not *one* reference to this decision in either of their briefs.

This Court's pragmatic approach in interpreting the Fourteenth Amendment reflects a profound understanding of the limits on the federal judiciary's ability to address education policy. As one member of this Court has stated:

> Unlike Congress, which enjoys discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, federal courts have no comparable license and must always observe their limited judicial role. Indeed, in the school desegregation context, federal courts are specifically admonished to take into account the interests of state and local authorities in managing their own affairs, in light of the *intrusion into the area of* education, where States historically have been sovereign, and to which States lay claim by right of history and expertise.

Jenkins, 515 U.S. at 113 (O'Connor, J., concurring) (citations and internal marks omitted) (emphasis added); *see also id.* at 133 (Thomas, J., concurring) ("Federal judges cannot make the fundamentally political decisions as to which priorities are to receive funds and staff, which educational goals are to be sought, and which values are to be taught."). In the context of higher education, these same principles apply as well as the principle of academic freedom.

Petitioners pay insufficient attention to the principle of academic freedom, perhaps hoping to gloss over its

significance in this case. *See generally* Brief of Barbara Grutter [hereinafter "Grutter Br."] (citing *no* academic freedom cases). However, this principle's relevance cannot be so easily avoided. In *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), a unanimous Court expressly rejected the notion that it – or any federal court – has the institutional expertise necessary to second-guess the complex decisions made by academics in deciding who is qualified to be a student:

> Considerations of profound importance counsel restrained judicial review of the substance of academic decisions. . . . Added to our concern for lack of standards is a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, a special concern of the First Amendment. If a federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies, far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions – decisions that require an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decision-making.

474 U.S. at 225-26 (citations and internal marks omitted). Nowhere in their briefs do Petitioners explain how this Court now can make "decisions that require an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative

decisionmaking," when this Court has unanimously held that it could not do so.[6]

There is no basis for delegating to Article III courts the difficult task of deciding who should be admitted to a college or university. Federal courts cannot effectively "evaluate the substance of the multitude of academic decisions that are made daily by faculty members" in the area of admissions, a dynamic that is different within each institution and involves numerous factors. As even Petitioners recognize, the "range of factors that a university may constitutionally consider in selecting its students . . . is virtually infinite," Gratz Br. at 37, and "there is no limit to the viewpoints, perspectives, ideas, character traits, talents, and experiences that a university might consider in assembling its community," *id.*

Nevertheless, Petitioners want this Court to "evaluate the substance" of college and university admissions policies and rule them invalid because they are "notoriously ill-defined," Grutter Br. at 31, "nebulous," *id.* at 16, "lacking in objective, ascertainable standards," *id.* at 17, and "with at least as many varied possibilities and standards of application as there are institutions to define it," *id.* at 19. Petitioners miss the point. Federal courts have not and do not make these kinds of determinations. These are quintessentially "academic decisions" to be made by educators, not courts. Nothing in this Court's rulings suggests otherwise.

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[6] In fact, in its most significant ruling on this issue since *Ewing*, this Court expressly stated: "Nothing we say today should be understood as a retreat from this principle of respect for *legitimate* academic decisionmaking." *Univ. of Pennsylvania*, 493 U.S. at 199.

II. THIS COURT SHOULD REAFFIRM JUSTICE POWELL's *BAKKE* OPINION.

There is no better constitutional calculus for determining how this Court should proceed than Justice Powell's opinion in *Bakke*. Justice Powell recognized that this Court's long-standing commitment to limit judicial intrusion into academic affairs cautioned against adopting a sweeping rule, such as the one Petitioners propose here. As Justice Powell rightly observed, this Court's role should be limited to ensuring that each applicant's qualifications are considered. The Equal Protection Clause of the Fourteenth Amendment requires nothing more. While Petitioners go to great lengths to disparage it, Justice Powell's opinion, both in theory and in practice, fully comports with this Court's most recent pronouncements.

Petitioners endeavor to paint Justice Powell's *Bakke* opinion as an aberration. In their view, this Court has already "rejected significant parts of Justice Powell's analysis." Gratz Br. at 37. In particular, they argue that even though Justice Powell unequivocally rejected the use of quotas or set-asides in university admissions, his refusal to find a "facial intent to discriminate" when admissions processes merely allow race to be considered as one factor among many runs afoul of decisions requiring strict scrutiny of *any* consideration of race. *See id.* at 38. Similarly, Petitioners characterize Justice Powell's presumption of good faith on the part of university administrators who allow race to be considered in admissions decisions as inconsistent with the "bedrock proposition" that all uses of race deserve strict scrutiny. *Id.* at 38-39 (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 223-24 (1995); *Croson*, 488 U.S. at 500). Petitioners' view of Justice Powell's reasoning in *Bakke* utterly misconstrues his

measured opinion as well as this Court's subsequent rulings.

From the outset of his opinion, Justice Powell adopted the very interpretation of the Fourteenth Amendment here urged by Petitioners: that the Amendment applies to all citizens, white or minority. *See Bakke*, 438 U.S. at 295 (Powell, J.) ("The clock of our liberties . . . cannot be turned back to 1868. It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others.") (citations omitted). Indeed, Justice Powell emphatically rejected the notion that this Court – or any court – could apply a "sliding scale" necessary for determining what groups were to be accorded varying levels of protection at a given time. *See id.* at 297. Instead, Justice Powell adhered to the "bedrock principle" that "it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a *particular* group." *Id.* at 299 (emphasis added).

It was in this context that Justice Powell adopted the distinction, so derided by Petitioners, between a set-aside program such as the one in operation at the University of California at Davis in *Bakke* and an admissions policy that considers race as but one of the many factors at play for any given applicant. For as Justice Powell recognized, considering race as a "plus" for minority applicants does not foreclose any white applicant from entry to a university, because all applicants would receive consideration in the process. "The applicant who loses out on the last available seat to another candidate receiving a 'plus' on

the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color. . . . " *Id.* at 318. Indeed, such could not be the case where, absent an explicit set-aside, *any* white student had been admitted. Instead, it was the fact that the rejected applicant's "combined qualifications . . . weighed fairly and competitively" did not warrant admission, "and he would have no basis to complain of unequal treatment under the Fourteenth Amendment." *Id.* In other words, where a university could show that it considers all applicants individually, without setting aside certain seats for minorities, and considers race as merely one factor among many for admission, *no one* member of any particular group can complain of any Fourteenth Amendment violation where any members of that group are admitted.

Again contrary to Petitioners' argument and as discussed above, this aspect of Justice Powell's opinion is not an aberration, but coheres with this Court's holdings in other contexts involving race. *See Miller*, 515 U.S. at 915-17 (refusing to apply strict scrutiny where race was not predominant factor in drawing district boundaries). In fact, in holding that "until a claimant makes a showing sufficient to support that allegation the *good faith* of a state legislature must be presumed," *id.* at 915 (emphasis added), the *Miller* Court relied on Justice Powell's opinion in *Bakke*, *see id.* (citing *Bakke*, 438 U.S. at 318-19 (Powell, J.)). As applied here, either *all* white applicants to the University of Michigan are able to compete for certain spots in a class, or they are not. But where multiple factors, objective and nonobjective, are at play in that decision and its outcome is contingent on an individual's

own circumstances, race cannot be a predominant factor, and strict scrutiny just simply does not apply.

Though Petitioners belittle his commitment to academic freedom, Justice Powell has struck a balance between equal protection, academic freedom, and judicial competence that Petitioners seek to obliterate. Yet, this Court has expressly rejected the notion that it – or any federal court – has the institutional expertise necessary to second-guess the complex decisions made by academics in determining the contours and composition of their academic communities. *See Ewing*, 474 U.S. at 225-26.

Finally, and again contrary to Petitioners' assertions, this Court has relied upon the reasoning contained in Justice Powell's opinion, even if it has not recognized it as a holding. In *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), the Court applied Justice Powell's analysis to uphold the agency's employment policy, which accounted for an applicant's sex as but one of many factors in the hiring decision:

> As the Agency Director testified, the sex of Joyce was but one of numerous factors he took into account in arriving at his decision. The Plan thus resembles the 'Harvard Plan' approvingly noted by Justice Powell in *Regents of the University of California v. Bakke*, 438 U.S. 265, 316-319 (1978), which considers race along with other criteria in determining admission to the college. As Justice Powell observed: "In such an admissions program, race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. *Id.* at 317. Similarly, the Agency Plan requires women to compete with all other qualified

> applicants. *No* persons are automatically excluded from consideration; *all* are able to have their qualifications weighed against those of other applicants.

480 U.S. at 638; *see also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) ("[A]lthough its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest.") (O'Connor, J., concurring in part and concurring in judgment). This repeated recognition, if not outright adoption, of Justice Powell's principles is a testament to their continuing relevance on this issue and to this case.

In the end, Justice Powell's opinion succeeds in providing guidance to colleges and universities as to how they can conduct admissions programs without fear of incurring a spate of annual race-based legal challenges to their admissions decisions, and without having to engage in a prophylactic refusal to consider qualified minority candidates with "objective" scores on the arguable margin of their applicant pools. By allowing schools to consider race as one factor among many, Justice Powell's *Bakke* rule thus ensures that schools can conduct their admissions procedures free from undue judicial interference, and that race does not predominate in those procedures. This Court's Fourteenth Amendment jurisprudence would be served well by reaffirming those principles and that opinion here.

CONCLUSION

The judgments of the Court of Appeals in the *Grutter* case and the District Court in the *Gratz* case should be affirmed.

Respectfully submitted,

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In The
Supreme Court of the United States

JENNIFER GRATZ and PATRICK HAMACHER,

Petitioners,

vs.

LEE BOLLINGER, JAMES J. DUDERSTADT, and the BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Respondents,

and

EBONY PATTERSON, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE BAY MILLS INDIAN COMMUNITY, GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, HANNAHVILLE INDIAN COMMUNITY, KEWEENAW BAY INDIAN COMMUNITY, LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, LITTLE RIVER BAND OF OTTAWA INDIANS, LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS OF MICHIGAN, NOTTAWASEPPI HURON BAND OF POTAWATOMI, ONEIDA TRIBE OF INDIANS OF WISCONSIN, SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, AND MICHIGAN INDIAN LEGAL SERVICES, AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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United States v. Mitchell, 463 U.S. 206 (1983) 17

United States v. Wheeler, 435 U.S. 313 (1978) 1, 17

FEDERAL TREATIES, STATUTES, REGULATIONS AND LEGISLATIVE MATERIALS

Treaty between the Wyandot, Seneca, Delaware, Shawanese, Potawatomees, Ottawas, and Chippeway Nations and the United States, Sept. 29, 1817, 7 Stat. 160 ..... 2, 3, 6-7

Treaty between the Ottawa, Chippewa, and Pottawatamie Nations and the United States, Aug. 29, 1821, 7 Stat. 218 10

Treaty between the Chippewa Tribe and the United States, Aug. 5, 1826, 7 Stat. 290 10

Treaty between the Pottawatamie Nations and the United States, Oct. 16, 1826, 7 Stat. 295 10

Treaty between the Chippewa, Menomonie, and Winebago Tribes and the United States, Aug. 11, 1827, 7 Stat. 303 10

Treaty between the Potowatomi Tribe and the United States, Sept. 20, 1828, 7 Stat. 317 10

Treaty between the Potowatomies and the United States, Oct. 27, 1832, 7 Stat. 399 10

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Treaty between the Chippewa, Ottawa, and Potawatomi Nations and the United States, Sept. 26, 1833, 7 Stat. 431 10-11

Treaty between the Ottawa and Chippewa Nations and the United States, March 28, 1836, 7 Stat. 491 10

Treaty between the Chippewa Nation and the United States, Jan. 14, 1837, 7 Stat. 528 10

Treaty between the Chippewa Nation and the United States, Oct. 4, 1842, 7 Stat. 591 10

Treaty between the Ottawa and Chippewa Nations and the United States, July 31, 1855, 11 Stat. 621 10

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43 Stat. 253 (codified as carried forward at 8 U.S.C. § 1401(b)) 15

48 Stat. 353 (1934) 15

Act of Feb. 14, 1873, ch. 138, § 1, 17 Stat. 437, 461 12

Act of March 3, 1819, ch. 851, § 2, 3 Stat. 516, 517 12

Indian Education Act of 1972, Pub. L. No. 92-318 14

The Impact Aid Law of 1950, Act of Sept. 30, 1950, ch. 1124, 64 Stat. 1100 14

The Johnson O'Malley Act of 1934, 48 Stat. 596, *codified as amended at* 25 U.S.C. §§ 452-458e 13

Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 67 Fed. Reg. 46,328 (July 12, 2002) 1, 18

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H.R. Rep. No. 151, 15th Cong., 1st Sess., Jan. 22, 1818 *in* II American State Papers: Indian Affairs 151 11

Exec. Order No. 13,096 (Aug. 6, 1998) 12

Special Subcommittee on Indian Education of the Senate Commission on Labor and Public Welfare, Indian Education: A National Tragedy – A National Challenge, S. Rep. No. 501, 91st Cong. Sess. XII (1969) 15

STATE CASES

Children of the Chippewa, Ottawa and Potawatomy Tribes v. The Regents of the University of Michigan, 305 N.W.2d 522 (Mich. Ct. App. 1981) 6, 9

OTHER STATE MATERIALS

Executive Directive 2001-2, Policy Statement on State-Tribal Affairs (Gov. John Engler, May 22, 2001) 18

Government-to-Government Accord between the State of Michigan and the Federally Recognized Indian Tribes in the State of Michigan (Gov. John Engler, Oct. 28, 2002) 18

MISCELLANEOUS

A University Between Two Centuries: The Proceedings of the 1937 Celebration of The University of Michigan (Wilfred B. Shaw ed., 1937) 7

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Catherine L. Horn & Stella M. Flores, Percent Plans in College Admissions: A Comparative Analysis of Three States Experiences, The Civil Rights Project, Harvard University (2003) 25

David H. DeJong, *Promises of the Past: A History of Indian Education in the United States* (1993).....13

Devon A. Mihesuah, *American Indians: Stereotypes & Realities* (1996).....20

Erica Frakenberg, Chungmei Lee & Gary Orfield, A Multiracial Society with Segregated Schools: Are We Losing the Dream, The Civil Rights Project, Harvard University (2003) 21

Felix S. Cohen, *Handbook of Federal Indian Law*, (Rennard Strickland et al. eds., 1982).....12, 13

First Person, First Peoples: Native American College Graduates Tell Their Life Stories (Andrew Garrod & Colleen Larimore eds., 1997).....8, 20

Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920* (1984) (discussing the boarding school movement) 13

Howard H. Peckham, *The Making of the University of Michigan 1817-1992* (Margaret L. Steneck & Nicholas H. Steneck eds., 1994).....3, 4, 6, 7

Judy Steeh, Plaque honors land gift from three Native American tribes, The Univ. Record Online, Nov. 18, 2002, at http://www.umich.edu/~urecord/0102/Nov18_02/16.shtml 8, 9

Martin J. Reinhardt, Master of Arts Thesis, Central Michigan University (1998).....14, 16

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Mary Christina Wood, "Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited," 1994 Utah L. Rev. 1471 12

NAACP Legal Defense and Educational Fund & Harvard University Center for Law and Education, An Even Chance, *reprinted in* 1971 Law & Soc. Order 245.....16

Vine Deloria, Jr., Legislative Analysis *of the Federal Role in Indian Education* (1974) (collecting treaties).....10

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INTEREST OF *AMICI*[1]

Amici Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Hannahville Indian Community, Keweenaw Bay Indian Community, Lac Vieux Desert Band of Lake Superior Chippewa Indians, Little River Band of Ottawa Indians, Little Traverse Bay Bands of Odawa Indians, Match-e-be-nash-she-wish Band of Potawatomi Indians of Michigan, Nottawaseppi Huron Band of Potawatomi, and Sault Ste. Marie Tribe of Chippewa Indians, are federally recognized Indian tribes located in the State of Michigan. *See* Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 67 Fed. Reg. 46,328 (July 12, 2002). *Amicus* Oneida Tribe of Indians is a federally recognized tribe located in the State of Wisconsin, and *Amicus* Michigan Indian Legal Services ("MILS") is a non-profit organization providing civil legal services to low-income Indians and tribes in Michigan to further self-sufficiency, overcome discrimination, and assist tribal governments. Except for MILS, *Amici* are "domestic dependent nations," possessing all "aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). As a result, they operate modern governments with complex legal, political and business interests on reservations within the State of Michigan.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *Amici* or their counsel, made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

The *Amici*'s interest in this case is substantial. In 1817, "believing they may wish some of their children hereafter educated," several of the *Amici* provided a land grant to the University of Michigan ("the University") in the Treaty of Fort Meigs. *See* Treaty between the Wyandot, Seneca, Delaware, Shawanese, Potawatomees, Ottawas, and Chippeway Nations and the United States, Sept. 29, 1817, art. 16, 7 Stat. 160, 166. This land grant formed a significant portion of the University's original endowment.

The tribal leaders who signed the Fort Meigs Treaty had the foresight to recognize that educating their children and future leaders was essential to coping with the increasingly complex problems confronting their tribes. Indeed, today the *Amici* recruit Native American[2] students at the University of Michigan to operate their tribal government and commercial businesses. If the University were forbidden from considering race[3] in its admissions decisions, the number of Native American students would decrease to token levels, and the purpose of the Treaty of Fort Meigs would be frustrated. Furthermore, if other colleges and universities were similarly prevented from considering race in admissions decisions, the *Amici* would be unable to fill important governmental positions with qualified candidates, therefore impeding the *Amici*'s

[2] The terms "Native American" and "Indian" are used interchangeably throughout this brief.

[3] As the University's policy is not based on tribal membership *per se*, the principles of *Morton v. Mancari*, 417 U.S. 535 (1974) are not squarely implicated in this case, and no party has raised or briefed those principles in this Court or in the courts below.

ability to exercise their sovereign authority and undermining the federal government's policy of self-determination for all Indian tribes.

Finally, in the past, debates about affirmative action have always focused on the impact on and the interests of Caucasians, African-Americans, and occasionally, Hispanics. Native American students and Indian tribal interests have remained virtually invisible. Although Native Americans may constitute the smallest minority group in the United States, they have very real and unique interests that are advanced by affirmative action. Accordingly, *Amici* add their collective voice in support of the University's admissions policy.

ARGUMENT

One of the University of Michigan's founding missions was the education of Native American students. In 1817, the Chippewa, Ottawa or Odawa, and Potawatomi Nations[4] gave the recently formed University of Michigania a land grant of 3,840 acres in the Treaty of Fort Meigs. Treaty between the Wyandot, Seneca, Delaware, Shawanese, Potawatomees, Ottawas, and Chippeway Nations and the United States, Sept. 29, 1817, art. 16, 7 Stat. 160, 166 (hereafter "Treaty of Fort Meigs"); Howard H. Peckham,

[4] Chippewa or Chippeway, Odawa or Ottawa and Potawatomi, Potawatomees, or Potawatomy are spelled differently in various written sources. Since the Indian languages of these three peoples originally were oral languages, there is no single correct spelling. We use here the spelling currently preferred by each tribe, rather than the spelling employed in the Treaty of Fort Meigs.

The Making of the University of Michigan 1817-1992 8 (Margaret L. Steneck & Nicholas H. Steneck eds., 1994). This land grant was given for the express purpose of educating Native American children. *Id.* The University of Michigania eventually became the University of Michigan, and the land grant from the Treaty of Fort Meigs formed a significant portion of the University's original endowment. Peckham, *supra*, at 12-13.

The University of Michigan first acknowledged the importance of the Treaty of Fort Meigs by granting five scholarships to Native American students in 1932, and then again, in 1936. Peckham, *supra*, at 13, 21. Beginning in the 1970s, however, increased Native American activism encouraged the University to more fully honor the original purposes for which it was created. Upon becoming reacquainted with its unique history, the University of Michigan sought to increase educational opportunities for Native American students, and did so in part by including Native American applicants within its affirmative action program.[5] Even if the consideration of Native American status were afforded the strictest scrutiny, the University's program would be constitutional.

I. THE STATE OF MICHIGAN HAS A COMPELLING INTEREST IN EDUCATING NATIVE AMERICAN STUDENTS

This Court has previously held that "a properly devised admissions program involving the competitive

[5] Since the 1970s, the University has utilized several different affirmative action policies. The University's current policy was instituted in 1999.

consideration of race and ethnic origin" is permitted under the Fourteenth Amendment. *Regents of the University of California v. Bakke*, 438 U.S. 265, 320 (1978). Although there is disagreement about the level of scrutiny such a program should receive, and *Amici* certainly do not concede that the highest level of scrutiny applies, the University's admissions program is constitutionally permissible even under the Court's strictest approach, *i.e.*, that to be considered "properly devised," the admissions program must be supported by a "compelling governmental interest," *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 485 (1989), or an interest that "is both constitutionally permissible and substantial." *Bakke*, 438 U.S. at 305.

The State of Michigan has a compelling interest in educating Native American students because: (1) one of the original missions of the University of Michigan was to educate Native American students, (2) the federal government has delegated much of its responsibility for Native American education to the states, including the State of Michigan, and (3) tribal and state governments share both citizens and neighboring geographic space, and therefore, Michigan has an interest in assuring effective governance on Indian reservations, which is greatly enhanced by an educated tribal citizenry.

A. One Of The Original Missions Of The University Of Michigan Was To Educate Native American Students

The history of the founding of the University of Michigan demonstrates that it was created in part to educate Native American students. Prior to the University's founding, the Chippewa, Ottawa or Odawa, and Potawatomi Tribes of Michigan (hereafter sometimes

referred to as the "Michigan Indian tribes") had developed a productive relationship with a Catholic missionary named Father Gabriel Richard. Father Richard established and began operating an Indian school at Spring Hill in 1808. Unfortunately, the school encountered financial difficulties and was forced to close in 1811. The Michigan Indian tribes, however, were so impressed by Father Richard's efforts to start an Indian school, that they, realizing the importance of education for the future generations of their tribe, decided to assist in the formation of a college in or near Detroit. *See Children of the Chippewa, Ottawa and Potawatomy Tribes v. The Regents of the University of Michigan*, 305 N.W.2d 522, 529 (Mich. Ct. App. 1981).

On August 26, 1817, Father Richard, Reverend Monteith, Lewis Cass and a small group of other leaders in the Detroit area banded together to form a new college, the Catholepistemiad or University of Michigania.[6] *Children of the Chippewa, Ottawa and Potawatomy Tribe*, 305 N.W.2d at 531. Shortly thereafter, the Chippewa, Ottawa or Odawa and Potawatomi Nations of Michigan entered into the Treaty of Fort Meigs with the United States, which contained a specific grant of land to the new college:

> Some of the Ottawa, Chippewa, and Potawatomy tribes . . . believing they may wish some of their children hereafter educated, do grant . . . to the corporation of the college at Detroit, for the use of the said college, to be retained or sold, as the

[6] It is believed the University was established at this time for the purpose of becoming eligible to receive the land grant offered by the Michigan Indian tribes. Peckham, *supra*, at 8.

> . . . corporation may judge expedient, each, one-half of three sections of land, to contain six hundred and forty acres, on the river Raisin, at a place called Macon; and three sections of land not yet located, which tracts were reserved, for the use of the said Indians, by the treaty of Detroit, in one thousand eight hundred and seven; and the superintendent of Indian affairs, in the territory of Michigan, is authorized, on the part of said Indians, to select the said tracts of land.

7 Stat. at 166. From the plain text of the grant, the Michigan Indian tribes offered the land "believing they may wish some of their children hereafter educated." *Id.*

The University of Michigania was soon renamed the University of Michigan. The lands granted to the University in the Treaty of Fort Meigs were sold, and a portion of the proceeds were used to purchase the University's campus in Ann Arbor, Michigan. Peckham, *supra*, at 12-13. The remaining proceeds from the sale provided a significant portion of the University of Michigan's original endowment. Indeed, Justice Thomas Cooley once stated that the land grant contained in the Treaty of Fort Meigs was actually equal in positive value and prospectively superior to the land gifts of John Harvard and Elihu Yale. *A University Between Two Centuries: The Proceedings of the 1937 Celebration of The University of Michigan* 41 (Wilfred B. Shaw ed., 1937).[7]

[7] The University continues to acknowledge the importance of the Fort Meigs Treaty today. A bronze plaque commemorating the treaty is located at the center of the University of Michigan campus and reads:

(Continued on following page)

This history demonstrates that one of the founding missions of the University of Michigan was education of Native American students. In this way, the University of Michigan's mission is similar to that of Harvard University, whose 1650 Charter called for the "education of English and Indian youth," or the missions of Dartmouth College and the College of William & Mary, which also specifically mentioned education of Native Americans.[8]

This plaque commemorates the grant of lands from the Ojibwe (Chippewa), Odawa (Ottawa), and Bodewadimi (Potawatomi), through the Treaty of Fort Meigs, which states that "believing they may wish some of their children hereafter educated, [they] do grant to the rector of the Catholic church of St. Anne of Detroit . . . and to the corporation of the college at Detroit, for the use of the said college, to be retained or sold, as the said rector and corporation may judge expedient. . . . " The rector was Gabriel Richard, a founder and first vice president of the corporation of the college, chartered by the territorial legislature as the University of Michigania in 1817. These lands were eventually sold to the benefit of the University of Michigan, which was relocated to Ann Arbor in 1837.

Judy Steeh, Plaque honors land gift from three Native American tribes, The Univ. Record Online, Nov. 18, 2002, *at* http://www.umich.edu/~urecord/0102/Nov18_ 02/16.shtml.

[8] To discharge its original mission of educating Indians, Harvard University not only includes Indians in its affirmative action programs, but has founded the Harvard University Native American Program, the history and description of which can be found at http://www.ksg.harvard.edu/hunap/about.html. Similarly, Dartmouth College recruits and admits Indians into its fine Indian studies program. The history of Dartmouth College is set forth at http://www.dartmouth.edu/about/history.html, and in more detail, in *First Person, First Peoples: Native American College Graduates Tell Their Life Stories* 7-15 (Andrew Garrod & Colleen Larimore eds., 1997). The history of the Charter of the College of William & Mary can be found at http://www.swem.wm.edu/SpColl/Archives/Charter/charterstory.html.

Although no one knows when the University of Michigan admitted its first Native American student, *see* Steeh, *supra* (quoting University historian Margaret Steneck), the University did grant five scholarships to Native American students in 1932, and then again in 1936, in recognition of the Treaty of Fort Meigs. Peckham, *supra*, at 13, 21.

In the 1970s, the University of Michigan began to make its first extensive efforts to facilitate the education of Native American students by including them in programs to diversify the student body.[9] Today, the University seeks to discharge its founding mission by specifically including Native Americans in its affirmative action admissions policies. The University's unique and historic interest in honoring the spirit of the Treaty of Fort Meigs is a sufficiently compelling interest to survive strict scrutiny under the Fourteenth Amendment.

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[9] On August 5, 1971, Paul Johnson, a Native American graduate student at the University of Michigan, brought an action against the University, arguing that the land grant contained in the Treaty of Fort Meigs created a trust, of which the children of the Chippewa, Ottawa, and Pottawatomy Tribes were the beneficiaries, and imposed on the University a duty to ensure their free education. *Children of the Chippewa, Ottawa and Potawatomy Tribe*, 305 N.W.2d at 523-24. Even though the court found no judicially enforceable trust was created by these land grants, the case prompted the University to take additional steps to fulfill its original mission.

B. The Federal Government Has Promoted Special Educational Programs For Native American Students Since This Nation's Founding, And Responsibility For Many Of These Programs Has Been Delegated To The States, Including The State Of Michigan

Article 16 of the Treaty of Fort Meigs was unique in that the Chippewa, Ottawa or Odawa, and Potawatomi Nations granted land to a specific university to ensure their children would be educated in the future. It was not at all unusual, however, for the United States to include general promises to provide education to Native Americans in Indian treaties. *See* Vine Deloria, Jr., *Legislative Analysis of the Federal Role in Indian Education* 39-73 (1974) (collecting treaties). Indeed, in addition to the Treaty of Fort Meigs, the Chippewa, Ottawa or Odawa, and Potawatomi Nations entered into more than twenty treaties with educational provisions.[10] For example, Article 3 of the September 26, 1833 Treaty between the Chippewa,

[10] *See, e.g.*, Treaty between the Ottawa, Chippewa, and Pottawatamie Nations and the United States, Aug. 29, 1821, art. 4, 7 Stat. 218, 220; Treaty between the Chippewa Tribe and the United States, Aug. 5, 1826, art. 6, 7 Stat. 290, 291; Treaty between the Pottawatamie Nations and the United States, Oct. 16, 1826, art. 3, 7 Stat. 295, 296; Treaty between the Chippewa, Menomonie, and Winebago Tribes and the United States, Aug. 11, 1827, art. 5, 7 Stat. 303, 304; Treaty between the Potowatomi Tribe and the United States, Sept. 20, 1828, art. 2, 7 Stat. 317, 317-18; Treaty between the Potowatomies and the United States, Oct. 27, 1832, art. 4, 7 Stat. 399, 401; Treaty between the Ottawa and Chippewa Nations and the United States, March 28, 1836, art. 4, 7 Stat. 491, 492; Treaty between the Chippewa Nation and the United States, Jan. 14, 1837, art. 3, 7 Stat. 528, 529; Treaty between the Chippewa Nation and the United States, Oct. 4, 1842, art. 4, 7 Stat. 591, 592; Treaty between the Ottawa and Chippewa Nations and the United States, July 31, 1855, art. 1 & art. 2, 11 Stat. 621, 623.

Ottawa, and Potawatomi Nations and the United States provided that:

> And in further consideration of the above cession, it is agreed, that there shall be paid by the United States . . . Seventy thousand dollars for purposes of education and the encouragement of the domestic arts, to be applied in such manner, as the President of the United States may direct. . . .

7 Stat. 431, 432-33 (1833).

A Congressional report issued in 1818 demonstrates that the federal government initiated special Native American education programs as a means of promoting more effective intergovernmental relations with Indian tribes and advancing its own Indian policy objectives:

> The committee believes that . . . establishing schools on or near our frontier for the education of Indian children, would be attended with beneficial efforts both to the United States and the Indian tribes, and the best possible means of securing the friendship of those nations in amity with us, and, in time, to bring the hostile tribes to see that their true interest lies in peace, and not in war. . . .

H.R. Rep. No. 151, 15th Cong., 1st Sess., Jan. 22, 1818, *in* II American State Papers: Indian Affairs 151.[11] The federal trust responsibility to educate Native Americans arose out

[11] Of course, one of these objectives was to "civilize" the Indians by encouraging them to become farmers in the hopes that they would settle down on small plots of land, thereby freeing up additional areas for white settlement.

of these early treaties and federal policies, and continues in force today. 20 U.S.C. § 7401 ("It is the policy of the United States to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children."); Exec. Order No. 13,096 (Aug. 6, 1998) ("The Federal Government has a special, historic responsibility for the education of American Indian and Alaska Native students"). *See generally* Mary Christina Wood, "Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited," 1994 Utah L. Rev. 1471, 1495-1508. Over the past two hundred years, however, the federal government has chosen to fulfill this trust responsibility through a variety of different policies.

At first, Native American education remained largely within the auspices of the church. In 1819, Congress passed legislation that created a permanent annual appropriation of ten thousand dollars to support Native American education. Act of March 3, 1819, ch. 851, § 2, 3 Stat. 516, 517. This "civilization fund" distributed money to churches and missionary organizations that created schools for Native American students, *see* Felix S. Cohen, *Handbook of Federal Indian Law*, 680, n.13 (Rennard Strickland et al. eds., 1982), and annual appropriations from this fund continued until the act was repealed in 1873. Act of Feb. 14, 1873, ch. 138, § 1, 17 Stat. 437, 461. Still, the majority of education funding in the first half of the nineteenth century was provided by the tribes themselves, and religious organizations. For example, between 1845 and 1855, the federal government appropriated $102,000 for Native American education, while the tribes provided $400,000 and an additional $824,000 from treaty appropriations in consideration for land cessions, and

private sources (e.g., religious organizations) contributed $830,000. Cohen, *supra*, at 680 (citing Sen. Exec. Doc. No. 1, 34th Cong., 1st Sess., pt.1, at 561 (1855)).

In the 1880s, perhaps dissatisfied with the rate of assimilation, congressional funding increased, and the federal government began building its own boarding schools to educate Native American youth. Many of these boarding schools were located off-reservation, because a key component of this scheme was separating children from their families and communities so that their way of life could be changed more rapidly and thoroughly. *See generally* Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920* 41-187, 189-210 (1984) (discussing the boarding school movement); David H. DeJong, *Promises of the Past: A History of Indian Education in the United States* 107-109, 116 (1993). These boarding schools were attended by Native American students from many different tribes, without regard to specific treaty provisions. Cohen, *supra*, at 680. Additionally, by the early 1900s, the Bureau of Indian Affairs had developed several hundred day schools, and a uniform curriculum for all federal Indian schools was implemented. Cohen, *supra*, at 681.

Federal policy shifted once again in the 1930s, when the government chose to cut back on its direct provision of educational services to Native Americans and to rely, instead, primarily on states to discharge its special Indian education policies. The Johnson O'Malley Act of 1934, 48 Stat. 596, *codified as amended at* 25 U.S.C. §§ 452-458e, authorized the Secretary of the Interior to make contracts with any state "for the education, medical attention, agricultural assistance and social welfare . . . of Indians." 25 U.S.C. § 452. The law provided states with federal

money to educate eligible Native American children in their public school system. In the years that followed, Congress would enact additional legislation providing state funding for Native American education. *See, e.g.*, The Impact Aid Law of 1950, Act of Sept. 30, 1950, ch. 1124, 64 Stat. 1100 (authorizing federal payments to state public schools serving Native American students residing on Indian trust lands that are exempt from state property taxation); Indian Education Act of 1972, Pub. L. No. 92-318 (providing special federal funding to state schools for Indian education and greater input by Indian parents into discretionary programs funded under the legislation).

During this same time period, state involvement in Native American education was even more pronounced in Michigan. In the early 1900s, the federal government operated nine Indian day schools,[12] and at least one off-reservation boarding school, the Mount Pleasant Indian Industrial School, in Michigan. The Mount Pleasant Indian Industrial School was founded in 1891, when Congress appropriated $25,000 for the purchase of 200 acres of land to develop an Indian school in Isabella County, Michigan. The school served approximately 375 students from 1920 to 1933. Reinhardt, *supra*, at 43, 45-46. In 1934, however, the federal government shut down the Mount Pleasant Indian Industrial School and sold the

[12] The Bureau of Indian Affairs operated the following day schools in Michigan: the Garden Island Day School, the Nawbetung Day School, the Longwood Day School, the Chippewa Day School, the Neppessing Day School, the Hannahville Indian Mission Day School, the L'Anse Indian Mission Day School, and the Sugar Island Indian Day School. Martin J. Reinhardt, Master of Arts Thesis, Central Michigan University, 43, 49 (1998).

school property to the State of Michigan for one dollar. In exchange, Michigan agreed to educate Native Americans within the State in its public schools, without cost to the federal government. 48 Stat. 353 (1934); William Comstock, Letter to Secretary of the Interior, Honorable Harold L. Ickes (May 28, 1934).

The federal government believed that this agreement, commonly known as the Comstock Agreement, constituted a complete delegation of the federal responsibility to educate Native American children residing in Michigan to the State of Michigan.[13] Special Subcommittee on Indian Education of the Senate Commission on Labor and Public Welfare, Indian Education: A National Tragedy – A National Challenge, S. Rep. No. 501, 91st Cong. Sess. XII (1969) (hereinafter referred to as "National Tragedy") (noting that "the education of Indian children in California, Idaho, *Michigan*, Minnesota, Nebraska, Oregon, Texas, Washington, and Wisconsin was the total responsibility of the State and not the Federal Government") (emphasis added). As a result, by 1952, the Bureau of Indian Affairs had closed all of the federal Indian schools in Michigan. *Id.* at 14.

Because the Comstock Agreement completely compensated the State of Michigan for its assumption of Native American education, Michigan was not entitled to funds

[13] This belief was based in part on the fact that the State had already been required to provide equal educational opportunities to Native American students since at least 1924, when Native Americans became United States citizens. 43 Stat. 253 (codified as carried forward at 8 U.S.C. § 1401(b)).

under the Johnson O'Malley Act.[14] The State, unwilling to appropriate money to further the special needs of Native American children, allowed Native American education to deteriorate. In 1969, the Michigan Commission on Indian Affairs determined that illiteracy and drop-out rates were at alarming levels among Native American students. Furthermore, there were only twenty-three Native American students attending college in the State of Michigan during that year.[15]

Shortly thereafter, the University of Michigan increased its efforts to fulfill the State's responsibility to Native American children by including Native American students in the first programs to achieve a diverse student body. These programs were precursors to the University's current affirmative action policy. As the above history demonstrates, this policy is constitutional because the State of Michigan has a compelling interest in fulfilling the federal government's trust responsibility to provide education to Native American students, a responsibility that was delegated over the past century, at least in part, to the State.

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[14] It was not until 1972 that Senator Robert Griffin spearheaded a successful effort to have the Interior Department order a policy change making Johnson O'Malley funds available to Michigan schools. Reinhardt, *supra*, at 78.

[15] At the same time, national studies indicated that states across the country were failing to provide Native American students with the educational opportunities guaranteed to them through treaties and the federal trust responsibility. *See generally* National Tragedy; NAACP Legal Defense and Educational Fund & Harvard University Center for Law and Education, An Even Chance, *reprinted in* 1971 Law & Soc. Order 245.

C. The State Of Michigan Has An Independent Interest In Educating Native American Students So That They Can Manage Complex Tribal Governmental And Business Affairs

Today, Indian tribes operate modern governments with complex legal, political and business interests that they must further through an educated citizenry, educated elected officials, and a skilled tribal governmental staff. Modern tribal governments must protect law and order on the reservation, *Talton v. Mayes*, 163 U.S. 376 (1896); *Wheeler*, 435 U.S. at 324-25, formulate taxation policies, *see Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 201 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982), develop membership or citizenship rules, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), maintain zoning and building code policies, *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), protect their lands and natural resources, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 330-33 (1983), and perform all of the other complex law-making and service tasks required of any other modern government. On the business and commercial side, Indian tribes increasingly have become involved in many modern business enterprises including commercial property development, *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribes*, 532 U.S. 411 (2001), manufacturing, *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803 (7th Cir. 1993), mineral, oil and gas development, *Montana v. Crow Tribe of Indians*, 523 U.S. 696 (1998), timber operations, *United States v. Mitchell*, 463 U.S. 206 (1983), and resort, recreation, and gaming development. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *Chickasaw Nation v. United*

States, 534 U.S. 84 (2001). Conducting such modern governmental operations and commercial businesses requires both an educated citizenry and specialists skilled in business, political science, history, anthropology, engineering, urban planning and many other fields taught only at institutions of higher education.

There are twelve federally recognized tribes in Michigan. 67 Fed. Reg. 46,328. These tribes provide a host of governmental services to tribal members, who are also Michigan citizens. Additionally, as reservation economies develop, tribal governments are providing more and more services to non-members. The State has recognized that "[t]he state of Michigan and tribal governments share a responsibility to provide for and protect the health, safety and welfare of our common constituents" and "[t]hrough cooperation, state and tribal governments can achieve more for all of our citizens." Executive Directive 2001-2, Policy Statement on State-Tribal Affairs (Gov. John Engler, May 22, 2001). *See also* Government-to-Government Accord between the State of Michigan and the Federally Recognized Indian Tribes in the State of Michigan (Gov. John Engler, October 28, 2002) ("[t]his accord provides a framework for a government-to-government relationship that recognizes that the parties to this accord share a responsibility to provide for and protect the health, safety and welfare of their common citizens"). The State of Michigan therefore has a compelling interest in assuring that the tribal leadership, staff and citizenry are highly educated. The University's affirmative action policy is a constitutionally permissible means to achieve this compelling interest.

II. IN ADDITION, THE UNIVERSITY HAS A COMPELLING INTEREST IN A DIVERSE STUDENT BODY

The *Amici* fully support the argument in the Respondent's principal brief that the pursuit of diversity in higher education is a compelling state interest. Therefore, the *Amici* seek only to supplement this discussion by identifying the specific tribal interests in a diverse student body.

Many college classes focus directly on racial or cultural issues, and these classes cannot be effectively taught without a racially diverse study body. For example, in 1952, the University developed a major in American Culture, a program that was originally intended to examine American values. In the 1970s, the American Culture Program ("the Program") was expanded specifically to examine American sub-cultures determined by national origin, race, religion, and social status. Today, the Program's curriculum includes an emphasis in Asian/Pacific Islander American Studies, Latino Studies, and Native American Studies.

The Native American Studies Program is currently supported by nine faculty members and includes courses such as American Indian History, Anthropology of Native America, Blacks, Indians, and the Making of America, Indian Intellectual History, Native American Feminism, Native American Religious Traditions, Ojibwa Language and Culture, Native American Mental Health, and Native American Literature.[16] To be taught effectively, these

[16] During the past three years, the University has expanded the Native American Studies program by adding two new faculty members

(Continued on following page)

classes require participation by Native American students. There are roughly 560 federally recognized tribes in the United States, and many of these tribes have different languages and customs. No matter how remarkable the University faculty is, they cannot, for example, be intimately familiar with the religious traditions of each of these tribes. The educational experience in these classes would be significantly diminished if Native American students were not present to share their personal experiences.

Additionally, although the Petitioners argue that the University's preferences for certain minority groups "rest on crude stereotypes," Petitioners' Br. at 16, the presence of meaningful numbers of Native American students in the classrooms and on campus actually create an opportunity to challenge the distorted images of Native American culture found in movies, literature, and other mediums, images that are most non-Indian students' only exposure to Native American culture. *See generally* Devon A. Mihesuah, *American Indians: Stereotypes & Realities* (1996) (discussing common Native American stereotypes); *First Person, First Peoples* (collecting narratives from Native American graduates of Dartmouth College, the majority of whom discuss their attempts to dispel the stereotypes attributed to them by their non-Indian peers).[17] Native

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and introducing additional coursework. In the near future, the University hopes to continue this expansion by hiring an additional faculty member and creating a Native American studies minor.

[17] Because schools have become largely resegragated during the past twenty years, most students have not been exposed to the perspectives of peers from different backgrounds and racial groups. For example, a recent study showed that very few African-American

(Continued on following page)

American student groups at the University of Michigan organize numerous events that are open to the campus community and provide an invaluable opportunity for non-Indian students to learn about contemporary Native American culture. For example, the annual University of Michigan Dance for Mother Earth Pow Wow is a three-day campus event attended by thousands of students and community members each year.[18] Additionally, Native American students have brought attention to instances of stereotyping and misappropriation of Native American culture on the University campus by speaking out both inside and outside of the classrooms.[19]

Thus, in addition to fulfilling State interests in promoting Indian education, the admission of Native American students under the University's affirmative action

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students attend a high school with a significant number of Native American students. Erica Frankenberg, Chungmei Lee & Gary Orfield, A Multiracial Society with Segregated Schools: Are We Losing the Dream, The Civil Rights Project, Harvard University (2003).

[18] Other events organized by Native American students include daily activities and concerts during Native American Heritage Month each November, and "American Indian Law Day," a symposium sponsored by the Native American Law Students Association.

[19] For example, in 2000, Native American students organized a sit-in in the student union to protest a student group that had a long history of "playing Indian." In addition to several months of daily coverage in the University of Michigan newspaper, the *Michigan Daily*, the protest garnered national media attention. *See, e.g.,* David Goodman, University of Michigan students end 37-day sit-in, Associated Press, March 14, 2000; Robyn Meredith, Michigan Students Protest Campus Club's Indian Relics, N.Y. Times, February 13, 2000; Brian Ballou, Sit-in continues over secret group, The Detroit Free Press, February 21, 2000.

policies broadens and enriches the education of all students and may serve to enlighten the faculty, as well. This type of free exchange of ideas forms the very basis for any university.

III. THE UNIVERSITY'S ADMISSIONS POLICY IS NARROWLY TAILORED TO ACCOMPLISH THE STATE'S INTEREST IN EDUCATING NATIVE AMERICAN STUDENTS AND IN PROMOTING EDUCATIONAL DIVERSITY

Although the *Amici* do not concede that strict scrutiny is the proper test to be applied in this case, the University's admissions policy is constitutionally permissible even under this approach, because it is narrowly tailored to accomplish the compelling interests set forth above. Obviously, to accomplish the University's and the State's interests in providing educational opportunities to Native American children, the University must consider Native American status in its admissions decisions.[20] The

[20] Although the University of Michigan could satisfy its compelling interest in honoring the Treaty of Fort Meigs by limiting its special admissions program specifically to descendants of the treaty tribes, accomplishing both the University's and the State's broader interests in an educated Native American citizenry and a diverse student body cannot be satisfied by a more narrowly tailored program. First, the federal government's responsibility for educating Native American youth is a general one not limited to specific treaty tribes. It is for this reason that the federal government has always chosen to discharge its responsibilities under a pan-Indian umbrella through federal Indian education programs. The State's interest is, in part, derived from the federal government's interest, and therefore can only be fulfilled by including all Native Americans in the University's special admissions programs. Second, achieving a truly diverse student body requires an admissions program that recognizes the amount of diversity *within* the

(Continued on following page)

University's affirmative action policy considers an applicant's race as only one of many factors in its admissions decisions. Applications to the University of Michigan are graded on a 150 point scale. Up to 110 points can be obtained for academic performance (grade point average, standardized test scores, strength of high school, challenging course selection), and generally 95 to 100 points are sufficient to obtain admission to the University. In addition to academic considerations, 40 points may be awarded for other factors that may lead to a diverse student body or demonstrate other potential contributions to the school. An African-American, Hispanic or Native American student receives 20 of these points. These same 20 points may also be obtained if the applicant is socioeconomically disadvantaged, attends a predominantly minority high school (regardless of their race), is an athlete, or, if the provost exercises her discretion.[21] Other factors such as residency, alumni relationship, leadership activities, and personal achievement are also considered and awarded points. As a point of comparison, an applicant whose father attended the University of Michigan and who resides in Michigan's upper peninsula (a geographic area typically underrepresented in the student body) is awarded 16 points.

The above illustrates that an applicant's race is only one of many factors considered in admissions decisions, and by no means guarantees entry into the University.

Native American community. Native Americans live in all fifty states, speak over three hundred different languages, and have vastly different tribal customs.

[21] An applicant can only obtain points for one of these factors.

The Petitioners argue, however, that the University's policy is not narrowly tailored because: (1) it has no time limits on its use of racial preferences; and (2) race-neutral alternatives can achieve the State's goals. These contentions are easily refuted.

First, the Petitioners assert that the University's policy is not narrowly tailored because there are no time limits on its use of race in admissions decisions, as required by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). Petitioners' Br. at 42. Although *Adarand* did state that a race-conscious program designed to remedy past discrimination must be limited so that it "will not last longer than the discriminatory effects it is designed to eliminate," this directive does not apply to an admissions program designed to facilitate Native American education. 515 U.S. at 238. Congress has long abandoned its policy of terminating federal-tribal relationships and has recognized that treaty rights and rights arising from the trust responsibility are continuing obligations. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (Chippewa treaty-guaranteed off-reservation fishing rights survived later changes in federal policy). Therefore, in the context of Native American preferences, time limits are unnecessary.

Second, both the Petitioners and the United States, as *Amicus curiae*, contend that the University's affirmative action policy is not narrowly tailored because race-neutral alternatives exist that could result in the enrollment of meaningful numbers of African-American, Hispanic and Native American students. Petitioners' Brief at 44. In particular, the United States dedicates nearly its entire *amicus* brief to the contention that the University of Michigan could obtain a diverse student body by simply

offering admission to the top 10% of graduating students at each high school. The accuracy of the United States' initial premise is questionable at best, however, *see* Catherine L. Horn & Stella M. Flores, Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences, The Civil Rights Project, Harvard University (2003), and will not permit most states to admit a meaningful number of Native American students.

Ironically, the United States' plan relies on the resegregation of schools that has occurred during the past twenty years. Today, many inner city schools have a student body that is comprised exclusively of minority students. As a result, admitting the top ten percent of each high school to, for example, the University of Michigan would guarantee a certain number of minority students. The Native American population, however, is much smaller and more dispersed than other minority groups. In states without large reservations (or without any reservations, such as New Jersey), Native American students will not be concentrated in a handful of public schools. As a result, admitting a percentage of students from each high school will not result in a meaningful number of Native American students at institutions of higher education. Although the United States claims that such plans have worked in California and Texas, these states have, respectively, the first and fourth largest Indian populations. The American Indian and Alaska Native Population: 2000, United States Dep't of Commerce, United States Census Bureau (2002). Thus, they cannot be considered representative of the results achievable in other states. Therefore, the Petitioners' contentions are without merit and the Law School's affirmative action program should be upheld.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, ET AL.

Respondents.

AND

JENNIFER GRATZ AND PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE BLACK WOMEN LAWYERS ASSOCIATION OF GREATER CHICAGO, INC., IN SUPPORT OF RESPONDENTS

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Cases: **Page**

Adarand Constructors, Inc. v. *Pena*, No. 93-1841 (1995) 7

The Antelope, 23 U.S. (10 Wheat.) 66 (1825) 5

Brown v. Board of Educ., 347 U.S. 483 (1954) .. 6, 16, 18, 27

Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) 3, 5

Green v. County School Board, 391 U.S. 430 (1968) 21, 22

Groves v. Slaughter, 40 U.S. (15 Pet.) 449 (1841) 5

McDaniel v. Barresi, 402 U.S. 39 (1971) 8, 21, 22

Nixon v. Herndon, 273 U.S. 536 (1927) 6

North Carolina Bd. of Educ. v. Swann, 402 U.S. 43 (1971) 22

Plessy v. Ferguson, 163 U.S. 537 (1896) 3

Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) 5

Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945) 6

Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978) ..... *passim*

The Slaughter House Cases, 83 U.S. 36 (1873) 5, 6

TABLE OF AUTHORITIES-Continued

Page

Swann v. Charlotte-Mecklenburg Board of Educ., 402 U.S. 1 (1971) 21

Sweatt v. Painter, 339 U.S. 629 (1950) 7

United States v. Paradise, 480 U.S. 149 (1987) 8

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) ... 21

Miscellaneous:

Michelle Adams, *Isn't It Ironic? The Central Paradox at the Heart of "Percentage Plans"*, 2001 Ohio State Law Journal 1 24

Association of Community Organizations for Reform Now, *"Separate But Equal: Predatory Lending in America"* (2002) 11

Mary Frances Berry, *How Percentage Plans Keep Minority Students Out of College*, The Journal of Higher Education (Aug. 4, 2000) 24

Black Law Student Enrollments: A Virtual Eviction in Texas and California, Journal of Blacks in Higher Education, at page 8 (Summer 1997) 24

William G. Bowen & Derek Bok, *The Shape of the River: Long Term Consequences of Considering Race in College and University Admissions* (1998) 27

TABLE OF AUTHORITIES-Continued

Page

Jomills Henry Braddock & James M. McPartland, *How Minorities Continue to be Excluded from Equal Employment Opportunities: Research on Labor Market and Institutional Barriers*, 43 J. of Soc. Issues 28 (1987) 9

Elizabeth Chambliss, *Miles to Go 2000, Progress of Minorities in the Legal Profession*, American Bar Association, Commission of Racial and Ethnic Diversity in the Profession (2000) 26

Theodore Cross, *Why the Hopwood Ruling Would Remove Most African-Americans from the Nation's Most Selective Universities*, Journal of Blacks in Higher Educ. 68 (Spring 1996) 25, 26

Theodore Cross & Robert Bruce Slater, *How Bans on Race Sensitive Admissions Severely Cut Black Enrollments at Flagship State Universities*, Journal of Blacks in Higher Education (Feb. 6, 2003) 25

John Hope Franklin, *From Slavery to Freedom* (4th ed. 1974) 5

Harold Freeman & Eric C. Schneider, *Racial Disparities in the Quality of Care for Enrollees in Medicare Managed Care*, Journal of the American Medical Association 1288 (March 14, 2002) 12

Diana B. Henriques, *Nissan's Loan Cost, Racial Tie Revealed*, N.Y. Times, July 4, 2001 11

TABLE OF AUTHORITIES-Continued

Page

The History of the Black Student Alliance at Duke University, http://www.duke.edu/web/bsa/about.htm 7

Ratna Indah, untitled story, January 19, 1999, www3.baylor.edu/Lariat/Archives/1999/19990119/12_black.html 7

Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States* (1985) 6

William C. Kidder, *Affirmative Action in Higher Education: Recent Developments in Litigation*, Admissions and Diversity Research, 12 Berkeley La Raza L.J. 173 (2001) 24, 25

Richard Kluger, *Simple Justice* (1975) 5

Lawyers for One America, *Bar None: Report to the President of the United States on the Status of People of Color*, www.lfoa.org/barnone_collaboration.html. 29

Richard O. Lempert, *et al.*, *"From the Trenches to the Towers": Law School Affirmative Action: An Empirical Study of Michigan's Graduates in Practice: The River Runs Through Law School*, 25 Law & Soc. Inquiry 395 (2000) 28

Jennifer Lin, *Civil Rights Commission Denounces Percentage Programs*, In Motion Magazine, 7 (June 2, 2000) 25

TABLE OF AUTHORITIES-Continued

Page

Lydia Lum, *Black Students' Struggles to Integrate Cause Doubts of Acceptance*, Houston Chronicle, August 24, 1997, http://www.chron.com/cgi-bin/auth/story/content/chronicle/metropolitan/hopwood/desegregation.html 7

Joseph Lupton & Frank Stafford, *Household Financial Wealth, (Thousands of 1999 Dollars)*, Institute for Social Research (Jan. 2000) 10, 11

Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (1993) 8, 9

Douglas S. Massey, *Residential Segregation and Neighborhood Conditions in U.S. Metropolitan Areas*, in 1 America Becoming 399 (Neil J. Smelser et al. eds., 2001) 9

Gary Orfield, *Federal Policy, Local Power and Metropolitan Segregation*, 89 Pol. Sci. Q. 784 (1974-75) 6

Gary Orfield, *Segregated Housing and School Resegregation in Dismantling Desegregation* (1996) 7

Stephen Power, *Black Graduate Tells Story of Racism, Hatred Factored For Students in the 1950s*, Cavalier Daily, http://www.mcps.org/ss/5thgrade/desegUVA.pdf 7

TABLE OF AUTHORITIES-Continued

Page

Resolution to Award an Honorary Doctorate Degree to Mr. Harold Franklin, http://www.auburn.edu/administration/governance/senate/franklin.html 7

Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination,* 86 Va. L. Rev. 727 (2000) ... 7

Kevin A. Schulman, *The Effect of Race and Sex on Physicians: Recommendations for Cardiac Catheterization,* New England Journal of Medicine 618 (February 25, 1999) 12

Janny Scott, *Rethinking Segregation Beyond Black and White*, N.Y. Times, July 29, 2001, § 4, at 1 9

Tambra Stevenson, *First Black Student Honored by OSU*, The Daily O'Collegian, April 15, 2002, http://www.ocolly.com/issues/2002_Spring/041502/stories/davis.html 7

Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming The Innovative Ideal,*, 84 Cal. L. Rev. 953 (1996) 26

T. Shawn Taylor, *What's In A Name? Bias, Sometimes*, Chi. Tribune, Dec. 29, 2002 10

U.S. Commission on Civil Rights, *The Fair Housing Amendments of 1988: The Enforcement Report* (1988) 6

TABLE OF AUTHORITIES-Continued

Page

University of Rhode Island, *Office of Affirmative Action, Equal Opportunity, and Diversity,* www.uri.edu. ... 18

Carol S. Weisse, *et al.*, *Do Gender and Race Affect Decisions About Pain Management*, Journal of General Internal Medicine 211 (April 2001) 12

Bridgett Williams, *Edith Hubbard: Survivor in the Era of Integration*, CNN.com February 15, 2001, www.cnn.com/fyi/interactive/specials/bhm/story/edith.hubbard.html 7

INTEREST OF AMICUS CURIAE

The Black Women Lawyers Association of Greater Chicago, Inc. ("BWLA") is an association of African-American female lawyers, judges, law professors and law students whose mission is to provide professional support for the continued presence and participation of African-American women in the legal profession. As such, BWLA's interest in these cases is substantial. BWLA is in a unique position to provide a perspective on issues which may not be adequately covered by the parties in their briefs or by the other *Amici* before this Court. Specifically, BWLA's perspective is unique because many of its members have been beneficiaries of college, university and law school admissions programs designed to create diverse applicant pools and student bodies. Additionally, as an organization whose membership includes attorneys, law professors and judges, BWLA is in a unique position to describe the experience of practicing law as an African-American lawyer during the twenty-five years since this Court's decision in the *Bakke* case.

A ruling proscribing the consideration of race as one factor, among many, in admissions decisions would dramatically reduce the number of black students admitted to our nation's institutions of higher learning, and thereby curtail professional and other employment opportunities reserved for those with college and graduate levels of education. As African-American attorneys and judges, our presence in the legal system is critical to the public's perception that our system of justice is fair, open and inclusive. Our opportunity for full participation in the legal system will be determined by the outcome of this case. Finally, a ruling proscribing the consideration of race as a positive factor in admissions would have a devastating impact on efforts to remedy past and present discrimination against African-

Americans and, correspondingly, to eliminate the possibility of ever achieving a day when race no longer matters in America.[1]

SUMMARY OF ARGUMENT

Race still plays a part in the lives of every American. History, statistical evidence, case law, and the personal experiences of our members demonstrate the important role that race plays in America. Race must remain a factor in the higher education admissions process as long as race remains a factor in America.

The focus of this case is on a state university's decision to use race as one factor, among several others, to include underrepresented minorities in its student body. With that focus in mind, we must consider that the educational institution that is seeking to uphold its admissions process which uses race as a factor is the same institution that had barriers to entry for African-Americans and perpetuated a racially hostile environment on its campus for years. Closing the door of opportunity on higher education for African-Americans will have an effect as dismal and lasting as slavery and the segregation laws have had on this country. The University of Michigan's inclusionary admissions processes are narrowly tailored solutions to an American dilemma that has spanned hundreds of years. Although the University itself does not argue that its own history of discrimination serves as a remedial justification for its admissions policies, the Intervenors have made a compelling case, and thus the Court should consider this justification.

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[1] Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. Pursuant to rule 37.6, *amicus curiae* affirm that no counsel for any party in this case authored this brief in whole or in part. No person or entity, outside of *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief.

In light of substantial evidence of the University of Michigan's specific discriminatory history, and American history itself, no other evidence should be required to justify a race-conscious admissions program designed to include the descendants of slaves in achieving equality of opportunity in this country. One need look no further than an American history book to identify acts of racial discrimination sanctioned under our nation's Constitution in order to justify a remedial admissions policy. Slavery, *de jure* and *de facto* segregation, and Jim Crow laws are undisputed chapters of American history that require no legislative, judicial or administrative determination to prove that they indeed occurred.

Moreover, the Supreme Court itself has had a major role in framing the issues and shaping the impact of race in this country through its decisions in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), and *Plessy v. Ferguson*, 163 U.S. 537 (1896), among others. As those cases demonstrate, not even this Court was immune from discriminating against African-Americans in this country. Therefore, it comes as no surprise that no segment of American society has been immune from the legacy of discrimination that began with the institution of slavery and continues today in other forms. Proof of racial discrimination in this country is readily available and its continuing effects are sufficient to justify a remedial program designed to alleviate the effects of past discrimination against African-Americans.

As Justice Marshall stated in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978):

> I agree with the judgment of the Court insofar as it permits a university to consider the race of an applicant in making admissions decisions. I do not agree that petitioner's admissions program violates the Constitution. For it must be remembered that, during most of the past 200 years, the Constitution, as interpreted by this Court, did not prohibit the most ingenious and pervasive forms

> of discrimination against the Negro. Now when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.

438 U.S. at 387 (1978) (Marshall, J., dissenting). The University of Michigan's admissions processes are not only justified by the need to remedy past and present discrimination; they are also narrowly tailored to do so.[2] The proffered "race-neutral" means have racially discriminatory effects on African-Americans because they act and have acted to exclude African-Americans. Additionally, African-Americans are not stigmatized by programs that include rather than exclude them. Accordingly, the University's admissions programs should be upheld.

ARGUMENT

I. Historical Analysis of Institutionalized Racial Discrimination.

The United States of America is a country that was founded on racial differences—from your birth certificate to your death certificate, race matters. This Court cannot reach a resolution of these cases without considering the historical perspective of race in America and the Court's role in establishing a legal basis for the use of race in America.

Nearly four centuries ago, blacks were kidnaped and forcibly brought to this country to be sold into slavery. For two and a half centuries, African-Americans were held in slavery and deprived of the most basic human rights. Slaves were denied any form of education and, in many states, were legally

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[2] The BWLA recognizes that the University of Michigan contends that it has a compelling state interest in a diverse student body for a number of reasons. We support the University's actions in seeking a diverse student body and we join with other *amici* in support of the University's position. However, we will not address the diversity arguments in this brief.

forbidden to learn how to read. They had no right to vote, to participate in any political activities, to marry or to contract out their services. As property, they could be bought, sold, leased and seized on the whim of their owner. *See generally*, John Hope Franklin, *From Slavery to Freedom* (4th ed. 1974); Richard Kluger, *Simple Justice* 27 (1975).

The Constitution treated a slave as three-fifths of a person for purposes of apportioning Congressional representatives and taxes among the States. U.S. Const. art. I, § 2. The Constitution also contained a clause ensuring that the migration and importation of slaves would not end before 1808. U.S. Const. art. I, § 9. Congress later passed laws that strengthened the institution of slavery. In 1793 and 1850, Congress enacted fugitive slave laws that empowered the federal government to apprehend fugitives and offered no protection against enslavement of northern blacks who had been born free.

This Court facilitated the legal institutionalization of slavery through a succession of cases in the early nineteenth century that continued to confirm the status of blacks as mere property, and thus inherently inferior to whites. *See, e.g., Groves v. Slaughter*, 40 U.S. (15 Pet) 449 (1841); *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 540 (1842). Perhaps one of the most notorious cases was *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). In *Dred Scott*, this Court concluded that blacks were not intended to be included as citizens but were "regarded as beings of an inferior order...altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect...." *Id.* at 407. In 1868, Congress ratified the Fourteenth Amendment. In *The Slaughter House Cases*, 83 U.S. 36, 71-72 (1873), this Court recognized that the "pervading spirit" and purpose of the Fourteenth Amendment was to remedy the evil of slavery. Similarly, early decisions of this Court recognized that the "one pervading purpose" of the Reconstruction Amendments was

"the freedom of the slave race, the security and firm establishment of that freedom and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *The Slaughter House Cases*, 83 U.S. at 71; *see also Bakke*, 438 U.S. at 398 (Marshall, J. dissenting); *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 94 (1945); *Nixon v. Herndon*, 273 U.S. 536, 541(1927).

Twentieth century governmental policies, both before and after *Brown v. Board of Educ.*, 347 U.S. 483 (1954), have perpetuated the legacy of slavery and state sanctioned segregation and discrimination by erecting barriers that depressed black economic advancement and substantially eliminated opportunities for generations of blacks to amass personal and familial assets. Even with the end of *de jure* segregation in public schools, blacks continued to suffer *de facto* segregation in public schools and the effects of federal policies designed to ensure their status as inferior third-class citizens. For example, for decades, beginning in the 1930's, the Federal Housing Administration ("FHA") actively fostered residential segregation. *See, e.g.*, Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States* 196-218 (1985); Gary Orfield, *Federal Policy, Local Power and Metropolitan Segregation*, 89 Pol. Sci. Q. 784-90 (1974-75). FHA Deputy Commissioner Philip Maloney reported in 1967 that in "a number of large urban centers...virtually no minority family housing has been provided through FHA." Orfield, *supra* at 789 (citing Cong. Rec. S15456 (1967)). The FHA also institutionalized overtly discriminatory lending practices that denied black families the opportunities to buy homes and accumulate equity. *See* Kenneth T. Jackson, *supra*, at 213-14 & n.41. This pattern and practice of discrimination in housing continued well into the 20th Century. For example, despite the passage of the Fair Housing Act in 1968 and an amended version in 1988, enforcement of housing anti-discrimination laws continues to be inadequate. *See* U.S.

Commission on Civil Rights, *The Fair Housing Amendments of 1988: The Enforcement Report* 5 (1988); Gary Orfield, *Segregated Housing and School Resegregation in Dismantling Desegregation* 299 (Orfield et. al. eds. 1996).[3]

The University of Texas at Austin did not formally desegregate until 1950 when it admitted a black law student pursuant to this Court's opinion in *Sweatt v. Painter*, 339 U.S. 629 (1950). The first African-American to enroll at Oklahoma State University was admitted as a graduate student in 1949 and received her master's degree in 1952. The University of Virginia admitted its first black undergraduate student in 1955. The University of North Carolina at Chapel Hill admitted black males to its undergraduate school in 1955. Duke University admitted its first black undergraduates in the Class of 1963. Harold A. Franklin became the first African-American student at Auburn University in 1964. Robert Gilbert was Baylor University's first black graduate in 1967. Until the mid-1940s, the University of South Carolina was the only state-supported law school in the South that had ever admitted African-Americans.[4]

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[3] *See also* Brief of NAACP Legal Defense Fund, Inc., as *amicus curiae* in *Adarand Constructors, Inc.* v. *Pena*, No. 93-1841 (1995).

[4] Lydia Lum, *Black Students' Struggles to Integrate Cause Doubts of Acceptance*, Houston Chronicle, August 24, 1997, http://www.chron.com/cgi-bin/auth/story/content/chronicle/metropolitan/hopwood/desegregation.html; Tambra Stevenson, *First Black Student Honored by OSU*, The Daily O'Collegian, April 15, 2002, http://www.ocolly.com/issues/2002_Spring/041502/stories/davis.html; Stephen Power, *Black Graduate Tells Story of Racism, Hatred Factored For Students in the 1950s*, Cavalier Daily, http://www.mcps.org/ss/5thgrade/desegUVA.pdf; Bridgett Williams, *Edith Hubbard: Survivor in the Era of Integration*, CNN.com February 15, 2001, www.cnn.com/fyi/interactive/specials/bhm/story/edith.hubbard.html; http://www.duke.edu/web/bsa/about.htm; http://www.auburn.edu/administration/governance/senate/franklin.html; Ratna Indah, untitled story, January 19, 1999, www3.baylor.edu/Lariat/Archives/1999/19990119/12_black.html; Daria

This historic pattern and practice of racial discrimination against African-Americans in education continued far into the 1970's—contrary to this Court's holding in *Brown* that "separate educational facilities are inherently unequal." *See, e.g. McDaniel v. Barresi*, 402 U.S. 39 (1971) (upholding Clark County, Georgia's mandatory integration plan to remedy past discrimination after a challenge by parents claiming it violated the Equal Protection Clause). Moreover, as recently as 1987, this Court acknowledged that the Alabama Department of Safety's "pervasive, systematic and obstinate discriminatory conduct" justified a narrowly tailored race-conscious remedy. *United States v. Paradise*, 480 U.S. 149, 167 (1987) (plurality opinion). Simply put, the effects of four hundred years of federal- and state-imposed racial discrimination have continued to the present. These effects did not disappear with the legal elimination of *de jure* discrimination.

II. Statistical Evidence of the Pervasiveness of Racial Discrimination.

Countless studies support our position that race continues to matter in America and that the experience of African-Americans differs fundamentally from the experience of whites. Not only is it fundamentally different, it is one in which our historical status as "beings of an inferior order" still acts as a disadvantage. This is true in housing, education, healthcare, employment, and in every aspect of society. Statistical evidence proves that racial discrimination continues to the present.

For example, this country remains residentially segregated on the basis of race. Black/white segregation in housing remains the most extreme of all residential segregation. Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* 235 (1993); Janny Scott, *Rethinking Segregation Beyond Black and White*,

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Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 Va. L. Rev. 727, 755 (2000).

N.Y. Times, July 29, 2001, § 4, at 1, 6. Housing is the market that determines one's schooling, peer groups, safety, jobs, insurance costs, public services, home equity, and, ultimately, wealth. No other ethnic or racial group in the history of the United States has ever, even briefly, experienced the high levels of residential segregation that African-Americans face. Douglas S. Massey, *Residential Segregation and Neighborhood Conditions in U.S. Metropolitan Areas*, in 1 America Becoming 399, 401 (Neil J. Smelser et al. eds., 2001). Moreover, unlike the experience of other ethnic groups, class does not explain the segregation of African-Americans. No matter how socioeconomic status is measured, black residential segregation remains universally high. Massey and Denton, *supra* at 88 *n.* 87 (1993).

Discrimination also persists in employment. African-Americans continue to face the exclusionary barriers created by segregated social networks, information bias, and discrimination.[5] Discrimination in hiring underpins a continued lack of access to employment. Indeed, two economics professors at the University of Chicago Graduate School of Business and Massachusetts Institute of Technology recently conducted a study, which found that resumes randomly assigned white-sounding names elicited 50% more callbacks than resumes assigned stereotypically "African-American-sounding names". The study's authors sent out 5,000 resumes in response to 1,300 job postings in *The Boston Globe* and *Chicago Tribune*. The stereotypically African-American and white sounding names were evenly divided so that the only

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[5] *See* Jomills Henry Braddock II & James M. McPartland, *How Minorities Continue to be Excluded from Equal Employment Opportunities: Research on Labor Market and Institutional Barriers*, 43 J. of Soc. Issues 28 (1987) ("Minorities face special difficulties in the employment process not only because they are victims of past discrimination in educational and occupational opportunities, but also because of the specific barriers that qualified individuals often encounter at present because of their membership in a race or ethnic minority group.").

differing factor was the name. T. Shawn Taylor, *What's In A Name? Bias, Sometimes*, Chicago Tribune, December 29, 2002, at page 5. Additionally, for applicants perceived as white, with resumes containing impressive skills, experience, academic degrees and honors received 30% more callbacks than those with low-quality resumes. Unfortunately, similar impressive credentials did not elicit more callbacks for African-Americans. According to the study's authors, a possible interpretation for such a finding is "when employers see a certain honor or skill, they don't put as much weight on it for African-Americans as they do for whites." The study concluded that racial discrimination is an important reason why African-Americans do poorly in the labor market. *Id.*

The current unemployment rate for African-Americans is 10%, for whites it is 5%. *Id.* In 2000, white men and African-American men were employed in managerial and professional (white-collar) occupations at 32 % and 18%, respectively. U.S. Census Bureau, Population Profile of the United States (2000). For women, the percentages were 35% for white women and 25% for African-American women. There are differential earnings for college educated African-Americans and whites. The median income for whites with a bachelor's degree or more was $41,700 in 2000. For African-Americans with a bachelor's degree or more, the median income was $36,600. U.S. Census Bureau, *Population Profile of the United States* (2000).

Unsurprisingly, there are significant disparities in household income resulting from a legacy of past and present racial discrimination in housing and employment. African-Americans earn less than whites in virtually every occupational group. Joseph Lupton & Frank Stafford, *Household Financial Wealth, (Thousands of 1999 Dollars)*, Institute for Social Research (Jan. 2000). The median household income for whites was $44,366 in 1999, compared with $27,910 for African-Americans. *Id.* For every dollar of wealth the median white household held in 1999, the median black household held 9 cents. *Id.* Net worth

for the median black household declined between 1994 and 1999 while net worth for white households increased 20%. *Id.*

Income disparities are further compounded when African-Americans pay more for financial services than their white counterparts. African-Americans paid on average more than double the discretionary finance charges than white automobile buyers with comparable credit ratings. *See* Diana B. Henriques, *Nissan's Loan Cost, Racial Tie Revealed*, The N.Y. Times, July 4, 2001. A statistical study conducted by Professor Mark Cohen of Vanderbilt University of 300,000 car loans arranged through Nissan dealers from March 1993 to September of 2000, shows that black customers in 33 states consistently paid more than white customers, regardless of their credit histories. *Id.* More specifically, African-American customers with the best credit rating paid on average $660 for discretionary finance charges on auto loans, while white customers spent $299 according to the study. African-American customers with the worst credit risks paid $1,100, while similar white customers paid $800. *Id.*

In African-American neighborhoods, sub-prime lenders now account for more than half of all refinanced loans, compared to just 9 % in predominantly white neighborhoods. From 1995 to 2000, the number of sub-prime purchase loans to African-American home buyers rose 714 %, while the number of prime conventional purchase loans fell 2.5 percent. Association of Community Organizations for Reform Now (ACORN) *"Separate But Equal: Predatory Lending in America"* (2002).

As shown above, every major indicator demonstrates that African-Americans, regardless of socioeconomic status, continue to experience the effects of racial discrimination. This is true even in the healthcare field. A report in the Journal of the American Medical Association found that blacks enrolled in Medicare managed-care plans received a poorer quality of care than white enrollees. More specifically, African-Americans over age 65 are 10% less likely to receive medications called beta-blockers to prevent repeat heart attacks. Blacks enrolled in

Medicare managed-care plans are 21 percent less likely than whites to receive follow-up help after hospitalizations for mental illnesses. Blacks are also 7% less likely to receive eye exams to prevent blindness from glaucoma resulting from diabetes. Several factors are generally associated with inferior medical care, including lower socioeconomic status. But the researchers found that after correcting for these factors, significant racial disparities persisted. Harold Freeman and Eric C. Schneider, *Racial Disparities in the Quality of Care for Enrollees in Medicare Managed Care*, Journal of the American Medical Association 1288 (March 14, 2002). Moreover, the New England Journal of Medicine reported in a study involving African-American and white actors playing patients, physicians were significantly less likely to recommend cardiac catheterization for African-American females than for white females, white males and African-American males exhibiting the same symptoms. Kevin A. Schulman, *The Effect of Race and Sex on Physicians: Recommendations for Cardiac Catheterization,* The New England Journal of Medicine 618 (February 25, 1999). Even pain medications are prescribed at differing rates for white and black patients. Carol S. Weisse, *et al.*, *Do Gender and Race Affect Decisions About Pain Management*, Journal of General Internal Medicine 211 (April 2001) (study found that male physicians prescribed twice the level of pain medication for white patients than black patients.).

The above statistics provide ample evidence establishing the overwhelming present-day discrimination faced by African-Americans in all facets of our lives. The one factor that has served to narrow the professional, housing, and economic gaps is access to higher education. As the statistics set forth above establish, without race as a criteria in admissions, the doors to economic opportunity through higher education will be closed.

III. The Experience of Black Women Lawyers in the 20th and 21st Centuries—A Difference in Kind and Not Just Degree.

Petitioners and certain *amici* argue that race should not be used as a factor to deal with "societal discrimination." Use of the term "societal discrimination" diminishes the pervasive nature of the discrimination faced by African-American lawyers and fails to accurately describe our experiences and the depth with which racial discrimination continues to affect us. Justice Marshall wrote in *Bakke* that "[t]he experience of Negroes in America has been different in kind, not just in degree from that of other ethnic groups." 438 U.S. at 400 (Marshall, J., dissenting). The collective experience of our members corroborates Justice Marshall's observation. Below, we provide a representative sample of some of the experiences of a few of our members to demonstrate to this Court that despite the acquisition of both undergraduate and graduate degrees, race acts as a significant disadvantage for African-American lawyers.

One of our members describes growing up in Chicago during the late 1970's and early 1980's and attending college after *Bakke* as follows:

> In approximately the eighth grade, I moved to a very segregated neighborhood on the south side of Chicago. The neighborhood was predominantly white. My family was the first black family on our block. I was one of only 8 black students in my eighth grade class. I was called "Nigger" and "little black girl" and shunned by all but the other black students in the class. Within one year of my family moving to our block, every white family on the block moved out and was replaced by black families. Not only my block changed over racially, but the entire neighborhood changed from white to black. During the first year however, the police were at our house constantly due to the racial harassment my family faced.

On several occasions, we were awakened to crosses burning in the yard. One night, someone set our garage on fire, which caused the gas lawnmower inside to catch fire.

In the late 1970's, when I graduated from high school, I went to the largest public university in our state. I was the only black person in my field of study. I was the only black person in classes in my major. Once, in a standing room only lecture hall, white students chose to stand as opposed to sitting down in the empty seats next to me on either side or behind or in front of me.

Another of our members described her experience growing up in Chicago and attending college and law school and practicing law since *Bakke* as follows:

I grew up on the South side of Chicago in an all-black segregated neighborhood and attended public elementary and high schools in Chicago. In order to attend a better high school, my mother sent me to an integrated school outside my neighborhood. I finished near the top of my high school class and graduated from Harvard College with honors in 1977. Before I applied to college, I did not know anyone who had gone to Harvard or to college in the Boston area. I also graduated from Harvard Law School in 1982. I am a beneficiary of race-conscious admissions and I do not feel stigmatized by that fact. No one in my family attended Harvard. I am the first lawyer in my family.

Since law school, I have worked in the legal departments of two Fortune 200 companies, two large law firms, one small law firm and a government legal department. In most of my jobs since law school, I have been the only black lawyer or one of less than a handful of lawyers. On a few occasions, I was the first black lawyer or first black female attorney to work at that company or firm. During my 21 years of practicing law,

I have rarely been in a meeting in a business setting where another black person was present. These experiences made me feel very isolated and alone. For most of the white people with whom I have worked, their experience with me is their first meaningful experience with a black lawyer and, as a result, I often have to spend time and energy trying to dispel the stereotypical assumptions they have about black women lawyers or black people, in general. I attribute all I have accomplished in my legal career to my hard work and the opportunity to attend Harvard College and Harvard Law School.

Another of our members describes her experience of attending law school in the South during the 1970's and her experience in the practice of law:

In 1973, I happened to catch a glimpse of a TV interview of a black Congresswoman who commented that she was a lawyer. I thought, "she looks like me. Maybe I could be a lawyer too." I did not know one black woman lawyer. I had no role models. I had a husband and two small children. But I applied to law school anyway and was wait-listed. Full of self-doubt, I was scared to death that I would not get in and even more scared that I would. I got in and for the first time in my life I had black classmates and I honestly believe that I would not have made it through that first year without their encouragement and support. I did well. After my second year of law school, we moved to the South. I had to transfer. I made an appointment with the dean of the state's flagship law school who told me there was absolutely no place for me there. I persevered and found my way to the school's affirmative action committee. I got in. For two years, I was ignored by virtually all of my white classmates and only tolerated by most of my professors. Fortunately, I received support from the other

black students and I learned to function and even thrive in an atmosphere of cold southern racism.

For the past 23 years, I have practiced law in a government agency. In our office, there are approximately 40 lawyers, including three black women. It has primarily been an atmosphere of benign neglect. However, I have found my way and have had a rewarding career investigating and litigating fairly complicated cases. One of my daughters graduated with honors from a well-known law school. She practices public interest law.

This member describes her experience with desegregation in the South and her experience in the practice of law:

In 1966, twelve years after *Brown*, a decree entered by the Court of Appeals for the Fifth Circuit finally brought integration to the schools in my southern home town. I, together, with two other young children, each day left my segregated community to attend a school on the other side of town. Although the schools were integrated, movie theaters, doctor's offices and the dressing rooms of many retail establishments remained segregated. I was ridiculed and taunted by white children who were opposed to my presence in the school. During most of my fourth grade year, my teacher referred to me as a "negress". In 1971, we moved to Chicago. After graduating from high school in the top 2 % of my class, I attended the largest state university in Illinois. I was the only African-American student in the entire department in my field of concentration. Students ignored my presence and very few would offer me any assistance. I later attended law school and graduated in 1983. I joined the law department of a local public agency, where I was one of four African-American attorneys in an office of over 150 attorneys. I presently work in a government law office of approximately 140 attorneys as a supervisor. There are

only 4 other African-American attorneys in the office. My years of practice have been marked by negative events arising solely from my race. My competence has been challenged repeatedly. I have been mistaken for the court clerk, judge's secretary and an office secretary. I have learned to live with a sense of isolation in the practice.

Another of our members describes her experience growing up in the 1980's and practicing as a lawyer in Chicago:

I grew up in the south suburbs of Chicago as one of four children. As medical doctors, my parents afforded us the best possible educational, athletic and community-oriented opportunities that they could. We grew up in a predominantly white affluent suburb. We received racial threats by telephone and mail while we were in high school and elementary school. My experiences in college, graduate school and law school only broadened my exposure to racism. Despite a presence of a diverse group of students, disparate treatment from the white students was the norm.

My experience in the law practice is similar. When appearing before judges or other attorneys, I am regularly mistaken for a non-lawyer. My experience at my law firm is similar. I have come to accept that my work will be more closely scrutinized than white lawyers at the firm and I am constantly attempting to overcome the assumption of incompetence that many African-American attorneys face. If it were not for my husband, who is also an African-American attorney, it would be largely impossible to endure the sense of isolation that I often feel.

These experiences are provided as anecdotal evidence of the experience of black women lawyers. There are as many different stories as there are members of our organization, but one thing is clear. The experience of African-Americans is

"different in kind, not just degree" from that of other Americans. Twenty-five years after *Bakke* and almost fifty years after *Brown*, in every day, in every way, our members experience instances of racial discrimination too numerous to recount. The pervasive nature of the discrimination makes it institutional in nature. At a minimum, it is structural and continuing. To eliminate it, we need more African-Americans educated and able to fully participate in all aspects of society. Race-conscious admissions serves as a way to ensure that African-Americans continue to have the access to higher education.

IV. Remedying Past Racial Discrimination In Higher Education Is a Compelling State Interest.

Race-conscious admissions in higher education give meaning to this Court's holding in *Brown* that "separate educational facilities are inherently unequal." *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954). There is a long history of racially segregated (both *de facto* and *de jure*) institutions of higher education in America. Many of the historically black colleges and universities developed because blacks were excluded from the private and state institutions of higher education. Use of race as one factor, among many, in the admissions process, has helped to reduce the level of *de facto* segregation in predominantly white institutions of higher education. Therefore, we urge this Court to uphold the use of race as a factor to remedy this history of racial discrimination against blacks by state actors.

In 1955, only 4.9 % of college students ages 18-24 were black. This figure rose to 6.5 percent during the next five years, but by 1965 had slumped back to 4.9 %. Only in the wake of affirmative action measures in the late 1960s and early 1970s did the percentage of black college students begin to climb steadily (in 1970, 7.8 percent of college students were black; in 1980, 9.1 % and in 1990, 11.3%). University of Rhode Island, *Office of Affirmative Action, Equal Opportunity, and Diversity,*

www.uri.edu. Even these bleak percentages of black enrollment between 1955 and 1965 only came about because of the change from governmentally sanctioned racial discrimination to governmentally imposed desegregation.

A. The University of Michigan's Discriminatory History.

The University of Michigan was founded in 1817 and admitted its first African-American students in 1868. Joint Appendix, *Gratz v. Bollinger*, Nos. 01-1416, 01-1418, 01-1438 (6th Cir.) (hereinafter "6th Cir. J.A."), at 2265. However, the University supported segregation in campus housing and allowed the exclusion of students of color from fraternities, sororities and University organizations into the 1960's. 6th Cir. J.A. at 3757. A program designed to recruit and admit disadvantaged students to the University had the effect of increasing minority enrollment; however, minority students were still excluded from campus activities and social traditions. 6th Cir. J.A. at 2274-76, 3768.

From 1949 to 1952, the Michigan Civil Rights Congress and other groups called for an end to discriminatory clauses in the constitutions and by-laws of all campus organizations. 6th Cir. J.A. at 2266. However, University President Harlan Hatcher flatly rejected the proposal, and effectively allowed all University organizations to continue their discriminatory practices. In 1966, the Department of Defense investigated the University's compliance with Title VI of the 1964 Civil Rights Act. 6th Cir. J.A. at 2270-71. The Department urged campus administrators to increase recruitment of black students, faculty and staff. *Id.* In 1970, intense dissatisfaction with the University's failure to address campus racism and the University's failure to increase minority enrollment culminated in a series of student strikes. The students urged the University to increase its African-American enrollment and increase financial aid to minorities. 6th Cir. J.A. at 2278-80. The proposal was supported by Governor William Milliken, while the University administrators rejected it. After a strike by

students, the African-American presence at the University increased to 6.8% in 1972. 6th Cir. J.A. at 2287.

In 1975, requests by minority students to increase the support services on campus and to address the negative racial climate on campus were rejected by President Robben Fleming. 6th Cir. J.A. at 2298-99. With no minority recruitment and admissions effort in place, well-publicized discrimination on campus and no corresponding University redress, enrollment and retention rates of minorities declined between 1976 and 1985. 6th Cir. J.A. at 3885. During that time period, the University's African-American student population dropped by 34 percent. *Id.*

During the 1980's, the "Michigan Mandate" was announced as a plan aimed at addressing racial discontent at the University and to increase the number of students and faculty of color. 6th Cir. J.A. at 1378-79. The Mandate acknowledged the "prejudice, bigotry, discrimination and even racism" on the Michigan campus. 6th Cir. J.A. at 1390.

The University of Michigan's history of egregious discriminatory practices towards minorities is well-documented. Intervenors in both cases below submitted evidence of the University's policies of racial discrimination and segregation that must be considered in the Court's determination of whether a race-conscious admissions policy is a compelling state interest in these cases. The University's admissions policies permit the "limited use" of race as one factor, among many others to include African-Americans. This "limited use" of race as a factor in a university's admissions program is one way to remedy the effects of racial discrimination, and thereby, reduce the economic disparity that exists between black and white citizens in this country. It also serves as a mechanism to increase the numbers of African-Americans that are given an opportunity to attend universities whose ancestors were traditionally excluded and/or discriminated against in the admissions process.

According to this Court, "a public employer. . . must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination. Evidentiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged in court by nonminority employees." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986). The University of Michigan's prior discrimination satisfies this standard and should provide sufficient evidentiary support for a race-conscious affirmative action program that has the effect of remedying past discrimination.

B. The School Desegregation Cases Establish the Constitutionality of Race-Conscious Remedial Measures.

The constitutionality of race-conscious remedial measures is well established. Several school desegregation cases have recognized that, even absent a judicial or legislative finding or a constitutional violation, a school board constitutionally could consider the race of students in making school assignment decisions. *See, e.g., Swann v. Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 1, 16 (1971); *McDaniel v. Barresi*, 402 U.S. 39, 41(1971); *Bakke*, 438 U.S. at 399. But the Court has gone further, stating that:

> [A] flat prohibition against assignment of students for the purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. As we have held in *Swann [v. Charlotte-Mecklenburg]*, the Constitution does not compel any particular degree of racial balance or mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful as starting points in shaping a remedy. An absolute prohibition against use of such a device–even as a starting point–contravenes the implicit command of *Green v. County*

School Board, 391 U.S. 430 (1968), that all reasonable methods be available to formulate an effective remedy.

North Carolina Bd. of Educ. v. Swann, 402 U.S. 43, 46 (1971).

This Court asserted in *McDaniel* that "[s]chool boards that operated dual school systems are 'clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.'" 402 U.S. at 41, *quoting Green v. County School Board*, 391 U.S. 430, 437-38 (1968). "In this remedial process, steps will almost invariably require that students be assigned 'differently because of their race.'" *McDaniel*, 402 U.S. at 41. "Any other approach would freeze the status quo that is the very target of all desegregation processes." *Id.*

The University of Michigan's race-conscious admissions policy is merely an effort to integrate or desegregate an institution of higher learning that allowed state-sanctioned discrimination against African-Americans in its recent past. As a result, this Court should support the continued desegregation of the University by allowing race to be utilized as one factor, among many others, in its admissions process.

V. Race-Neutral Plans Are Inherently Race-Conscious and Disadvantage African-Americans.

The beginnings of black presence in higher education in any significant numbers can be traced to Executive Order 1146 issued by President Lyndon Johnson in 1965. That Order forbade discrimination on any basis that included race by those contracting with the federal government. By 1990, 11% of college students were black, a figure which largely mirrored the percentage of blacks in this country. Our continued presence in higher education in meaningful numbers is threatened by potential elimination of race-conscious admissions plans approved by the Court in *Bakke*.

Almost 25 years ago the Court in *Bakke*, 438 U.S. at 320, held that "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." In *Bakke*, this Court approved the use of race as a "plus" factor in admissions if the plan was narrowly tailored to further that interest. 438 U.S. at 315-20. The Court determined that the attainment of a diverse student body is a constitutionally permissible goal protected under the First Amendment to the Constitution. 438 U.S. at 311-12. The University of Michigan has defended its admissions policies by producing evidence which establishes clear compliance with the requirements of *Bakke*.

The Petitioner and other *amici* argue that the University's policies fail to pass the required strict scrutiny test because they are not narrowly tailored given the existence of purportedly race-neutral alternatives. As examples of "race-neutral" alternatives, the United States directs the Court to the experiences of state universities in Texas, Florida and California.[6] In these states, race conscious admissions policies were eliminated and replaced with purportedly race neutral plans that focus on the admission of a certain top percentage of high school students from every high school in the state. The viability of a purported diversity initiative whose success depends on residential segregation to produce meaningful results is troubling. The Florida, California and Texas plans are no more "race-neutral" in effect than any "race-neutral" plan would be in a country with a history of racial segregation. "Percentage plans function effectively to diversify higher education only if secondary education remains firmly racially segregated. Percentage plans are a reflection of current day educational apartheid, highlighting the fact that much of our secondary education system is both racially segregated and

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[6] *See, e.g.*, Brief of the United States in *Gratz* at § C1; Brief of the State of Florida and Governor Jeb Bush at 6-10.

profoundly unequal."[f] Michelle Adams, *Isn't It Ironic? The Central Paradox at the Heart of "Percentage Plans"*, 2001 Ohio State Law Journal 1.

Under the Texas plan, high school students in the top 10 % of their class are entitled to attend the University of Texas or Texas A & M--the state's two flagship campuses--or any other state university. While the number of minority students *applying* to public universities in Texas increased, the percentage of those *admitted* declined. Mary Frances Berry, *How Percentage Plans Keep Minority Students Out of College*, The Journal of Higher Education (August 4, 2000). With regard to black enrollment at the University of Texas Law School, after 1997, black enrollment in the first year class fell from an average of 34 to an average of 10. *Black Law Student Enrollments: A Virtual Eviction in Texas and California*, Journal of Blacks in Higher Education, at page 8 (Summer 1997). In Florida, many minority students attend substandard public schools that do not offer the courses needed for entry to the state's university system. Furthermore, the Florida plan does not require the state's flagship schools to admit the top twenty per cent from every high school, potentially creating a two-tier system of "separate but equal educational facilities." In fact, the State of Florida admits in its brief as *amicus curiae* that the percentage of African-Americans enrolled at the University of Florida, one of its flagship institutions, decreased after the implementation of its "race-neutral" plan. *See* Brief of the State of Florida and Governor Jeb Bush at 9. Enrollment of African-Americans in the 1999-2000 academic year, the last year before the plan was implemented, was 9.95%. It fell to 7.15% in 2001-02 after the plan was implemented. *Id.*

The statistics regarding minority enrollment in California are not much better. In 1995, after the California board of regents voted to end all affirmative action programs in its admissions, at the University of California-LosAngeles ("UCLA"), enrollment dropped from 470 to 265. William C. Kidder,

Affirmative Action in Higher Education: Recent Developments in Litigation, Admissions and Diversity Research, 12 Berkeley La Raza L.J. 173, 210 (2001). The last time there were so few African-American students at UCLA was 1968. *Id.* at 209. In 1997, law school admissions at University of California law schools dropped 76.6%. Theodore Cross and Robert Bruce Slater, *How Bans on Race-Sensitive Admissions Severely Cut Black Enrollments at Flagship State Universities*, The Journal of Blacks in Higher Education (February 6, 2003). For example, in fall 1999, there were only two black students and one Native American student enrolled in the UCLA Law School. Jennifer Lin, *Civil Rights Commission Denounces Percentage Programs*, In Motion Magazine, at 7 (June 2, 2000). In fall 2002, 13 black students enrolled at the law school at UCLA; this is less than one third the total black first year enrollments in 1994. Today, first-year enrollments at the Boalt Hall Law School University of California at Berkeley, are still less than one half the level of black enrollments that existed less than a decade ago when race conscious admissions were in place at the University. Cross and Bruce, *supra*, at 7.

In 2000, a federal district court ruled that the University of Georgia's admissions program was unconstitutional. The Eleventh Circuit Court of Appeals upheld this decision and, as a result, in 2001 the University of Georgia was forced to utilize a strict "race-neutral" admissions policy. In the first year under the plan, the number of black freshmen at the University of Georgia represented a 20% decline from the number of black freshmen who enrolled at the university in the fall of 2000. *See* Cross and Bruce, *supra*.

Similarly, if institutions rely solely on standardized tests such as the SAT or LSAT, these scores do not have a "race neutral" effect. The College Board's data demonstrate that these tests continue to display differences based on race. Theodore Cross, *Why the Hopwood Ruling Would Remove Most African-Americans from the Nation's Most Selective*

Universities, Journal of Blacks in Higher Educ. (Spring 1996), at 68. Minorities on average score lower than whites on the LSAT and on other standardized tests. *Id.* Thus, in practice standardized tests do not have a race neutral effect. *See id.* at 67; Elizabeth Chambliss, *Miles to Go 2000, Progress of Minorities in the Legal Profession,* American Bar Association, Commission of Racial and Ethnic Diversity in the Profession (2000). Moreover, researchers have established that scores on standardized tests are no predictor of law school or professional success. Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming The Innovative Ideal,*, 84 Cal. L. Rev. 953 (1996) ("[Standardized tests] do not reliably identify who will succeed in college or later in life, nor do they consistently predict those who are most likely to perform well in the jobs they occupy"). In practice, standardized tests are more a predictor of race and wealth rather than academic competence. Indeed, data collected indicate in that "many test [scores] correlate quite closely with parental income". *Id.* at 988.

Reliance on "legacy" admissions as a purported "race-neutral" admissions factor is also misplaced. With the exception of historically black colleges, blacks were systematically discriminated against and refused admissions to colleges and universities throughout the fifty states. Hence, most colleges and universities can identify the date the first African-American was admitted. Those dates generally are within the 20th century, and certainly only within the last 25 years have African-Americans been admitted in any meaningful numbers. With that historical context, it is easy to see that reliance on the legacy of a parent or a grandparent or a great-grandparent being an alumnus for purposes of admission is simply a race-based policy by another name. Virtually all alumni of predominantly white state institutions were white until the last 25 years or so, therefore, only white students will benefit from this classification. Legacy admissions are simply another proxy for race—the white race—which continues the

discrimination of the past and disadvantages blacks with no compelling state interest. Simply put, it is not "race neutral."

As set forth above, reliance on "race-neutral plans" which largely depend on the existence of residential segregation to ensure success is a poor substitute for an admissions plan which allows educators to conduct an individualized assessment of an applicant. It is estimated that imposing purportedly race neutral standards in admissions would decrease the number of blacks in colleges to 2%. William G. Bowen & Derek Bok, *The Shape of the River: Long Term Consequences of Considering Race in College and University Admissions*, at 280 (1998). This would be lower than levels seen at the time of this Court's decision in *Brown* when black enrollment in largely segregated colleges was approximately 5%.

VI. Beneficiaries of Affirmative Action Are Not Stigmatized.

Ward Connerly as *amicus curiae*, at 13-14, argues that there is a stigma of inferiority placed on African-Americans when race is one of the factors, among others, used in the higher educations admissions process. He argues that this Court should be mindful of this stigma on African-Americans when it is weighing the constitutionality of an admissions process which considers race as a factor in including historically underrepresented groups. We acknowledge that the stigma of inferiority is something that African-Americans must bear in this country. However, we disagree that the source of the stigma is a policy designed to provide opportunities to African-Americans who have been historically disadvantaged.

We attribute the source of the stigma of inferiority with which African-Americans often suffer to this nation's history of slavery and the Constitution's treatment of former slaves as property and otherwise inferior human beings. Additionally, we attribute the source of the stigma to the legal system's codes and case law that branded blacks as inferior. As Justice

Marshall stated in *Bakke*, the inferiority suffered by blacks was created by a legal system which denied opportunity to blacks. 438 U.S. at 400 (Marshall, J., dissenting) ("It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured."). As black women lawyers, we have not been stigmatized by having the opportunity to attend predominantly white colleges, universities and law schools.

We note that Petitioners and *amici* that support them do not assert that the black students admitted are unable or unqualified successfully to complete the academic curriculum and graduate. Similarly, we note that the Petitioners and *amici* do not assert that black lawyers are less competent or less accomplished than their white peers. That being said, it appears the stigma argument is a distraction to divert this Court's attention from the highly qualified nature of the black students who are admitted and the accomplishments of black lawyers who graduated from these institutions. For examples, statistically African-American lawyers have significantly higher levels of participation in civic activities and leadership than their white counterparts, thereby making their survival important in cultivating leadership for our community. Richard O. Lempert, *et al.*, *"From the Trenches to the Towers": Law School Affirmative Action: An Empirical Study of Michigan's Graduates in Practice: The River Runs Through Law School*, 25 Law & Soc. Inquiry 395, 455-56 (2000).

Unfortunately, in recent years, our presence in the legal profession has declined. In 1999, the total number of minority law graduates dropped for the first time since 1985. Minority representation in the legal profession is about 10%; the only profession lower is dentists–4.8%. Combined African-American and Hispanic attorneys make up only 7% of the

profession.[7] There are fewer African-American federal appellate court judges today than there were under President Jimmy Carter. Three quarters of the federal circuit courts have either no African-American or no Hispanic jurist. *Id.* Less than 3% of partners in large law firms are racial minorities. The attrition rates of African-American associates and partners from large law firms is staggering. Accordingly, while we do not perceive or suffer any stigma of inferiority from having the opportunity to attend certain predominantly white institutions of higher education, we do feel a sense of urgency that we not retreat from efforts made to increase our presence in the legal profession.

The University of Michigan's use of race was narrowly tailored, as is constitutionally required, because no race-neutral means yet exist to serve the compelling interest in diversity of the student body in institutions of higher education. Certain *amici* have raised the question, when will this use of race to achieve diversity end? They suggest that there is no logical ending. However, they are wrong. The logical ending is when race no longer matters in America. We will know that we have reached that point when a child born black has the same opportunity in America as a child born white in America. We will have reached that day when research reflects that there is no economic disparity in America based upon race for individuals similarly situated. We will have reached that day when a black person with a stereotypically African-American name and an identical resume to that of a white person with a stereotypically white name as an equal opportunity to get a job interview in America. Until the research reflects that the historic legacy of slavery and its continued discriminatory effect has disappeared, we must use race conscious means to

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[7] Lawyers for One America, Bar None: Report to the President of the United States on the Status of People of Color, www.lfoa.org/barnone_collaboration.html.

keep the doors of opportunity open to African-Americans in America.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Sixth Circuit in *Grutter* should be affirmed and the district court's judgment in *Gratz* should be reversed.

Respectfully submitted.

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Nos. 02-241 and 02-516

IN THE

Supreme Court of the United States

BARBARA GRUTTER,
Petitioner,

v.

LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,
Respondents.

JENNIFER GRATZ AND PATRICK HAMACHER,
Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AMICI CURIAE MEDIA COMPANIES IN SUPPORT OF RESPONDENTS

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LIST OF AMICI

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Banks Broadcasting, Inc.
Brunson Communications
ChaseCom, LLP
El Dorado Communications
Emmis Communications Corp.
Essence Communication Partners
Granite Broadcasting Corp.
Hispanic Broadcasting Corp.
K-B Prime Media, LLC
La Favorita Broadcasting, Inc.
LIN-Television Corp.
Mariner Broadcasters, Inc.
Northpoint Technology Ltd.
Radio One, Inc.
Stop 26-Riverbend, Inc.
Susquehanna Radio Corp.
Waters Broadcasting Corp.
Yankees Entertainment and Sports Network, LLC

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OTHER AUTHORITIES

Bill Dedman, *Newspapers Fall Short of Diversity Goal*, BOSTON GLOBE, April 11, 2002 , *available at* http://www.boston.com/news. 6,9

Caroline Garcia, *Diversity and Making a Difference*, AMERICAN SOCIETY OF NEWSPAPER EDITORS , *at*

http:// www.asne.org/index.cfm?id=3644 (June 17, 2002)..... 7,8

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WASHINGTON POST/KAISER FAMILY FOUNDATION/HARVARD UNIVERSITY, RACE AND ETHNICITY IN 2001: ATTITUDES, PERCEPTIONS, AND EXPERIENCES (August, 2001) *at* http://www.mphaweb.org/RacialBiracialToplines.pdf 7

INTEREST OF AMICI CURIAE[1]

Amici are television, radio, print and cable media companies, with workforces ranging from eight to over three thousand employees. Some of the *amici* are minority-owned. All target audiences that include substantial minority communities. All of the *amici* endeavor to be racially diverse, but view increased diversity as essential to the success of their businesses and to the public interest. *Amici* have a vital interest in the issues before the Court, because the outcome of these cases will affect *amici*'s ability to recruit a diverse and talented workforce that values the many racial, cultural and ethnic differences reflected in the nation's communities.

All of the *amici* hire recent college and university graduates for entry-level positions and promote entry level hires into supervisory and managerial positions. Several of the *amici* recruit at the University of Michigan and other public universities, including Indiana University, Arizona State University, and the University of Virginia. *Amici* actively seek minority applicants through contact with organizations representing minorities, such as the National Association of Black Journalists, the National Association of Hispanic Journalists and the Asian American Journalists Association, through advertisement with minority job placement organizations and participation in job fairs, and

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[1] All parties have consented to the filing of this *amicus curiae* brief. No portion of the brief was authored by counsel for a party. No person or entity other than the *amici* signing this brief or their counsel made a monetary contribution to the preparation or submission of the brief.

through scholarships, internships and mentorships aimed at minorities. Through these efforts, *amici* have increased the diversity of their workforces, both managerial and non-managerial.

It is essential to *amici* that the University of Michigan and other leading universities be able to take race and ethnic background into consideration in their admissions decisions. *Amici* are in the business of communication. Their success, and the future of this country, depend on *amici*'s ability to communicate with people and communities reflecting increasingly diverse racial and ethnic backgrounds. *Amici* need talented college graduates, minority and non-minority, who have been educated in an environment that reflects the nation's diversity. These graduates will enter *amici*'s workforces and become the managers of the future. The Court's decision on the constitutionality of the admissions programs at the University of Michigan will have a profound impact on the makeup of that workforce.

SUMMARY OF THE ARGUMENT

Amici media companies play a vital role as the vehicle for the exchange of information and ideas in this country. The public welfare depends on *amici*'s ability to engage individuals from all aspects of our multi-faceted nation in debate on the complex issues confronting us. *Amici* urge the Court to find that diversity in higher education is a compelling governmental interest and that the University of Michigan's admissions programs are narrowly tailored to serve that compelling interest. This holding is essential to *amici*'s success and to the public interest.

The nation's colleges and universities provide the pool from which *amici*'s workforces are drawn. These graduates will become the managers of *amici*'s businesses. It is

essential to *amici*'s ability to communicate effectively both that there be a large pool of qualified minority applicants and that all of the graduates, minority and non-minority, have been educated to value each other's differences.

The public interest also is served when *amici*'s workforces reflect the nation's diversity. Individuals whose backgrounds and life experiences are different from the majority add to the public debate, because they bring different perspectives to bear on important issues. In addition, precisely because minority viewpoints are not monolithic, it is important for the media to include more than a token representation of minorities. Access to this broad spectrum of viewpoints both enriches the exchange of information and breaks down stereotypical assumptions about minority perspectives.

Amici are working to improve the diversity of their workforces and to support minority employees as they develop and move into management positions. Despite the efforts of *amici* and others in the industry, minority representation in the media falls far short of the goal of reflecting the diversity of the communities *amici* serve. Programs such as those at the University of Michigan are necessary to *amici*'s ability to hire and retain talented minority employees in a workforce that responds to the concerns of individuals of different backgrounds.

Amici do not need token representation of minorities in their workforces. They need talented minority and non-minority graduates who have been educated in an environment like that of University of Michigan, where differences in racial and ethnic background are valued because they add to the richness of the educational experience and to the students' preparation to contribute to the national and international exchange of ideas.

ARGUMENT

In 1978, Justice Powell recognized that our "'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Regents of the University of California v. Bakke*, 438 U.S. 265, 313 (1978)(opinion of Powell, J.)(quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)). Justice Powell's words are equally, if not more, true today than they were in 1978. The complexity of the domestic and international issues facing us twenty five years after *Bakke* requires that everyone in our multi-faceted nation be represented and engaged in the national debate on these issues.

Amici media companies are particularly aware of the wisdom of Justice Powell's judgment. *Amici* are a critical vehicle for the exchange of ideas and information that forms the basis for national dialogue. We urge the Court to confirm that diversity is a compelling governmental interest and that practices like those employed by the University of Michigan to enhance diversity are sufficiently narrowly tailored to foster this compelling interest. Without such a finding, *amici*'s ability to attract and retain a workforce that reflects and values the nation's diversity will be impaired and the meaningful exchange of ideas and information among all segments of our population will be harmed.

It is *amici*'s job to communicate – to be the vehicle for the exchange of information and ideas. *Amici* perform that job as "fiduciaries for the public," *FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984), whose welfare depends on "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

For two reasons, diversity in higher education is essential to *amici*'s ability to communicate effectively and thus to serve the public interest. First, diversity in higher education enables *amici* to hire talented college graduates from diverse racial and ethnic backgrounds. *Amici* increasingly need such a workforce in order to communicate effectively with the audiences to whom they address their programming. Second, diversity in higher education produces a workforce of minorities and non-minorities who have been educated to understand and value the racial and ethnic differences reflected in our communities. Both of these results are necessary to the success of *amici*'s businesses and to the public interest in the widest possible exchange of information and ideas.

From a purely business perspective, a diverse workforce is essential to *amici*'s success. Communication is not a one-way dissemination of information. Communication requires a listening audience. The communities served by the media increasingly reflect multiple racial and ethnic backgrounds. Individuals in these communities are likely to choose a broadcast station or newspaper where the programming reflects the diversity of the community. See Siegelman,P. & Waldfogel, J., Race and Radio: Preference Externalities, Minority Ownership, and the Provision of Programming to Minorities (study filed with the FCC, October 24, 2001)(minorities listen to minority targeted stations), at *http://www.fcc.gov/ownership/roundtable-docs/waldfogel-c.pdf*. Individuals also are likely to discuss their thoughts and concerns with someone who shares their cultural background and speaks their language, or with someone who has learned to communicate easily across racial, ethnic and ideological lines. See Bill Dedman, *Newspapers Fall Short of Diversity Goal*, BOSTON GLOBE, April 11, 2002 (editors surveyed by Boston Globe report that

diversity "improves awareness of what's going on in the community . . . [and] enhances credibility, especially among minorities"), *available at* http://www.boston.com/asne.

A diverse media workforce also serves the public interest. The broadcast and print media shape public debate by identifying issues and asking questions. Individuals whose backgrounds and life experiences are different from the majority add to the public debate, not simply because they have different ideas, but because they ask different questions. There is evidence, for instance, that the increased representation of women in the media has expanded the range of issues presented for public debate. INTERNATIONAL WOMEN'S MEDIA FOUNDATION, LEADING IN A DIFFERENT LANGUAGE: WILL WOMEN CHANGE THE NEWS MEDIA?, DIFFERENT PERSPECTIVES (2000)(IWMF Report) (women have changed the definition of news; domestic violence, education and other "women's issues" are now issues of general interest; Russian editors report that women war correspondents in Russia have changed the type of report from the field and had an impact on politicians), *available at* http:// www.iwmf.org/pub.

Just as there is no "Black viewpoint," "Asian viewpoint" or "Arab viewpoint" on a given issue, *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 615 (1990) (O'Connor, J., dissenting), there is no "women's viewpoint," but the increased presence of women in the industry has made the public exchange richer. Similarly, leaders in the media industry have recognized that minority journalists may "look at government in a different way," and are working to encourage those different perspectives. Caroline Garcia, *Diversity and Making a Difference*, AMERICAN SOCIETY OF NEWSPAPER EDITORS (reporting on meeting of two dozen editors at Freedom Forum Diversity Institute), *at* http:// www.asne.org/index.cfm?id=3644 (June 17, 2002).

Minority views are not monolithic, nor are minority program choices. Precisely for that reason, it is important to have more than token representation of minority groups in the media industry. Full participation of minorities in the industry ensures that a full range of perspectives and program choices may be heard, within racial and cultural groups, as well as across racial and cultural lines. Presenting that range of ideas and choices, from a group of people highly visible to the community, breaks down racial stereotypes. *See* WASHINGTON POST/KAISER FAMILY FOUNDATION/HARVARD UNIVERSITY, RACE AND ETHNICITY IN 2001: ATTITUDES, PERCEPTIONS, AND EXPERIENCES (August, 2001) (study finding that high percentage of Americans get information about different racial and ethnic groups from the media), *at* http://www.mphaweb.org/RacialBiracialToplines.pdf. Racial stereotypes also are broken down by accurate portrayals of minorities in the media. That accuracy is linked directly to the media company's commitment to diversity. Doug White, *Newsroom Diversity Attitudes Affect Content*, AMERICAN SOCIETY OF NEWSPAPER EDITORS, *at* http://www.asne.org/index.cfm?Id=3608 (June 12, 2002).

A diversity of ideas and backgrounds has the most impact in the media at supervisory and management levels. A diverse pool of qualified college graduates ready to enter the industry is a necessary and important step toward increased minority participation in these positions. *See* Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, 15 FCC Rcd. 2329, 2347 ¶46 (2000), *reconsideration denied*, 15 FCC Rcd 22548 (2000), *reversed and remanded in part on other grounds sub nom. MD/DC/DE Broadcasters Ass'n. v. FCC*, 236 F.3d 13, *petition for hearing and rehearing en banc denied*, 253 F.3d

732 (D.C. Cir. 2001), *cert. denied sub nom. Minority Media and Telecommunications Council v. FCC*, 534 U.S. 1113 (2002) (citing affidavits from broadcast owners that they or their colleagues started in entry-level or internship positions); *id.* at 2355-56 n.121(citing Declaration of W. Don Cornwell, Chair, Granite Broadcasting Co., that virtually all managers at his broadcasting company got their start in entry level positions). Educating university students to appreciate each other's differences also furthers this goal, because individuals from diverse backgrounds are more likely to remain in the industry if they are in a workforce where their differences are valued. *See* Caroline Garcia, *Diversity and Making a Difference*, AMERICAN SOCIETY OF NEWSPAPER EDITORS (more journalists of color left the industry last year than were hired; editors' appreciation of different backgrounds and perspectives needed for retention), *at* http://www.asne.org/index.cfm?id=3644 (June 17, 2002).

Amici and others in the media industry have instituted programs to find qualified minority employees and equip them to move into management positions. *Amicus* LIN Television sponsors a minority scholarship and training program, which includes payment of college expenses and part-time employment during college as an intern at LIN. *Amicus* Emmis Communications offers a minority internship program and is in the process of fortifying its minority recruitment and development efforts by launching a Diversity Fellowship Program later this year. The National Association of Minority Media Executives ("NAMME") administers the McCormick Fellowship Initiative, which pairs executives of color in the media industry with mentors, sends them to executive development programs and conducts annual progress surveys. NAMME also partners with executives in the media industry, minority and non-minority, to offer a three-day Leadership Development Institute for new and middle managers of color. The National Association of

Broadcasters also has a leadership program to help prepare minorities in the industry become station owners.

Statistics on minorities in the media are not encouraging. Twenty five years ago, the American Society of Newspaper Editors set a goal of having newsrooms as diverse as the communities they serve. That diversity has yet to be reached, in the print or broadcast industry. In 2001, minorities were 31% of the U.S. population, but made up 12% of newsroom employees. Bill Dedman, *Newspapers Fall Short of Diversity Goal*, BOSTON GLOBE, April 11, 2002 (reporting on 2001 Globe survey), *available at* http://www.boston.com/asne. In 2002, minorities made up only 20.6% of the television workforce and 8% of the radio workforce. RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION & FOUNDATION, 2002 WOMEN AND MINORITIES SURVEY, *at* http://www.rtnda.org/research/womin.shtml.

Education and talent are key to success in the media industry. It is vitally important to *amici* and to the public interest that talented individuals of diverse racial and ethnic backgrounds be included in the mix of students at the nation's best colleges and universities. *Amici* do not need token representation of minorities. They need the brightest, most qualified candidates, both minority and non-minority. They need talented graduates who have been educated in an environment where they were constantly challenged to understand and value the racial and ethnic differences that reflect our nation's population.

Amici urge the Court to hold that diversity in higher education is a compelling governmental interest that allows consideration of racial and ethnic origin in university admissions. This holding does not require a stereotypical assumption that skin color determines what one thinks and

believes. It requires only the recognition that racial and ethnic background is one of the "differences" that make our country rich and that learning to value those differences is an educational experience on which the future of our country depends. The experience of *amici* and others in the media demonstrates that while bringing together people from different racial and ethnic backgrounds does not guarantee that any particular viewpoint will be expressed, it does make it very likely that those involved in the exchange will come away with new questions and broader perspectives.

Amici also urge the Court to conclude that the University of Michigan's admissions programs, which take race and ethnic origin into consideration as one of the factors bearing on an applicant's admission, are narrowly tailored to serve this compelling interest. The programs accomplish the goal of creating a rich learning environment more effectively than "race neutral" programs that sweep in some minority students, but ignore the many other factors that bear on the appropriateness of the student for admission. The University of Michigan admissions programs treat each student as an individual whose racial and ethnic background is one factor that bears on the student's likely contribution to a rich educational experience for all involved and on his or her likely value as a future employee, manager or owner in industries like those of *amici*.

CONCLUSION

The Court should find that diversity in higher education is a compelling governmental interest, and that the University of Michigan's admissions programs are narrowly tailored to serve this compelling interest.

Respectfully submitted,

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Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF NEW YORK CITY COUNCIL SPEAKER A. GIFFORD MILLER, NEW YORK CITY COUNCIL MEMBERS BILL DE BLASIO, HELEN FOSTER, HIRAM MONSERRATE, CHARLES BARRON, WILLIAM PERKINS, JOEL RIVERA, LEROY G. COMRIE AND OTHER INDIVIDUAL MEMBERS OF THE NEW YORK CITY COUNCIL AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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CASES

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 7, 17, 18

Agostini v. Felton, 521 U.S. 203 (1997) 6

City of Richmond v. J. A. Croson, Co., 488 U.S. 469 (1989) 7, 18

Dickerson v. United States, 530 U.S. 428 (2000) 7, 8

Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000) 4, 19, 20

Grutter v. Bollinger, 288 F.3d 732 (6th Cir.), *cert. granted*, 123 S. Ct. 617 (2002) 4, 6, 19, 20, 21

Marks v. United States, 430 U.S. 188 (1977) 6

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), *overruled on other grounds, Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) 6

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) 8

Page

Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) 3, 5, 19, 20

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) 7, 18

OTHER AUTHORITIES

William G. Bowen & Derek Bok, *The Shape of the River* (1998) 15-16

William G. Bowen & Neil R. Rudenstine, *Race Sensitive Admissions: Back to Basics*, The Chronicle Rev., Feb.7, 2003, at B7 ..... 24, 25

Bureau of Justice Statistics, U.S. Dep't of Justice, *Homicide Trends in the United States, available at* http://www.ojp.usdoj.gov/bjs/homicide/tables/oarstab.htm (last visited Feb. 13, 2003) 14

Bureau of Labor Statistics, U.S. Dep't of Labor, *Employment Status of the Civilian Noninstitutional Population by Sex, Age, Race & Hispanic Origin, available at* http://www.bls.gov/lau/table12full01.pdf (last visited Feb. 14, 2003) ... 11

Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and the Theory*, 43 B.C. L. Rev. 521 (2002) 10

Cited Authorities

Page

Anemona Hartocollis, *Racial Gap in Test Scores Found Across New York*, N.Y. Times, Mar. 28, 2002, at A1 13

Catherine L. Horn & Stella M. Flores, *Recent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* (The Civil Rights Project at Harvard University 2003) 21, 22, 23

The Importance of Preserving a Core of African Americans at the Most Prestigious Law Schools, 26 J. Blacks Higher Educ. 22 (Winter 1999/2000) 16

Alan B. Krueger, *Children Smart Enough to Get into Elite Schools May Not Need to Bother*, N.Y. Times, Apr. 27, 2000, at C2 16

Patricia Marin & Edgar K. Lee, *Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida* (The Civil Rights Project at Harvard University 2003) 23

Lenna Nepomnyaschy & Irwin Garfinkel, *Wealth in New York City and the Nation: Evidence from New York Social Indicators Survey and the Survey of Income and Program Participation* 11 (Columbia University School of Social Work, Social Indicators Survey Center, Working Paper No. 02-02), *available at* http://www.siscenter.org/Wealth%209-4-02.pdf (last visited Feb. 13, 2003) 12

Cited Authorities

Page

New York City Council, Committee on Women's Issues, *Oversight: The Second Annua! Report on the Status of Women of Color in New York City* (2003) 14

New York City, Dep't of Educ., *2000-2001 Annual School Reports* (2002), *available at* http://www.nycenet.edu/daa/01asr/ (last visited Feb. 13, 2003) 1-2

New York City, Dep't of Educ., *Statistical Summaries*, *available at* http://www.nycenet.edu/stats/ (last visited Feb. 13, 2003) 1

T.L.C., *Thomas Carlyle and Affirmative Action*, 24 J. Blacks Higher Educ. 7 (Summer 1999) ... 15

U.S. Census Bureau, U.S. Dep't of Commerce, *American FactFinder* (2002), *available at* http://factfinder.census.gov (last visited Feb. 13, 2003) 11

U.S. Census Bureau, U.S. Dep't of Commerce, *Asset Ownership of Households: 1995*, *available at* www.census.gov/hhes/www/wealth/1995/wlth95-1.html (last visited Feb. 13, 2003) 12

Cited Authorities

	Page
University of California Application, Admission and Enrollment of California Resident Freshmen for Fall 1995 through 2001, available at http://www.ucop.edu/news/factsheets/flowfrc9501.pdf (last visited Feb. 13, 2003)	22
Vital Signs: Statistics that Measure the State of Racial Inequality, 34 J. Blacks Higher Educ. 79 (Winter 2001/2002)	13
Vital Signs: Statistics that Measure the State of Racial Inequality, 36 J. Blacks Higher Educ. 83 (Summer 2002)	13
Vital Signs: Statistics that Measure the State of Racial Inequality, 37 J. Blacks Higher Educ. 79 (Autumn 2002)	12
Vital Signs: Statistics that Measure the State of Racial Inequality, 38 J. Blacks Higher Educ. (Winter 2002/2003), *available at* http://www.jbhe.com/vital/index.html (last visited Feb. 13, 2003)	11-12

INTEREST OF AMICI CURIAE[1]

Individual members of the New York City Council (the "Council Members")[2] are the elected representatives of the people of New York City. The New York City Council, the legislative branch of the city government, is made up of fifty-one Council Members elected from districts spread throughout the five boroughs of the City of New York.

Every year, nearly forty thousand New York City residents graduate from public high schools. *See* New York City, Dep't of Educ., *Statistical Summaries, available at* http://www.nycenet.edu/stats/ (last visited Feb. 13, 2003). The vast majority of those students plan to enroll in colleges and universities in New York City and throughout the country. *See* New York City, Dep't of Educ., *2000-2001 Annual School Reports* (2002), *available at* http://www.nycenet.edu/daa/

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1. Pursuant to Supreme Court Rule 37.3(a), all parties have filed with the Court their written consent to the filing of all *amicus curiae* briefs. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certifies that counsel for *amici curiae* authored this brief in its entirety. No person or entity other than the *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief.

2. This brief is submitted on behalf of the following individual members of the New York City Council: New York City Council Speaker A. Gifford Miller and New York City Council Members Bill de Blasio, Helen Foster, Hiram Monserrate, Charles Barron, William Perkins, Joel Rivera, Leroy G. Comrie, Tony Avella, Maria Baez, Gale A. Brewer, Yvette D. Clarke, Alan J. Gerson, Sara Gonzalez, Robert Jackson, Melinda R. Katz, G. Oliver Koppell, John C. Liu, Margarita Lopez, Michael E. McMahon, Christine Quinn, Domenic M. Recchia, Philip Reed, Diana Reyna, James Sanders, Jr., Larry B. Seabrook, Jose Serrano, Kendall Stewart, Albert Vann and David Yassky.

01asr/ (last visited Feb. 13, 2003). Countless other New York City residents attend graduate and professional schools each year. Given the diversity of New York City, many of these students are members of ethnic and racial groups that are generally under represented at selective universities and colleges throughout the country (hereinafter, "under-represented minorities"). As representatives of these under-represented minorities, the Council Members are committed to removing the barriers to higher education that these students face. The Council Members also seek to ensure that all New York City students are able to pursue higher education at schools with diverse student bodies, where they share experiences inside and outside of the classroom with classmates who possess varying backgrounds and perspectives.

New York City is also the center of business in the nation, and indeed, the world. Each year, thousands of college and professional school graduates come to New York City to work for its many corporations as well as for the City itself. Like the residents of the city in which they are based, New York businesses operate in an increasingly global and diverse environment. Their continued success depends in part on their ability to interact with increasingly diverse customers, competitors, employees, and vendors. In order to do this, they must be able to recruit from an applicant pool that includes well-educated individuals from a broad range of racial and ethnic backgrounds.

SUMMARY OF ARGUMENT

Through race-conscious admissions plans at both its Law School and its undergraduate school of Literature, Science & the Arts, the University of Michigan (the "University") seeks to further an interest that the Court has already found compelling: diversity. Indeed, in *Regents of the Univ. of Cal. v. Bakke*, the Court found diversity a compelling interest in the context of a university's admissions program. *See* 438 U.S. 265, 313-15 (1978) (Powell, J.). Overruling *Bakke* would ignore the doctrine of *stare decisis* and deny students and their future employers the wealth of benefits that flow from a richly-diverse student body.

But affirmative action serves to advance more than a single compelling state interest. In addition to promoting educational diversity, affirmative action improves the social conditions facing many under-represented minorities today. As such, it advances an alternative and equally compelling government interest in narrowing the glaring gap between the social conditions of under-represented minorities and those of Caucasians in this country.

The University's Law School and current undergraduate admissions policies (collectively, the "University Policies") are narrowly tailored to achieve both of these compelling interests. Indeed, both policies follow to the letter the guidelines for a constitutionally-permissible affirmative action admissions plan set out by the Court in *Bakke*. Contrary to the brief submitted by the United States, "top percentage" plans do not present a viable race-neutral alternative to affirmative action plans. Such policies suffer fatal limitations, including: (i) their failure to enroll under-represented minorities at selective state schools; (ii) a dependence upon—

and perpetuation of—segregated secondary schools; and (iii) their complete inapplicability at the graduate and professional school level.

Accordingly, whether this Court relies upon the diversity rationale in *Bakke* or the social conditions rationale discussed herein, it should affirm the rulings of both the Sixth Circuit in *Grutter* and the Eastern District of Michigan in *Gratz* and uphold the University Policies as narrowly-tailored to achieve a compelling state interest.

ARGUMENT

I. DIVERSITY IS A COMPELLING STATE INTEREST JUSTIFYING RACE-CONSCIOUS UNIVERSITY ADMISSIONS POLICIES

In upholding the constitutionality of the University Policies, the lower courts took clear direction from the Court. Following Justice Powell's binding opinion in *Bakke*, both courts determined that the University's interest in educational diversity was sufficiently compelling to survive strict scrutiny. *See Grutter v. Bollinger*, 288 F.3d 732, 739 (6th Cir.) (en banc), *cert. granted*, 123 S. Ct. 617 (2002); *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 820 (E.D. Mich. 2000).

This Court should follow the same path to reach an identical conclusion. While the *Bakke* Court was fragmented, the opinion of the Court unquestionably recognized diversity as a compelling state interest. In the more than twenty years since *Bakke* was decided, the Court has never questioned—let alone overruled—this fundamental holding. It should not do so here.

A. Diversity in Education is a Compelling State Interest Under *Bakke*

In *Bakke*, the Court confronted the constitutionality of a race-conscious admissions plan at the University of California at Davis Medical School ("Davis"). Unlike the University Policies at issue here, the Davis policy utilized a two-track admissions system that set aside a predetermined number of spaces in each class for minority applicants. *See Bakke*, 438 U.S. at 272-73. Delivering the judgment of a fragmented Court, Justice Powell applied strict scrutiny to the Davis plan. He accepted Davis' argument that its policy was aimed at achieving a compelling state interest: diversity in its student body. Recognizing the value of attaining a "robust exchange of ideas" in the university setting, Justice Powell concluded that "the interest of diversity is compelling in the context of a university's admissions program." *Id.* at 314. Ultimately, however, Justice Powell rejected the university's policy as not narrowly tailored to achieve this permissible goal. *See id.* at 315-16.

Much debate has centered around whether Justice Powell's opinion constituted the opinion of the Court in *Bakke*. Four Justices concurred in his opinion, although all four would have approved a more expansive consideration of race in admissions and upheld the Davis policy as constitutional. *See id.* at 324-408 (Blackmun, Brennan, Marshall, & White, JJ., concurring). Four Justices dissented from Justice Powell's opinion, although none of the four even addressed the constitutionality of the Davis policy, focusing instead on Title VI of the Civil Rights Act. *See id.* at 412-21 (Stevens, Rehnquist, Stewart, JJ. & Burger, C.J., concurring in part and dissenting in part). None of the other Justices explicitly endorsed Justice Powell's diversity rationale.

There is, however, an "answer" to this much debated question—one that the Sixth Circuit found in *Grutter*. The Court has provided explicit guidelines for extracting a rule from the various opinions of a divided Court. In *Marks v. United States*, the Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks*, 430 U.S. 188, 193 (1977) (internal citation omitted). Applying this rule to *Bakke*, the Sixth Circuit in *Grutter* properly determined that Justice Powell's strict scrutiny analysis of Davis' admissions policy permitted the "most limited consideration of race" and, accordingly, constituted the narrowest ground on which the majority agreed. *See Grutter*, 288 F.3d at 741. In short, under *Marks*, Justice Powell's opinion—including his clear proclamation that educational diversity is a compelling state interest—constitutes the holding of *Bakke*.

B. *Bakke* Has Not Been Overruled and Remains Good Law

This Court retains the sole power to overrule its own decisions. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989)). It has never done so with *Bakke*. To the contrary, years after *Bakke* was decided, the Court explicitly recognized Justice Powell's diversity rationale. *See Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 568 (1990) ("Just as a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated, the diversity of views and

information on the airwaves serves important First Amendment values.") (Brennan, J.) (citing *Bakke*, 438 U.S. at 311-313), *overruled on other grounds*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

Moreover, on the several occasions since *Bakke* that the Court has considered affirmative action policies in contexts other than higher education, *see, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J. A. Croson, Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), it has left untouched the pivotal holding in *Bakke*: that diversity can be a compelling state interest justifying affirmative action. Thus, in the absence of any decision from the Court overruling *Bakke*, the case—including Justice Powell's opinion of the Court upholding diversity as a compelling state interest—remains binding precedent.

C. This Court Should Not Overrule *Bakke*

Nor should this Court overrule *Bakke* today. To do so would not only disregard the doctrine of *stare decisis*, but would also deprive millions of students of all races, as well as their potential employers, of the benefits of a diverse learning environment.

1. *Stare decisis* requires that *Bakke* be left undisturbed

Regardless of this Court's views of Justice Powell's analysis and opinion in *Bakke*, "the principles of *stare decisis* weigh heavily against overruling it now." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). The Court has consistently recognized that while the rule of *stare decisis* is not an

"inexorable command," a departure from precedent must be supported by some "special justification," *id.*, or "compelling reason." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 867 (1992). No such reason exists for overruling *Bakke*.

In deciding whether a "special" or "compelling" reason for overruling precedent exists, the Court has looked to several factors, including: (i) whether the rule has become unworkable, *see Casey*, 505 U.S. at 855 (citing *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965)); (ii) whether related principles of law have developed so as to "have left the old rule no more than a remnant of abandoned doctrine," *id.* (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 173-74 (1989)); (iii) whether facts have changed so as to have robbed the old rule of its significance, *see id.* (citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)); and (iv) whether the rule has been relied upon and become embedded in our legal culture, *see id.*; *Dickerson*, 530 U.S. at 443.

Here, none of these factors favors overturning *Bakke*. In brief, *Bakke* is as workable today as it was when it was decided. No change in factual circumstances has robbed Justice Powell's opinion of significance. To the contrary, students of color remain grossly under represented in selective universities today. Finally, and perhaps most significantly, in the years since *Bakke* was decided, affirmative action has gained cultural centrality. *See Dickerson*, 530 U.S. at 443 (refusing to overturn *Miranda v. Arizona* where it had "become embedded in routine police practice to the point where the warnings have become part of our national culture"). Indeed, affirmative action has become virtually standard for admissions policies throughout the country.

Without any compelling reason to overrule *Bakke*, this Court should leave the decision undisturbed under the principles of *stare decisis*.

2. Overruling *Bakke* would deny students and their future employers the benefits of a diverse student body

Overruling *Bakke* would do far more than disrupt the Court's precedent. Perhaps even more importantly, it would deprive future generations of students of the benefits that flow from a racially diverse student body. In the more than twenty years since *Bakke* was decided, students—including the tens of thousands graduating from New York City schools each year—have been able to exchange viewpoints with classmates of varied racial and ethnic backgrounds. Absent affirmative action, many of these students would lose this opportunity.

The effects of overturning *Bakke* would soon also reach businesses and employers across the nation, including in New York City, where so many businesses are located. In order to thrive, today's increasingly global companies need to recruit under–represented minority students who are graduates of the country's best schools as well as other graduates who have grown accustomed to sharing ideas in an environment rich with diversity.

Finally, as discussed below, race-conscious admissions policies are a proven way of helping under-represented minorities improve their socio-economic status in society. *See infra* at II.B. Overruling *Bakke* would cripple a significant means of social advancement for many people of color.

II. NARROWING THE GAP BETWEEN SOCIAL CONDITIONS OF UNDER-REPRESENTED MINORITIES AND CAUCASIANS CONSTITUTES AN ALTERNATIVE COMPELLING GOVERNMENT INTEREST

Like the lower courts, this Court can uphold the University Policies by relying on *Bakke* alone. However, should it determine that Justice Powell's opinion is not the holding in *Bakke*, or decide to overrule *Bakke* altogether, there is an alternative compelling interest that justifies the University's race-conscious admissions policies: an interest in narrowing the existing gap between the social conditions of under-represented minorities and those of Caucasians in this country.[3]

Students applying to any university program today live in a country with a startling gap between the economic and social conditions of under-represented minorities and those of Caucasians. Whatever the causes of these social and economic conditions may be, it is clear that the effects of these conditions depress the advancement not only of under-represented minorities, but of society as a whole. Confronting the existing disparity and helping to close the gap in social conditions is a compelling state interest that justifies upholding the University's affirmative action policies.

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3. The alternative theory presented in this section is set out in full in a recent article published in the Boston College Law Review. *See* Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and the Theory*, 43 B.C. L. Rev. 521 (2002).

A. Socio-Economic Conditions Facing Under-Represented Minorities Nationwide

No one statistic captures the socio-economic conditions of all under-represented minorities in this country. Taken together, however, several economic and social indicators reveal an undeniable disparity between the social conditions of under-represented minorities and those of Caucasians. While it is impossible to discuss them all, these indicators demonstrate most vividly the disadvantaged conditions under which many under-represented minorities live.

1. Economic Conditions

On average, under-represented minorities occupy the lower rungs of this country's economic ladder. For the last two years, African Americans have been more than twice as likely to be unemployed as Caucasians. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Employment Status of the Civilian Noninstitutional Population by Sex, Age, Race & Hispanic Origin, available at* http://www.bls.gov/lau/table12full01.pdf (last visited Feb. 14, 2003). During the same time period, the national unemployment rate for Latinos was approximately 55% higher than the rate for Caucasians. *See id.*

Moreover, those under-represented minorities who are employed are likely to earn far less than their Caucasian counterparts. In 1999, while the median family income was $53,356 for Caucasians, it was only $33,255 for African Americans and $34,397 for Latinos. *See* U.S. Census Bureau, U.S. Dep't of Commerce, *American FactFinder* (2002), *available at* http://factfinder.census.gov (last visited Feb. 13, 2003); *see also Vital Signs: Statistics that Measure the State*

of Racial Inequality, 38 J. Blacks Higher Educ. (Winter 2002/2003) ("In 2001 the median black family income in the United States as a percentage of the median white family income: 62%"), *available at* http://www.jbhe.com/vital/index.html (last visited Feb. 13, 2003). In 2001, when 7.8% of Caucasian Americans were living in poverty, nearly three times as many African Americans (22.7%) were living under such conditions. *See Vital Signs: Statistics that Measure the State of Racial Inequality*, 37 J. Blacks Higher Educ. 79 (Autumn 2002).

Perhaps unsurprisingly, on average, under-represented minorities have also amassed far less personal wealth than Caucasians. In 1995, the median value of household assets was $49,030 for Caucasian households, but only a fraction of that amount—just over $7,000—for African American and Latino households alike. *See* U.S. Census Bureau, U.S. Dep't of Commerce, *Asset Ownership of Households: 1995*, *available at* www.census.gov/hhes/www/wealth/1995/wlth95-1.html (last visited Feb. 13, 2003). Statistics from New York City reveal an even more significant disparity. In the late 1990s, the median value of assets in a Caucasian household was valued at $14,013, while the median value of assets in an African American household was $623. *See* Lenna Nepomnyaschy & Irwin Garfinkel, *Wealth in New York City and the Nation: Evidence from New York Social Indicators Survey and the Survey of Income and Program Participation* 11 (Columbia University School of Social Work, Social Indicators Survey Center, Working Paper No. 02-02), *available at* http://www.siscenter.org/Wealth%209-4-02.pdf (last visited Feb. 13, 2003).

2. Social Conditions

Statistics from the educational arena demonstrate similar inequities. In 2000, 17.8% of all African American adults over the age of twenty-five had completed four or more years of college, as compared with 34% of Caucasians of the same age. *See Vital Signs: Statistics that Measure the State of Racial Inequality*, 36 J. Blacks Higher Educ. 83 (Summer 2002). The same year, while 77.3% of all Caucasian American children ages three to seventeen had access to a computer at home, only 42.5% of African American children had such access. *See Vital Signs: Statistics that Measure the State of Racial Inequality*, 34 J. Blacks Higher Educ. 79 (Winter 2001/2002).

In New York City, a recent report on educational performance showed a wide gap in the performance of under-represented minority children and Caucasian children on statewide achievement tests. While 70% of Caucasian fourth graders met New York State standards in English, only 37% of African American children and 35% of Latino students met these standards. *See* Anemona Hartocollis, *Racial Gap in Test Scores Found Across New York*, N.Y. Times, Mar. 28, 2002, at A1. This gap diminished, but clearly persisted, through eighth grade achievement tests. *See id.* (showing 57% Caucasian , 24% African American, and 25% Latino students met standards in English; 45% Caucasian, 12% African American, and 14% Latino students satisfying state math standards).

Under-represented minorities are also over-represented in the nation's criminal justice system and prison population. In 2000, 205.8 of 100,000 African American men between the ages of eighteen and twenty-four had been convicted of

homicide, as compared to 23.9 out of 100,000 Caucasian males of the same age. Bureau of Justice Statistics, U.S. Dep't of Justice, *Homicide Trends in the United States*, *available at* http://www.ojp.usdoj.gov/bjs/homicide/tables/oarstab.htm (last visited Feb. 13, 2003). In New York City, African American and Latino women constitute fifty-five percent of the female population, but eighty-five percent of all women arrested in 2001. *See* New York City Council Committee on Women's Issues, *Oversight: The Second Annual Report on the Status of Women of Color in New York City* 4 (2003).

This disparity carries over to the victims of violent crime as well. In 2000, 100.2 of 100,000 African American eighteen to twenty-four year olds were homicide victims as compared to 12.1 of 100,000 Caucasians. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Homicide Trends in the United States*, *available at* http://www.ojp.usdoj.gov/bjs/homicide/tables/varstab.htm (last visited Feb. 13, 2003).

Taken together, these conditions create an environment that not only hampers the advancement of under-represented minorities, but harms all of society. The economic situation of under-represented minorities depresses the national economy as a whole. Similarly, high crime rates affect all individuals within a community as well as taxpayers. When viewed together, the gap in social conditions is unquestionably a compelling problem that our public institutions must be permitted to correct.

B. Race-Conscious University Admissions Policies are a Proven Means of Redressing the Social Conditions of Under-Represented Minorities

Given the pervasiveness of the "social gap," there is no one solution that could remedy all of the conditions faced by many communities of color. University affirmative action policies, while not a panacea, are a proven way of improving the social conditions of many minorities.

According to the Journal of Blacks in Higher Education,

> [O]ver the past 30 years, at least 15,000 black students admitted under affirmative action guidelines have graduated from America's 25 highest-ranked universities. Another 15,000 African Americans, also admitted under preferential admissions policies, have graduated from the nation's highest-ranked law schools. Some 10,000 more blacks have successfully entered the business world after admissions under affirmative action policies that were established at our leading business schools. Another 3,500 young blacks have graduated from our most distinguished medical schools.

T.L.C., *Thomas Carlyle and Affirmative Action*, 24 J. Blacks Higher Educ. 7 (Summer 1999).

Graduates of these selective universities have entered and excelled in the professional world. Since the 1960s when affirmative action plans were first utilized, the percentage of African American physicians in this country has almost doubled, and the percentage of African American attorneys and engineers has nearly tripled. *See* William J. Bowen &

Derek Bok, *The Shape of the River* 10 (1998) (citing U.S. Bureau of the Census statistics from 1960 and 1990). In 2000, all nine African American general counsels of Fortune 500 companies graduated from selective law schools. *See The Importance of Preserving a Core of African Americans at the Most Prestigious Law Schools*, 26 J. Blacks Higher Educ. 22, 23 (Winter 1999/2000).

From a purely economic perspective, at least one study has found a clear "wage premium" associated with attending a selective university. According to data collected by the Mellon Foundation, the average student who entered a "highly selective university" earned $22,000 more than the average student from a "moderately selective" college. *See* Alan B. Krueger, *Children Smart Enough to Get into Elite Schools May Not Need to Bother*, N.Y. Times, Apr. 27, 2000, at C2; *see also* Bowen & Bok, *supra*, at 123 (reporting that "black women from the [selective] schools earned 73% more ($27,000 more) than did all black women with BAs. The [selective school] earnings advantage was even greater for black men. . . ."). Accordingly, beneficiaries of affirmative action are far more likely to thrive financially than under-represented minorities on average.

In short, beneficiaries of affirmative action plans have gone on to live under social conditions that stand in stark contrast to those facing much of the country's minority population. Affirmative action contributes to closing the gap in social conditions between minorities and Caucasians. *See* Bowen & Bok, *supra*, at 10.

C. Closing the Gap in Social Conditions Is a Compelling State Interest

The Court has never developed a general definition of what constitutes a "compelling state interest." Nor has it considered whether redressing the social conditions facing many of the country's under-represented minorities can constitute a compelling state interest. Accordingly, this Court—unconstrained by precedent—is free to assess the compelling nature of this interest in light of the evidence of social disparities presented above.

A review of this data leaves no question about the severity of the socio-economic conditions facing many minorities today. Indeed, at least one Member of this Court has recognized the magnitude of the problem:

> Those effects [of past discrimination], reflective of a system of racial caste only recently ended, are evident in our workplaces, markets, and neighborhoods. Job applicants with identical resumes, qualifications, and interview styles still experience different receptions, depending on their race. White and African-American consumers still encounter different deals. People of color looking for housing still face discriminatory treatment by landlords, real estate agents, and mortgage lenders. . . Bias, both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice.

Adarand, 515 U.S. at 273-74 (Ginsburg, J., dissenting).

At first blush, a "social conditions" justification for the University's admissions plans may appear at odds with the Court's previous decisions rejecting the notion that remedying general societal discrimination can constitute a compelling state interest. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). This is not the case. Unlike the remedial approach that the Court has taken in the past, applying social conditions as a compelling interest requires examination not of the causes of current social conditions, but simply of their existence today. Indeed, the causes of the gap in social conditions are irrelevant to a finding that the continued existence of the gap constitutes a compelling problem that our states must be permitted to address.

The depth and breadth of this problem leave no doubt that narrowing the gap in social conditions between under-represented minorities and Caucasians constitutes a compelling state interest. The state should be permitted to continue affirmative action plans—like those at the University of Michigan—that have made a substantial contribution to improving the social conditions of under-represented minorities.

III. THE LAW SCHOOL AND UNDERGRADUATE ADMISSIONS POLICIES ARE NARROWLY TAILORED TO ACHIEVE THE COMPELLING INTERESTS OF EITHER DIVERSITY OR EQUALIZATION OF SOCIAL CONDITIONS

In order to survive strict scrutiny, the University admissions policies must not only advance a compelling state interest (indeed, they advance at least two), but must also be "narrowly tailored" to achieve that compelling interest. *See Adarand*, 515 U.S. at 227. As set out below, both of the

University Policies satisfy the narrow tailoring requirements established both in, and after, *Bakke*.

A. Both the Law School and the Undergraduate Admissions Policies are Narrowly Tailored Under *Bakke*

In *Bakke*, the Court, while finding diversity to be a compelling state interest, ultimately struck down Davis' dual-track, "quota" system as not narrowly tailored to achieve that goal. *See Bakke*, 438 U.S. at 315-19. Both Justice Powell and Justice Brennan contrasted the Davis plan with the constitutional Harvard admissions plan, which considered race as a "plus" factor. *See id.* at 316-17 (Powell, J.), 326 n.1 (Brennan, J., concurring). Here, both of the lower courts properly extracted two fundamental principles from *Bakke*: (i) a two-track "quota" admissions system is not narrowly tailored, and thus is unconstitutional; and (ii) consideration of race as a "plus" factor does not violate the Equal Protection Clause. *See Grutter*, 288 F.3d at 745; *see also Gratz*, 122 F. Supp. 2d at 825-26. The University Policies fall squarely within the parameters identified in *Bakke*.

Neither of the University Policies considers minority applicants separately from Caucasian applicants or sets aside a predetermined number of spots for minorities in an incoming class. Instead, like the Harvard admissions program cited with approval in *Bakke*, both policies consider race as one of several "plus" factors. Under the Law School policy, race and ethnicity is one of several "soft" factors taken into account after an applicant's LSAT scores and grade point average are tallied. *See Grutter*, 288 F.3d at 746-47. While petitioners and several *amici* make much of the fact that the

Law School seeks to grant admission to a "critical mass" of under-represented minorities, such a goal is far from a strict quota. Rather, like the Harvard plan, the Law School's policy seeks to include in each class a flexible number of students of color sufficient to ensure that under-represented minorities do not feel isolated in the classroom. *See Grutter*, 288 F.3d at 747.

Similarly, the current undergraduate policy takes race into account by either giving an under-represented minority candidates twenty "points" out of a one hundred and fifty-point admissions scale, or "flagging" an application from a student from an under-represented minority group of color for further consideration despite lower grades and test scores. *See Gratz*, 122 F. Supp. 2d at 826-27. Again, there is no quota of minority students guaranteed admission to an entering class.

In short, *Bakke* expressly permitted universities to take race into account as a favorable factor, barring only strict quota systems that considered applicants of color separately. *See Bakke*, 438 U.S. at 312-15. By viewing race as one of several "plus" factors, the University Policies fall in line with *Bakke*'s commands.

B. The University Should Not Be Required to Consider Non-Viable Race-Neutral Alternatives in Order to Survive Strict Scrutiny

As the Sixth Circuit in *Grutter* recognized, since *Bakke*, this Court has suggested that another factor may be relevant to the narrow-tailoring analysis: an institution's consideration of race-neutral alternatives to an affirmative action plan.

See Grutter, 288 F.3d at 749 (citing *Croson*, 488 U.S. at 507).[4] The Court has never suggested, however, that consideration of *ineffective* race-neutral alternatives is required in order to satisfy the narrowly-tailored analysis. The brief submitted by the United States does precisely this. By arguing that the University of Michigan should have considered "top percentage" plans that guarantee admission to students who graduate in the top X percent of their high school class, the United States' brief ignores the serious limitations of such plans, including: (i) their failure to enroll under-represented minorities at selective state schools; (ii) the perverse incentives they create; and (iii) their inapplicability outside of the undergraduate context.

1. Top percentage plans have not increased the number of under-represented minority students in the most selective state schools

Following the abolition of affirmative action in the California and Florida state university systems, both states implemented top percentage plans. Under California's policy, students who complete certain course requirements and graduate in the top four percent of their high school class are guaranteed admission to one of eight California state schools, but not necessarily to a student's first choice school. *See* Catherine L. Horn & Stella M. Flores, *Recent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* 19-20 (The Civil Rights Project at Harvard University 2003). Similarly, under Florida's "Talented 20" program, students who satisfy certain academic requirements

4. In *Grutter*, the Sixth Circuit determined that the Law School had considered and rejected several race-neutral alternatives. *See Grutter*, 288 F.3d at 750.

and graduate in the top twenty percent of their high school class automatically qualify for admission to the state school system, but, again, not to a student's top choice within that system. *See id.* at 21.

Statistics from California show a clear and disturbing admissions trend: since implementation of the plan in 1997, minority enrollment at California's state schools has increased overall, but minority enrollment at the most selective schools has sharply declined. For example, in 1997, before affirmative action was prohibited in California, 252 African American and 469 Chicano and Latino students enrolled at the University of California at Berkeley, one of the state's most selective schools. *See University of California Application, Admission and Enrollment of California Resident Freshmen for Fall 1995 through 2001, available at* http://www.ucop.edu/news/factsheets/flowfrc9501.pdf (last visited Feb. 13, 2003). In 2001, under the state's top percentage plan, those figures decreased to 137 African Americans and 379 Chicanos and Latinos—a drop of approximately 45% and 20%, respectively. *See id.* The same occurred at California's other most selective school, the University of California at Los Angeles, where the number of African American students dropped from 201 in 1997 to 137 in 2001. *See id.* Although the number of Chicano and Latino students rose slightly (from 565 in 1997 to 574 in 2001), the overall percentage of Chicano and Latino students actually decreased due to an increase in class size by approximately 400 students. *See id.* At the same time, the number of under-represented minority students at the much less selective University of California at Riverside nearly doubled between 1997 to 2001. *See id.*

It is too early to discern any clear enrollment trends under Florida's Talented 20 program, which went into effect in 2000. The plan has, however, drawn early criticism from both educational experts and university officials. A recent study conducted at Harvard University concluded that the Talented 20 program was "virtually irrelevant" to minority enrollment at Florida's state universities. *See* Gary Orfield, *Foreword* to Patricia Marin & Edgar K. Lee, *Appearance and Reality in the Sunshine State*: *The Talented 20 Program in Florida* v (The Civil Rights Project at Harvard University 2003). Moreover, experts and university officials have attributed any success in enrolling increased numbers of under-represented minority students at Florida State University (one of the two most selective schools in the Florida system) to the school's increased race-targeted recruitment and retention efforts, not the top percentage plan.[5] *See* Marin & Lee, *supra*, at 31-36; Horn & Flores, *supra*, at 56-58. Notably, this "success" has not carried over to the state's other most selective school, the University of Florida, where enrollment of both African American and Latino students declined between 2000 and 2001. *See* Horn & Flores at 50.

In short, top percentage plans like the ones in place in California and Florida have proven to be either irrelevant or harmful to the enrollment of under-represented minority students at selective state schools. Such plans are not viable, race-neutral alternatives to affirmative action plans.

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5. Although race cannot be considered in college and university admissions decisions, Florida's plan permits the use of race in awarding scholarships, outreach and recruiting efforts. *See* Marin & Lee, *supra*, at 9.

2. Top percentage plans depend upon—and create an incentive for students to stay in—segregated high schools

Proponents of top percentage plans also ignore the fact that they depend upon, and provide perverse incentives for students to stay in, segregated secondary schools. In practice, top percentage plans can only be truly effective in segregated school systems where, for example, the top ten percent of an inner-city school is likely to consist of primarily minority students. Thus, top percentage plans depend upon the existence of a *de facto* segregated secondary school system. *See* William G. Bowen & Neil R. Rudenstine, *Race Sensitive Admissions: Back to Basics*, The Chronicle Rev., Feb.7, 2003, B7, at B9.

Moreover, top percentage plans almost certainly provide a perverse incentive for a high-performing student of color to attend a segregated high school, where she is likely to be at the top of the class, rather than an integrated school, where she might fall into a lower percentile. Instead of promoting richly-diverse learning environments at all levels of education, top percentage plans depend upon and encourage segregation in high schools.

3. Top percentage plans do not work in the graduate or professional school context

Finally, top percentage plans are wholly unworkable at the graduate or professional school level. These schools—including law schools—receive applications from an enormous pool of national and international university graduates. They also have far smaller entering classes than undergraduate state schools. It is simply not feasible for these

schools to limit the universe of schools from which they will accept applications or admit a large enough entering class to accommodate the top percentages from all schools. *See id.*

CONCLUSION

The University Policies are narrowly tailored to achieve the dual compelling state interests of diversity and narrowing the existing gap in social conditions. For all of the reasons set forth herein, *amici curiae* urge this honorable Court to affirm the decisions of the courts below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

-and-

JENNIFER GRATZ and PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS AND THE LCCR EDUCATION FUND AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CITED AUTHORITIES

CASES

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Alexander v. Sandoval, 532 U.S. 275 (2001)	21
Ambach v. Norwick, 441 U.S. 68 (1979)	18
Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978)	13, 23
Bob Jones Univ. v. United States, 461 U.S. 574 (1983)	9
Brown v. Bd. of Educ., 347 U.S. 483 (1954)	18
Gomillion v. Lightfoot, 364 U.S. 339 (1960)	28
Guinn v. United States, 238 U.S. 347 (1915)	28
Haig v. Agee, 453 U.S. 280 (1981)	5
Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358 (W.D. Ky. 2000)	6
Keyishian v. Bd. of Regents, 385 U.S. 589 (1967)	16
Linmark Assocs., Inc. v. Willingboro Township, 431 U.S. 85 (1977)	16

Cited Authorities

	Page
Lippitt v. Cipollone, 404 U.S. 1032 (1972)	5
Luetkemeyer v. Kaufman, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974)	6
Mackey v. Montrym, 443 U.S. 1 (1979)	5
McCulloch v. Maryland, 17 U.S. 316 (1819)	3, 4
McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637 (1950)	17
Plyler v. Doe, 457 U.S. 202 (1982)	18
Regents of Univ. of Calif. v. Bakke, 438 U.S. 265 (1978)	4, 16, 17, 21, 22
Regents of Univ. of Mich. v. Ewing, 474 U.S. 214 (1985)	13, 23
Shaw v. Reno, 509 U.S. 630 (1993)	28
Storer v. Brown, 415 U.S. 724 (1974)	5, 8
Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971)	16, 23

Cited Authorities

	Page
Sweatt v. Painter, 339 U.S. 629 (1950)	16, 20
Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972)	16
United Mine Workers of Am. v. Gibbs, 383 U.S. 715 (1966)	5
United States v. Hardman, 297 F.3d 1116 (10th Cir. 2002)	6
Univ. of Penn. v. EEOC, 493 U.S. 182 (1990)	13, 23
Wayte v. United States, 470 U.S. 598 (1985)	5, 8
Wisconsin v. Yoder, 406 U.S. 205 (1972)	5
STATUTE	
Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d	4, 21
MISCELLANEOUS	
2000 Democratic National Platform (Aug. 15, 2000), http://www.democrats.org/about/2000platform.html	9

Page

2000 Republican Party Platform (July 31, 2000), http://www.rnc.org/GOPInfo/Platform/2000platform1.htm 9

Advisory Board of the President's Initiative on Race, *One America in the 21st Century: Forging a New Future* (1998), http://thataway.org/dialogue/res/docs/advbdreport.pdf 29

Michelle Adams, *Isn't It Ironic?: The Central Paradox at the Heart of "Percentage Plans"*, 26 OHIO ST. L.J. 1729 (2001) 24

Amicus Br. of 3M et al. in Supp. of Appellants, *Grutter v. Bollinger* (6th Cir. 2001) 10

Amicus Br. of Center for New Black Leadership in Supp. of Pet'rs 28

Amicus Br. of General Motors Corp. in Supp. of Appellants, *Grutter v. Bollinger* (6th Cir. 2001) 10, 16

Amicus Br. of the State of Florida and Governor Jeb Bush in Supp. of Pet'rs 29

Amicus Br. of United States in Supp. of Pet'r Grutter 11, 24, 25, 28

Assoc. of American Universities, *AAU Diversity Statement on the Importance of Diversity in University Admissions* (Apr. 14, 1997), http://www.aau.edu/issues/Diversity4.14.97.html 11, 14

Page

Alexander W. Astin, *Diversity and Multiculturalism on Campus: How Are Students Affected?*, 25 CHANGE 44 (Mar./Apr. 1993) 15, 18, 19, 22

William G. Bowen & Derek Bok, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998) 19, 20, 22

Br. of Pet'rs Gratz and Hamacher 12, 28

Br. of Pet'r Grutter 27

George W. Bush, Remarks on Hispanic Heritage Month (Oct. 9, 2002), http://www.whitehouse.gov/news/releases/2002/10/20021009-1.html 10

George W. Bush, Remarks on the Michigan Affirmative Action Case (Jan. 15, 2003), http://www.whitehouse.gov/news/releases/2003/01/20030115-7.html 19

Mitchell J. Chang, *The Positive Effects of Racial Diversity on Campus*, *in* DIVERSITY CHALLENGED 175 (Gary Orfield ed., 2001) 22

William J. Clinton, *Remarks to Corporate Leaders on the One America Initiative*, 36 WEEKLY COMP. PRES. DOC. 754 (Apr. 10, 2000) 10

Adam Clymer, *Service Academies Defend Use of Race in Their Admissions Policies*, N.Y. Times, Jan. 28, 2003, at A17 10

Page

Carl N. Degler, OUT OF OUR PAST: THE FORCES THAT SHAPED MODERN AMERICA (1970) 8

Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 2000: Hearing Before a Subcomm. of the House Comm. on Appropriations, 106th Cong. (1999) 21

John Dewey, DEMOCRACY AND EDUCATION (1929) .. 18

Expert Report of Patricia Gurin, *Gratz v. Bollinger*, No. 97-75321 (E.D. Mich.) & *Grutter v. Bollinger*, No. 97-75928 (E.D. Mich.), http://www.umich.edu/~urel/admissions/legal/expert/gurintoc.html 15, 18, 19, 22

Expert Report of Thomas Sugrue, *Gratz v. Bollinger*, No. 97-75321 (E.D. Mich.) & *Grutter v. Bollinger*, No. 97-75928 (E.D. Mich.), http://www.umich.edu/~urel/admissions/legal/expert/sugrutoc.html 15

THE FEDERALIST NO. 10 (James Madison) (Clinton Rossiter ed., 1961) 7

Erica Frankenberg et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* (2003), http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf 26

Page

Roxane Harvey Gudeman, *Faculty Experience with Diversity: A Case Study of Macalester College*, *in* DIVERSITY CHALLENGED 251 (Gary Orfield ed., 2001) 19

Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* (2003), http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf 24, 25

Anne Hull, *Fallen Astronauts Spanned the Globe of Diversity*, Wash. Post, Feb. 2, 2003, at A1 11

Human Rights Watch, *World Report 2003* (2003), http://www.hrw.org/wr2k3 6

John Iceland & Daniel H. Weinberg, U.S. Census Bureau, *Racial and Ethnic Residential Segregation in the United States: 1980 - 2000* (2001), http://www.census.gov/hhes/www/housing/resseg/pdf/censr-3.pdf 26

Karen McGill Lawson et al., Leadership Conference Education Fund, BUILDING ONE NATION: A STUDY OF WHAT IS BEING DONE TODAY IN SCHOOLS, NEIGHBORHOODS AND THE WORKPLACE (1998) 2

Lawyers for One America, *Bar None: Report to the President of the United States on the Status of People of Color and Pro Bono Services in the Legal Profession* 5 (July 2000), *available at* http://www.lfoa.org/barnone/index.htm 17

Page

Horace Mann, *The Importance of Universal, Free, Public Education*, *in* 1 THE PEOPLE SHALL JUDGE: READINGS IN THE FORMATION OF AMERICAN POLICY 589 (1949) 18

Tony Mauro, *Corps of Clerks Lacking in Diversity*, USA Today, Mar. 13, 1998, at 12A 21

Lewis Mumford Ctr. for Comparative Urban & Residential Research, *Metropolitan Racial and Ethnic Change: Census 2000*, http://www.albany.edu/mumford/census/index.html. .. 26

NASA Management Challenges: Hearing Before House Subcomm. on Space & Aeronautics, Comm. on Science, 107th Cong. (July 18, 2002) (statement of NASA Administrator Sean O'Keefe), http://www.house.gov/science/hearings/space02/jul18/okeefe.htm 11

Peter H. Schuck, *The Perceived Values of Diversity, Then and Now*, 22 CARDOZO L. REV. 1915 (2001) 8

Katherine Q. Seelye, *U.S. of Future: Grayer and More Hispanic*, N.Y. Times, Mar. 27, 1997, at B16 12

Jeffrey Selingo, *What States Aren't Saying About the 'X-Percent Solution'*, CHRON. OF HIGHER ED., June 2, 2000, at A31 28

Page

Walter G. Stephan & Cookie White Stephan, *The Role of Ignorance in Intergroup Relations*, *in* GROUPS IN CONTACT: THE PSYCHOLOGY OF DESEGREGATION 229 (Norman Miller & Marilynn B. Brewer eds., 1984) 15, 18

Marta Tienda et al., *Closing the Gap?: Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action* (2003), http://www.texastop10.princeton.edu/publications/tienda012103.pdf 25

U.S. Census Bureau, *Demographic Trends in the 20th Century* (2002), http://www.census.gov/prod/2002pubs/censr-4.pdf 12

U.S. Census Bureau, *Projections of the Resident Population by Race, Hispanic Origin, and Nativity: Middle Series, 2050 to 2070*, *at* http://www.census.gov/population/projections/nation/summary/np-t5-g.pdf (Jan. 13, 2000) 12

U.S. Census Bureau, *Quickfacts: California* (2002), *at* http://quickfacts.census.gov/qfd/states 06000.html 25

U.S. Census Bureau, *Quickfacts: Florida* (2002), *at* http://quickfacts.census.gov/qfd/states/12000.html 26

U.S. Census Bureau, *Quickfacts: Texas* (2002), *at* http://quickfacts.census.gov/qfd/states/48000.html 25

Cited Authorities

Page

U.S. Commission on Civil Rights, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education* (2002), http://www.usccr.gov/pubs/percent2/main.htm 24

INTEREST OF *AMICI CURIAE*

The Leadership Conference on Civil Rights ("LCCR") is a coalition of more than 180 national organizations committed to the protection of civil and human rights in the United States.[1] It is the nation's oldest, largest, and most diverse civil and human rights coalition. LCCR was founded in 1950 by three legendary leaders of the civil rights movement – A. Philip Randolph, of the Brotherhood of Sleeping Car Porters; Roy Wilkins, of the NAACP; and Arnold Aronson, of the National Jewish Community Relations Advisory Council. Its member organizations represent men and women of all races and ethnicities.[2]

LCCR promotes effective civil rights legislation and policy. It was in the vanguard of the movement to secure passage of the Civil Rights Acts of 1957 and 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968. Since enactment of these landmark laws, the number of LCCR member organizations has grown and LCCR's commitment to social justice has flourished.

The LCCR Education Fund is the research, education, and communications arm of LCCR. It focuses on documenting discrimination in American society, monitoring efforts to enforce civil rights legislation, and fostering better public understanding of issues of prejudice. The LCCR Education Fund has published studies and reports on many

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1. Pursuant to Supreme Court Rule 37.3(a), all parties have filed with the Court their written consent to the filing of all *amicus curiae* briefs. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* LCCR and the LCCR Education Fund certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than LCCR and LCCR Education Fund, their members, and their counsel has made a monetary contribution to the preparation and submission of this brief.

2. See Appendix for a list of LCCR member organizations and other signatories to this brief. Several member organizations are filing their own *amicus* briefs in this case.

subjects, including diversity in education. *See* Karen McGill Lawson et al., Leadership Conference Education Fund, BUILDING ONE NATION: A STUDY OF WHAT IS BEING DONE TODAY IN SCHOOLS, NEIGHBORHOODS AND THE WORKPLACE 21-55 (1998).

LCCR and the LCCR Education Fund support the use of race as one factor in admissions policies to preserve diversity in the nation's colleges and universities. Diversity cultivates leadership, promotes civic engagement, and dispels stereotypes. The success of the Leadership Conference as a multiracial and multiethnic coalition dedicated to common goals illustrates the tangible contribution of diversity to contemporary American society.

SUMMARY OF ARGUMENT

In analyzing which government interests are compelling, this Court has asked whether they advance traditional government functions and whether they are consistent with the nation's history and constitutional tradition, among other factors. For over two hundred years, the central goal of our government has been a strong, unified country forged from a population more diverse than any other – building the first and greatest nation of immigrants. Historical precedent and even contemporary experience in other countries have provided scant encouragement for this enterprise. Ethnic, racial, and religious violence has been commonplace around the world. But this country, despite its racial tensions, has avoided the level of conflict that has devastated other nations over the last 50 years. We have productively struggled with the problems of our diversity, and even galvanized diversity into one of America's greatest strengths. As the nation becomes increasingly heterogeneous, harnessing the potential of racial diversity and avoiding ethnic conflict remain critical challenges for our government.

Against this backdrop, achieving a diverse student body in higher education is on par with other government interests

that this Court has recognized as compelling. Education plays a critical role in meeting the challenges of diversity and advancing historically important national and governmental objectives. Policymakers and educators have reached a judgment, which this Court has no reason to second-guess, that colleges and universities need to prepare outstanding people of diverse backgrounds for leadership in American society. To this end, educational experts have determined that diversity benefits students, that it breaks down barriers, that it allows students to learn for themselves how we are the same, as well as how we are different. Educators have found that a diverse environment cultivates the civic values necessary to deal effectively with race, which remains uniquely difficult among American problems. And to fulfill their calling, educators have found it important to consider race as one factor, of many, in admissions to colleges, graduate schools, and professional schools.

The University of Michigan and other institutions have weighed alternatives to race-conscious admissions policies, including so-called percentage plans. But if the Court agrees that diversity in higher education is a compelling interest, if diversity is essential to a broader and compelling governmental purpose of fostering leadership and national unity, percentage plans are not tailored to achieve that end. Indeed, the ostensibly race-neutral plans advanced by the United States and other *amicus* parties are not race-neutral at all. Percentage plans have, and are intended to have, a disparate racial impact. Unlike the University of Michigan's approach, however, they are not honest about the role of race in admissions. It is difficult to believe either that the Constitution mandates such subterfuge, or that camouflaging the use of race will further the civic missions of public universities and help them to meet the challenges of America's growing diversity.

The Court should bear in mind, as Chief Justice Marshall observed, that "it is a *constitution* we are expounding," *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819), "a constitution

intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs," *id.* at 415. The Court is being asked to tie the hands – indiscriminately, inflexibly, without recourse to democratic processes – of thousands of elected officials and the professional educators who are responsible to them for the admissions policies of public universities. Indeed, this Court's holding will likely cut an even broader swath. Through Title VI of the Civil Rights Act of 1964, the Court's decision could also bind private colleges, foreclosing access by the future generation of minority leaders to elite institutions. Particularly given the substantial challenges that the nation faces in forging unity out of diversity, there is no reason for this Court to substitute its judgment for the consensus of educators in both the public and private sectors. It should not impose a rigid, sweeping finality that circumstances do not warrant.

ARGUMENT

I. RACIAL DIVERSITY IN THE UNITED STATES SERVES GOVERNMENT INTERESTS OF THE HIGHEST ORDER.

Petitioners challenge the decisive opinion of Justice Powell in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), which found diversity a compelling government interest that can justify consideration of race as one factor in admissions to institutions of higher education. Petitioners' analysis is peremptory. They do not consider how diversity in higher education compares to the other interests this Court has recognized as compelling. Indeed, they ignore factors that have figured in the Court's analysis of compelling state interests – such as advancement of traditional government functions and harmony with the American constitutional tradition.

Although this Court has not itemized all the considerations affecting whether an asserted state interest is

compelling, several patterns emerge from the case law. The Court has recognized the importance of the traditional government functions of protecting public welfare and preserving domestic tranquility. For example, in *Mackey v. Montrym*, 443 U.S. 1, 17 (1979), the Court concluded that public safety on the highways is a paramount state interest, on the basis that "[w]e have traditionally accorded the states great leeway in adopting summary procedures to protect public health and safety." *See also United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 730 (1966) (noting that "the maintenance of domestic peace" is compelling state interest).

In a number of cases, the Court has turned to the nation's history and constitutional tradition, dating back to the early Republic. Thus, in *Storer v. Brown*, 415 U.S. 724, 736 (1974), the Court noted that California, in passing a law to restrict a political candidate's access to the ballot, "apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government." The Court credited that judgment, and concluded that the stability of the political system is a compelling state interest. *Id.* Likewise, the Court in *Wayte v. United States*, 470 U.S. 598, 611-12 (1985), examined the nation's historical tradition, including the Constitution and the Federalist Papers, in determining that "[f]ew interests can be more compelling than a nation's need to ensure its own security." *See also Wisconsin v. Yoder*, 406 U.S. 205, 226 (1972) (concluding, partially on basis of "our history," that a state's interest in compulsory education is not sufficiently compelling to outweigh free exercise rights of Amish); *Haig v. Agee*, 453 U.S. 280, 307-08 (1981) (citing Federalist Papers to support proposition that "no governmental interest is more compelling than the security of the Nation"); *Lippitt v. Cipollone*, 404 U.S. 1032, 1033 (1972) (Douglas, J., dissenting) (arguing that "the

'compelling state interest' advanced by the appellees . . . seems alien to our political and constitutional heritage").[3]

As demonstrated below, diversity in higher education is comparable to other interests the Court has recognized as compelling. It is essential to achieving a longstanding and important national objective – an objective validated by our history and tradition, central to our continued national success, and embodied in an enduring national consensus.

A. This country historically has pursued a national goal of unity in the face of powerful polarizing forces.

In this supposedly enlightened modern era, nations have not coped well with racial, ethnic, and cultural differences among their populations. Violent conflict has engulfed the Balkans, where war erupted between Bosnian Muslims, Croats, and Serbs in the 1990s. Palestinians and Israelis battle in the Middle East. In Central Africa, rivalries between Hutu and Tutsi tribal factions resulted in wholesale genocide. Northern Ireland has seen longstanding violence and terrorism between Catholics and Protestants. *See generally* Human Rights Watch, *World Report 2003* (2003), http://www.hrw.org/wr2k3.

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3. The lower courts have followed the Court's lead. *See, e.g.*, *United States v. Hardman*, 297 F.3d 1116, 1128 (10th Cir. 2002) ("[W]e have little trouble finding a compelling interest in protecting Indian cultures from extinction, growing from government's 'historical obligation to respect Native American sovereignty and to protect Native American culture.'"); *Luetkemeyer v. Kaufman*, 364 F. Supp. 376, 386 (W.D. Mo. 1973) ("[T]he long established constitutional policy of the State of Missouri, which insists upon a degree of separation of church and state to probably a higher degree than that required by the First Amendment, is indeed a 'compelling state interest in the regulation of the subject within the State's constitutional power. . . .'"), *aff'd*, 419 U.S. 888 (1974); *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 379 (W.D. Ky. 2000) (concluding that voluntary maintenance of desegregated school system is compelling state interest, in part due to "the long history of desegregation efforts").

Despite its legacy of slavery and Jim Crow, America has fared better, at least in modern times. With a population of astonishing diversity, the United States nonetheless has avoided widespread and sustained ethnic violence, even as the country has grown less homogenous. That accomplishment has reflected not luck, but historical purpose – the kind of constitutional bedrock that the Court has considered in assessing whether an asserted governmental interest is compelling.

Beginning in colonial times, the Founders recognized the compelling need to bind the nation together against polarizing forces. As James Madison wrote:

> The latent causes of faction are . . . sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points, . . . have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good.

THE FEDERALIST No. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961). To combat the political and religious divisions that jeopardized the nascent Republic, Madison promoted a counterintuitive solution. He advocated a far-reaching nation with many different parties and interests. In such a nation, he wrote,

> you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.

Id. at 83. "Ironically, and brilliantly," in the words of one commentator, "Madison's solution to the problem of social

diversity was for the state to encompass more of it." Peter H. Schuck, *The Perceived Values of Diversity, Then and Now*, 22 CARDOZO L. REV. 1915, 1948 (2001).

To be sure, the diversity that Madison and his contemporaries embraced did not contemplate an equal role for racial minorities or for women. But the principle they articulated as a core constitutional value was broader than their vision of it. Subsequent leaders, such as Benjamin Rush, Frederick Douglass, Susan B. Anthony, and Dr. Martin Luther King, Jr., stripped away those atavistic limits, and reaffirmed the antinomy that embracing diversity is the key to national unity. The historical pedigree of this concept, its embodiment in the fundamental charter of our government and nation, bolsters the conclusion that it undergirds a compelling government interest. *See, e.g., Storer*, 415 U.S. at 736; *Wayte*, 470 U.S. at 611-12.

In the 19th and 20th centuries, vast numbers of immigrants originally from Europe, and more recently from Asia and the Americas, changed the face of America. These waves of immigration, along with the growth and migration of the African-American population, have generated tensions, prejudice, and sometimes violence, putting Madison's theory of faction to the test. But the conflicts have never spiraled into the chaos that other nations have encountered. A significant difference between the United States and these other nations is that, increasingly over time, law and social policy here have not merely tolerated diversity, but have embraced it.[4] The point is that the diversity of our population, especially with regard to race, has long presented a

4. In the early 20th century, for example, progressives celebrated the ideal of the "melting pot." *See* Schuck, *supra*, at 1927-28. Now our vision of diversity is even broader. *See, e.g.*, Carl N. Degler, OUT OF OUR PAST: THE FORCES THAT SHAPED MODERN AMERICA 296 (1970) (noting that immigrant values "remain, not fusing into a new cultural synthesis but persisting as living remnants of many cultures, spicing and enlivening the broader stream of American life").

fundamental American problem, to which the nation has crafted a unique and so far workable American solution. Dealing effectively with that problem, sustaining that solution, is – by history, by tradition, and by necessity – a core government interest.

B. Racial diversity remains a paramount value.

In assessing whether a governmental interest is compelling, the Court should not only consider its historical provenance, but should also look to contemporary evidence reflecting a broad consensus that it is an important value. *Cf. Bob Jones Univ. v. United States*, 461 U.S. 574, 592 (1983) (concluding, on the basis of "deeply and widely accepted views of elementary justice," that racial discrimination in education is contrary to public policy). On that analysis, too, diversity remains a compelling state interest.

Although Petitioners call it into question, the conviction that diversity among individuals of different races adds affirmative value has gained widespread acceptance in all walks of American life. To cite but a few examples:

- Both major political parties endorse racial diversity as an important value. *See* 2000 Republican Party Platform (July 31, 2000) ("We offer . . . a vision of a welcoming society in which all have a place. To all Americans, particularly immigrants and minorities, we send a clear message: this is the party of freedom and progress, and it is your home."), http://www.rnc.org/GOPInfo/Platform/2000platform1.htm; 2000 Democratic National Platform (Aug. 15, 2000) ("In the years to come, we must celebrate our diversity and focus on strengthening the common values and beliefs that make us one America. . . ."), http://www.democrats.org/about/2000platform.html.

- Presidents of both parties have recognized the importance of racial diversity among members of their Cabinets. *See, e.g.*, George W. Bush, Remarks on Hispanic Heritage Month (Oct. 9, 2002) ("[O]ur country is a strong country because of our diversity. . . . One of my jobs is to put together an administration that is talented; an administration here to serve the country, not themselves; an administration that reflects the diversity of our country. And I'm doing just that."), http://www.whitehouse.gov/news/releases/2002/10/20021009-1.html; William J. Clinton, Remarks to Corporate Leaders on the One America Initiative, 36 WEEKLY COMP. PRES. DOC. 754, 755 (Apr. 10, 2000) ("I'm proud of the fact that we have an administration that looks like America, with the most diverse Cabinet and staff in history.").
- America's armed forces, integrated by Executive Order in 1948, now place a premium on racial diversity – especially among the officer ranks. *See* Adam Clymer, *Service Academies Defend Use of Race in Their Admissions Policies*, N.Y. Times, Jan. 28, 2003, at A17 (reporting that racial minorities constitute 28 percent of enlisted personnel in the Air Force, 44 percent in the Army); *id.* ("We want to build an officer corps [that] reflects the military services of which we are a part.") (quoting Dean of Admissions at Naval Academy).
- The country's largest and most successful businesses have promoted racial diversity. *See* Amicus Br. of 3M et al. in Supp. of Appellants at 1, *Grutter v. Bollinger* (6th Cir. 2001) (discussing efforts of Fortune 500 companies "to hire and maintain a diverse workforce, and to employ individuals of all backgrounds"); Amicus Br. of General Motors Corp. in Supp. of Appellants at 30 & n.9, *Grutter v. Bollinger* (6th Cir. 2001) (quoting corporate CEOs on importance of diversity).

- America's leading academic institutions uniformly favor racial diversity in higher education. *See* Assoc. of American Universities, *AAU Diversity Statement on the Importance of Diversity in University Admissions* (Apr. 14, 1997), http://www.aau.edu/issues/Diversity4.14.97.html [hereinafter *AAU Diversity Statement*].
- Racial diversity is even valued on the frontiers of space exploration. *See NASA Management Challenges: Hearing Before House Subcomm. on Space & Aeronautics, Comm. on Science*, 107th Cong. __ (July 18, 2002) ("NASA continues to face challenges in its efforts to recruit scientists and engineers from a candidate pool that is representative of the Nation's diversity.") (statement of NASA Administrator Sean O'Keefe), http://www.house.gov/science/hearings/space02/jul18/okeefe.htm; *see also* Anne Hull, *Fallen Astronauts Spanned the Globe of Diversity*, Wash. Post, Feb. 2, 2003, at A1 ("The diversity of the crew – three white American men, a white American woman, a black American man, an Israeli national and an Indian immigrant – was what struck many Americans about [the Columbia space shuttle] tragedy.").

Even the United States, as *amicus* supporting Petitioners in these cases, does not dispute that promoting racial diversity is an important state interest. *See* Amicus Br. of United States in Supp. of Pet'r Grutter at 10. According to the United States: "Ensuring that public institutions, especially educational institutions, are open and accessible to a broad and diverse array of individuals, including individuals of all races and ethnicities, is an important and entirely legitimate government objective." *Id.* at 8.

Are all these leaders and institutions misguided in assessing their own interests, mistaken in stressing the importance of diversity to them and to the social order? Are they, as Petitioners assert, using race as a "stereotype" or "a proxy for . . . intellectual diversity that can be found directly in the different outlooks, backgrounds, experiences, and talents of each unique individual"? Br. of Pet'rs Gratz and Hamacher at 17. Hardly. The Court should take this evidence at face value – as reflecting a pervasive and abiding consensus that the differences as well as the similarities among us are a source of strength, that diversity enhances these institutions, that it defuses potential conflicts, and that it is an important social and governmental goal.

C. Racial diversity will pose a central challenge over the next century.

America faces significant challenges. Fueled by fertility rates and new waves of immigration, the populace will grow strikingly more diverse over the next several decades. In approximately fifty years, non-Hispanic whites will no longer constitute a majority of Americans. *See* U.S. Census Bureau, *Projections of the Resident Population by Race, Hispanic Origin, and Nativity: Middle Series, 2050 to 2070, at* http://www.census.gov/population/projections/nation/summary/np-t5-g.pdf (Jan. 13, 2000); *see also* Katherine Q. Seelye, *U.S. of Future: Grayer and More Hispanic*, N.Y. Times, Mar. 27, 1997, at B16. In virtually all the largest states, in fact, people of color already represent 30% or more of the population. U.S. Census Bureau, *Demographic Trends in the 20th Century* 99 fig.3-16 (2002), http://www.census.gov/prod/2002pubs/censr-4.pdf.

Thus, the centrifugal forces, the potential for polarization with which American policymakers have so long contended, could well increase over the coming years. The point is not that we are on the brink of chaos. It is, rather, that managing our diversity, breaking down barriers, and creating leaders

who understand both our similarities and our differences has never been more important.

II. IN THE UNIVERSITY SETTING, THE GOVERNMENT HAS A COMPELLING INTEREST IN DEVELOPING COOPERATIVE LEADERSHIP AND PROMOTING CIVIC VALUES TO DEAL WITH THE CHALLENGES OF PLURALISM.

Considering the historical and contemporary role of diversity in society at large is a critical first step in the more particularized assessment of whether it is a compelling governmental interest in the context of higher education. Diversity is valuable in many contexts. But education is different – different from public contracting, different from employment, different from broadcasting, different from all the other settings in which this Court has considered issues of race. The unique place of education in American society, its centrality to the achievement of the national goals discussed above and to tackling the challenges and opportunities posed by the pluralism of American society, substantially elevates the importance of diversity in education.[5]

Universities are the training grounds for the leaders of American society. Their mission is to produce young men and women equipped to deal with the challenges of modern life and to better our social order, to provide an education in values as well as facts, to break down barriers to understanding and communication.

Confronted with the question of how best to educate its students and to fulfill its mission, the University of Michigan

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5. Indeed, in deferring to the judgment of educators, this Court has recognized the unique role of education. *See Univ. of Penn. v. EEOC*, 493 U.S. 182, 199 (1990); *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985); *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 96 n.6 (1978) (Powell, J., concurring); *id.* at 90-92 (opinion of the Court).

concluded long ago that an applicant's race should be considered among many factors in the admissions process. In making this determination, the University reached the same educational judgment as countless public and private colleges and universities, including many of the nation's premiere schools. *See AAU Diversity Statement.* As these institutions concluded, fostering a diverse student body creates an educational community of individuals who bring different personal histories to their social interactions, to their extracurricular activities, and to their studies. It does not assume that race and ethnicity correlate with viewpoint, any more than geography and economic status do. Rather, by expanding the horizons of students who may not have previously interacted with those of different races and backgrounds, diversity in higher education enables students to share experiences and to learn firsthand how people are the same as well as how they differ. Decades of social science studies and experience by educators reveal that a diverse student body promotes engagement in an increasingly heterogeneous society, that it yields leaders capable of meeting the challenges posed by these social developments, and that it promotes effective citizenship in our pluralistic democracy.

A. A diverse student body cultivates leadership skills.

Beginning with the founding of America's first institution of higher education in 1636, colleges and universities have trained the nation's future leaders. Colleges, graduate programs, and professional schools seek to instill an appreciation for the insights of the great thinkers, deepen students' understanding of their chosen field of study, and refine their social skills. A central goal is to provide students with the tools for effective leadership.

Although the greatness of the nation is rooted in its racial and ethnic diversity, America in many ways remains a racially segregated society. Different racial and ethnic groups throughout the country generally live in separate communities and send their children to different schools. *See* Expert Report of Thomas Sugrue, *Gratz v. Bollinger*, No. 97-75321 (E.D. Mich.) & *Grutter v. Bollinger*, No. 97-75928 (E.D. Mich.), http://www.umich.edu/~urel/admissions/legal/expert/sugrutoc.html. University campuses present the first opportunity for many students to become acquainted with people of different backgrounds.

College and university students are at a formative stage in their personal and intellectual development. In addition to pursuing academic courses of study, undergraduate, graduate, and professional students are learning about the society they are about to enter, the workplaces they will confront, the people with whom they will interact in different aspects of their lives. *See* Expert Report of Patricia Gurin, *Gratz v. Bollinger*, No. 97-75321 (E.D. Mich.) & *Grutter v. Bollinger*, No. 97-75928 (E.D. Mich.), http://www.umich.edu/~urel/admissions/legal/expert/gurintoc.html [hereinafter Gurin Expert Report]. Providing white students a lily white environment, and minority students an exclusively minority environment – the prevailing pattern in many, if not most elementary and high schools – deprives them of the contacts they need to understand better the differences and similarities of people of varying backgrounds. Such environments are breeding grounds for stereotypes, which personal relationships can dispel. *Id.*

By contrast, learning in a diverse environment helps students develop greater self-awareness and facilitates cooperation and communication. *See* Alexander W. Astin, *Diversity and Multiculturalism on Campus: How Are Students Affected?*, 25 CHANGE 44, 44-49 (Mar./Apr. 1993); Gurin Expert Report, *supra*; Walter G. Stephan & Cookie White Stephan, *The Role of Ignorance in Intergroup Relations*, *in* GROUPS IN CONTACT: THE PSYCHOLOGY OF

DESEGREGATION 229, 243-249 (Norman Miller & Marilynn B. Brewer eds., 1984). Writing for a unanimous Court, Chief Justice Burger recognized over 30 years ago that educators should have discretion to take race into account "in order to prepare students to live in a pluralistic society." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). *Cf. Linmark Assocs., Inc. v. Willingboro Township*, 431 U.S. 85, 94-95 (1977) ("[S]ubstantial benefits flow to both whites and blacks from interracial association. . . .") (citing *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972)).

Higher education contributes more than formal learning to the preparation of future leaders. As Justice Powell observed, the "'nation's future depends upon leaders trained through wide exposure'" to the views and values of classmates who reflect the diversity of American society. *Bakke*, 438 U.S. at 313 (opinion of Powell, J.) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). Political leaders who must deal with the pluralism of society need this type of grounding. Corporate leaders – running businesses, selling products, and promoting innovation for a diverse populace – likewise require a practical appreciation of the differences and similarities of both their colleagues and their customers. *See, e.g.*, Amicus Br. of General Motors Corp. in Supp. of Appellants at 14-21, *Grutter v. Bollinger* (6th Cir. 2001).

The contributions of a diverse learning environment to future leadership are significant in professional and graduate studies as well as college. Students preparing for professional practice benefit from training in environments that resemble the world in which they will work. Professional training enriched by the varied experiences of a diverse student body better prepares students to serve their communities. *See, e.g.*, *Sweatt v. Painter*, 339 U.S. 629, 634 (1950) ("The law school . . . cannot be effective in isolation from the individuals and

institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned."); *Bakke*, 438 U.S. at 313-14 ("An otherwise qualified medical student with a particular background – whether it be ethnic, geographic, culturally advantaged or disadvantaged – may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.") (opinion of Powell, J.); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 641 (1950) ("Our society grows increasingly complex, and our need for trained leaders increases correspondingly. Appellant's case represents, perhaps, the epitome of that need, for he is attempting to obtain an advanced degree in education, to become, by definition, a leader and trainer of others."). Preserving diversity in legal education is particularly imperative given the leadership roles that attorneys historically have assumed in government and other civic contexts.[6]

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6. Although the nation's law schools have achieved modest success in recruiting and retaining people of color – approximately 20% of the nation's law students are now non-white – racial minorities remain grossly underrepresented within the profession. For example, fewer than 2% of partners at the largest and most profitable firms in America are people of color. Lawyers for One America, *Bar None: Report to the President of the United States on the Status of People of Color and Pro Bono Services in the Legal Profession* 5 (July 2000), *available at* http://www.lfoa.org/barnone/index.htm. Minority representation among general counsels in the Fortune 500 is 2.8%. *Id.*

B. Colleges and universities promote civic engagement in a pluralistic society.

Education promotes the civic values necessary to deal with the diversity of American society, to advance the historic goal of national unity, and to draw strength from the pluralism of our society. As the "very foundation of good citizenship," *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954), education helps to "maintain[] the fabric of our society," *Plyler v. Doe*, 457 U.S. 202, 221 (1982). Schools are "an 'assimilative force' by which diverse and conflicting elements in our society are brought together on a broad but common ground . . . inculcating fundamental values necessary to the maintenance of a democratic political system." *Ambach v. Norwick*, 441 U.S. 68, 77 (1979) (citing John Dewey, DEMOCRACY AND EDUCATION 26 (1929)) (other citations omitted); *see also* Horace Mann, *The Importance of Universal, Free, Public Education, in* 1 THE PEOPLE SHALL JUDGE: READINGS IN THE FORMATION OF AMERICAN POLICY 589, 592-93 (1949) ("Education, . . . beyond all other devices of human origin, is the great equalizer of the conditions of men – the balance wheel of the social machinery. . . . [I]f this education should be universal and complete, it would do more than all things else to obliterate factitious distinctions in society.").

Among the civic skills learned in colleges and universities is the ability to consider different perspectives, to manage or avoid the conflicts that result from such differences, to understand where common ground lies, and to seek it. *See* Astin, *supra*; Gurin Expert Report, *supra*; Stephan & Stephan, *supra*. To be sure, a monolithic institution could teach such skills in the abstract. But it would provide little practical experience. And it is through such practical experience that students learn that differences among individuals and groups of people are not incompatible with the shared interests of the larger community. *See* Astin, *supra*; Gurin Expert Report, *supra*. They learn that they should not assume people of different races have different

views, that there very often is common ground, that imagined barriers to cooperation and communication are not real, and that real ones are not insurmountable. *See* Roxane Harvey Gudeman, *Faculty Experience with Diversity: A Case Study of Macalester College, in* DIVERSITY CHALLENGED 251, 258 (Gary Orfield ed., 2001); Astin, *supra*; Gurin Expert Report, *supra*. Colleges and universities further the overriding national interests discussed before by laying the foundations for such skills.

Graduates of institutions marked by diversity, including white students, recognize the value of studying in diverse environments. Former students of all races believe that living harmoniously and working effectively with members of other races and cultures are important skills, and most students consider diverse campus communities to have contributed to their abilities in this regard. William G. Bowen & Derek Bok, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 220-28 (1998). Among white students graduating from selective schools, almost 80 percent favor preserving diversity programs or emphasizing diversity more. *Id.* at 245.

The President of the United States has recognized how diversity in higher education contributes to American society. As the President noted:

> America is a diverse country, racially, economically, and ethnically. And our institutions of higher education should reflect our diversity. A college education should teach respect and understanding and goodwill. And these values are strengthened when students live and learn with people from many backgrounds.

George W. Bush, Remarks on the Michigan Affirmative Action Case (Jan. 15, 2003), http://www.whitehouse.gov/news/releases/2003/01/20030115-7.html. In a nation that has historically acknowledged the importance of unity and the

value of diversity, and that confronts formidable challenges in dealing with race and ethnicity – challenges that have confounded other societies – promoting diversity in higher education is a compelling interest.

C. Diversity at elite institutions of higher education yields unique benefits.

The benefits of promoting diversity at selective institutions are especially compelling in light of the relatively small pool of students from which they draw, the unique stature they enjoy, and the unparalleled opportunities they create. While not every captain of industry or notable government official is an alumnus of a top school or even a college graduate, a great proportion of the nation's prominent leaders studied at a relatively few elite colleges and universities. As proven training-grounds for the next generation of leadership, these institutions regard diversity as especially important. Minority students admitted to selective colleges and universities enjoy unique benefits from attending these institutions. In their seminal work on the effects of race-conscious admissions policies, William G. Bowen and Derek Bok observed that African-American students enrolled in selective schools were more likely to serve their community through civic leadership than their white classmates. Bowen & Bok, *supra*, at 160-73. Bowen and Bok concluded that minority students attending selective institutions receive "more encouragement and opportunity to lead civic activities" than students at other schools. *Id.* at 172. Accordingly, preserving diversity at selective colleges and universities not only enhances the experience of all students preparing for leadership, but also yields a cadre of future minority leaders.

The nation's premiere schools have a history and tradition of excellence that engenders immeasurable benefits for their students. High quality faculty, the prestige of the institutions, and the social networks established at elite institutions are important intangible advantages. *See Sweatt*,

339 U.S. at 634 (recognizing that "those qualities which are incapable of objective measurement but which make for greatness in a law school . . . [include] reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige").[7] Policies promoting diversity preserve access to elite institutions for those who are unlikely to benefit from other preference programs, like legacy admissions.

Many of these elite institutions are private, yet this Court's ruling could constrain their admissions policies as well. Title VI of the Civil Rights Act of 1964 could extend the Court's decision to virtually every private college and university in the nation.[8] A decision proscribing any

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7. Members of this Court appreciate the value of a prestigious degree. *See* Tony Mauro, *Corps of Clerks Lacking in Diversity*, USA Today, Mar. 13, 1998, at 12A ("During the past decade, the current justices have selected more than 130 clerks from Harvard and Yale law schools alone – almost half of the clerks during that time."); *see also Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 2000: Hearing Before a Subcomm. of the House Comm. on Appropriations*, 106th Cong. 40 (1999) ("Hiring for all of us . . . is meant to be a risk-free business. We cannot afford a mistake. I know that if somebody comes from Harvard Law School, Yale, Stanford, Chicago, . . . I can make a sounder, less risky judgment than I can make if somebody is coming from a law school that I have not had a lot of experience with . . . .") (testimony of Justice Souter).

8. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." This statutory proscription is coextensive with the prohibitions of the Equal Protection Clause and the Fifth Amendment. *See Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001) (citing *Bakke*, 438 U.S. at 287 (opinion of Powell, J.); *Bakke*, 438 U.S. at 325 (opinion of Brennan, White, Marshall, and Blackmun, JJ.)).

consideration of race in admissions could frustrate the efforts of these elite institutions to recruit and retain a student body that, in their educational judgment, furthers their respective missions. Moreover, such a holding could foreclose the best schools to a whole generation of future minority leaders. As America confronts the potential for increasing racial polarization, such a result would undermine our ability to meet the challenges of our growing diversity.

D. Justice Powell properly deferred to the judgment of educators regarding the value of diversity in higher education.

In *Bakke*, Justice Powell concluded that attaining a diverse student body "is a constitutionally permissible goal for an institution of higher education." *Bakke*, 438 U.S. at 311-12 (opinion of Powell, J.). His reasoning was premised on the consensus in the education community that a diverse campus community confers tangible educational benefits on students. *See id.* at 312-13. Recent empirical research confirms decades of experiences among educators, documenting the pedagogical value of diversity in the classroom and campus. *See, e.g.*, Mitchell J. Chang, *The Positive Educational Effects of Racial Diversity on Campus*, *in* DIVERSITY CHALLENGED 175, 175-86 (Gary Orfield ed., 2001); Bowen & Bok, *supra*, at 53-90; Astin, *supra*; Gurin Expert Report, *supra*.

Each college and university environment is unique, and the pool of applicants seeking admission varies from year to year. Education professionals, charged with the responsibility of preparing the nation's future leaders, formulate their admissions policies to respond to each institution's needs. At the University of Michigan and elsewhere, race is only one of many factors considered in admissions decisions. The Court should be loath to constrain education professionals in making these important decisions, particularly when those decisions have a reasoned, empirical basis.

This Court has long recognized the wisdom of deferring to the informed and independent decisions of educators. *See Swann*, 402 U.S. at 16 ("School authorities are traditionally charged with broad power to formulate and implement educational policy . . . ."); *Ewing*, 474 U.S. at 225 ("[J]udges . . . asked to review the substance of a genuinely academic decision . . . should show great respect for the faculty's professional judgment."); *Univ. of Penn.*, 493 U.S. at 199; *Horowitz*, 435 U.S. at 96 n.6 (Powell, J., concurring); *id.* at 90-92 (opinion of the Court). It is particularly appropriate to exercise such deference here, where the basic task of higher education is so central to the historic goal of fostering national unity, where the educational judgments reflect and implement a broad national consensus on the value of diversity, and where the challenges of dealing with racial justice are critical to our national success in the 21st century.

III. PERCENTAGE PLANS FAIL TO ACCOUNT HONESTLY AND EFFECTIVELY FOR THE SIGNIFICANCE OF RACE IN AMERICAN LIFE.

Petitioners argue in the alternative that the University of Michigan has not narrowly tailored its admissions criteria to achieve the goal of diversity in higher education. Specifically, they characterize the University's affirmative action programs as a system of permanent and rigid quotas inconsistent with the Court's precedents. Moreover, Petitioners and several *amicus* parties assert that the University neglected to consider race-neutral alternatives to ensuring diversity – including so-called percentage plans, which guarantee admission to highly-ranked students at in-state high schools.

These arguments ignore the reasons that diversity in higher education is a compelling interest – that it is essential to deal with the burgeoning challenges of a diverse population, to avoid the conflicts that have plagued other ethnically diverse societies, and to harness diversity as a great strength of the American polity. Percentage plans are not

tailored – narrowly or otherwise – to further these goals. In fact, they would impede these objectives. The plans employ subterfuge to achieve diversity, akin to "racial gerrymandering" that this Court has disapproved in other contexts. It is difficult to imagine that deflecting issues of race, failing to deal with them honestly, is a valid way to meet the challenges of America's growing diversity, much less the path that the Constitution mandates.

A. Percentage plans are ill-suited to achieving racial diversity.

Much of the recent debate over affirmative action has focused on percentage plans, employed in California, Texas, and Florida since those states abandoned overtly race-conscious admissions policies. The United States, in its *amicus* briefs to this Court, touts these programs as a highly effective solution to the problems posed by both the under-representation of minorities and race-conscious measures. *See, e.g.*, Amicus Br. of the United States in Supp. of Pet'r Grutter at 20 ("Such programs have produced school systems to which minorities have meaningful access and are represented in significant numbers, as the experience in Texas, Florida, and California demonstrates.").

These programs do not advance the compelling interest of diversity in institutions of higher education, and potentially obstruct, rather than further, the charge of those institutions. *See generally* Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* (2003), http://www.civilrights project.harvard.edu/research/affirmativeaction/tristate.pdf; U.S. Commission on Civil Rights, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education* (2002), http://www.usccr.gov/pubs/percent2/main.htm; Michelle Adams, *Isn't It Ironic?: The Central Paradox at the Heart of "Percentage Plans"*, 26 Ohio St. L.J. 1729 (2001). In terms of the role of higher education in meeting

that these measures train leaders, or promote civic values, or advance constructive dialogue about racial justice.

1. Percentage plans undercut diversity by relying on continuing educational segregation.

There is no consensus about whether percentage plans actually offset the declines in minority enrollment when educators abandon affirmative action programs. *Compare* Amicus Br. of the United States in Supp. of Pet'r Grutter at 14-17 *with* Horn & Flores, *supra*, at 58-59. The populations of the states that rely on percentage plans have grown increasingly diverse, especially among college-age students, since the plans were first introduced. *See* Horn & Flores, *supra*, at 25. Arguably, the purported success of these plans in restoring minority student enrollment fails to account for the growth of minority groups. *See, e.g.*, Marta Tienda et al., *Closing the Gap?: Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action* 41 (2003), http://www.texastop10.princeton.edu/publications/tienda012103.pdf. But even if they succeed at a superficial level, however, percentage plans work at cross-purposes with the goal of diversity in education.

Percentage plans grant automatic admission to students who rank above a certain academic threshold relative to their classmates in a particular school. To the extent that they function as any type of "alternative" to affirmative action programs, percentage plans capitalize on enduring patterns of residential and educational segregation. Minority students are admitted through such plans because they compete with their overwhelmingly minority classmates for a limited number of guaranteed positions. Indeed, it is probably not coincidental that percentage plans have provided a degree of racial diversity in higher education only in states with some of the largest – and highly segregated – minority populations in the country. *See* U.S. Census Bureau, *Quickfacts: California* (2002) (people of color constitute 53.3% of population), *at* http://quickfacts.census.gov/qfd/states/06000.html; U.S. Census Bureau,

gov/qfd/states/48000. html; U.S. Census Bureau, *Quickfacts: Florida* (2002) (34.6%), *at* http://quickfacts.census.gov/qfd/states/12000. html; *see also* Lewis Mumford Ctr. for Comparative Urban & Residential Research, *Metropolitan Area Rankings: Populations of All Ages* (comparative data on residential segregation by metropolitan area), http://mumford1.dyndns. org/cen2000/WholePop/WPsort.html.

In spite of the elimination of legal barriers to residential integration, America's neighborhoods are highly segregated by race. *See* John Iceland & Daniel H. Weinberg, U.S. Census Bureau, *Racial and Ethnic Residential Segregation in the United States: 1980 – 2000*, at 4 (2001) ("Despite . . . declines, residential segregation was still higher for African Americans than for the other groups across all measures. Hispanics or Latinos were generally the next most highly segregated. . . ."), http://www.census.gov/hhes/www/housing/resseg/pdf/censr-3.pdf. And the result of the ascendancy of neighborhood schooling is that residential segregation corresponds overwhelmingly with racially isolated public schools and school districts. *See* Erica Frankenberg et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* at 30-34 (2003), http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf. Among student bodies at most individual primary and secondary schools in America, racial homogeneity is the norm rather than the exception.

Intentionally or not, percentage plans place a premium on the continuation of such segregated schooling. They cannot ensure a meaningful level of diversity unless members of the same race compete against one another for the same selective positions. Thus, measures designed to break down racial isolation in early education potentially undercut racial diversity at the college and university level. A program for college admissions that relies on racial segregation as its linchpin is contrary to national policy and ultimately an

unsatisfactory way to deal with the national challenges of diversity. But such reliance is the *sine qua non* for an effective percentage plan.

2. Percentage plans override the individualized judgment of educators and admissions officials.

In arguing that the University of Michigan's admission program is not narrowly tailored to achieve the educational benefits of diversity, Petitioners assert that schools can ensure greater diversity of experience and outlook by relying on race-neutral alternatives to affirmative action. *See* Br. of Pet'r Grutter at 48. But percentage plans do not fulfill the promise of an individualized assessment for each and every applicant. In truth, percentage plans are a far cruder alternative than considering race as one of many factors in admissions decisions.

Percentage plans are a blunt instrument that would displace the complex and particularized decision-making processes of admissions officers. Instead of seeking individuals of all races who have demonstrated leadership potential, these programs grant automatic admission to students based solely on their class rank, regardless of the quality of their school. They elevate class rank, an unreliable measure of potential, over all other considerations. In fact, percentage plans suffer from a host of deficiencies that Petitioners attempt to lay at the door of the University of Michigan's admissions program: they employ rigid numerical quotas; they automatically guarantee admission to select minority students regardless of other factors; and they lack a natural stopping point. *See id.* at 38-42.

B. America must confront race honestly.

A key to America's success has been its ability to meet the challenges posed by diversity in all its forms. As noted above, this nation historically has sought national unity by embracing its diversity, and higher education has played and

continues to play a crucial role in that process. Programs that seek to increase minority representation through subterfuge are not consistent with this goal. They are not a likely avenue to dealing successfully with the challenges of diversity. Despite the claims to the contrary, percentage programs are not race-neutral. They have a racially disparate impact, and are *intended* to have a racially disparate impact.[9] In this Court's jurisprudence, both intent and impact play a role in assessing whether a program is truly "race-neutral." *See, e.g., Shaw v. Reno*, 509 U.S. 630, 641 (1993).

It is ironic, to say the least, that Petitioners chastise the University of Michigan and other proponents of affirmative action programs for being dishonest in their advocacy of racial diversity. *See* Br. of Pet'rs Gratz and Hamacher at 47 ("[T]he use of 'diversity' as a rationalization has led to the diminution of integrity in our institutions before the nation and even before this Court."). By promoting ostensibly race-neutral alternatives in order to replicate the gains in diversity under affirmative action, *see, e.g.*, Amicus Br. of the United States in Supp. of Pet'r Grutter at 14-17, Petitioners undercut the goals of diversity in the first place. Such advocacy teaches that racial diversity, an imperative in modern American life, must be publicly maligned as a goal even while it is privately engineered. And they force school administrators to manipulate admissions criteria to achieve a desired outcome.[10]

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9. In the case of Florida, for example, officials settled on a 20% percentage plan after concluding that a lower threshold would not offset the consequences of eliminating race-conscious admission criteria. *See* Jeffrey Selingo, *What States Aren't Saying About the 'X-Percent Solution'*, CHRON. OF HIGHER ED., June 2, 2000, at A31.

10. As constituted in three states, percentage plans bear a disconcerting resemblance to "grandfather clauses" and "racial gerrymandering" employed by foes of racial integration. *See, e.g., Guinn v. United States*, 238 U.S. 347 (1915); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *see also* Amicus Br. of Center for New Black (Cont'd)

However this Court rules, race will continue to play a prominent role in American life. Either the nation can confront race honestly, by acknowledging that racial diversity is an affirmative value that should be considered in a variety of contexts, or it can employ a euphemistic policy that obstructs useful dialogue.

There is no one solution to the many challenges that diversity poses. Promoting a society where individuals of all backgrounds and upbringings enjoy genuine opportunity requires consideration of many different approaches. Indeed, a number of the race-neutral "alternatives" put forth in these cases – promoting minority participation in college preparatory programs, for example – are not in any way inconsistent or mutually exclusive with race-conscious admissions policies. *Compare, e.g.*, Amicus Br. of the State of Florida and Governor Jeb Bush in Supp. of Pet'rs at 10-16, *with* Advisory Board of the President's Initiative on Race, *One America in the 21st Century: Forging a New Future* 61-64 (1998), http://thataway.org/dialogue/res/docs/advbdreport.pdf.

This Court can meaningfully contribute to the debate in the education community over the importance and proper role of diversity. Or it can brusquely end it, forcing colleges and universities, both public and private, to abandon diversity as a goal or to contrive alternatives that are neither forthright nor demonstrably effective. To adopt the latter approach would interpose a rigidity that will inevitably hinder educators and policymakers from dealing constructively with one of the most complex, difficult, and perilous issues confronting American society.

(Cont'd)
Leadership in Supp. of Pet'rs at 13 (arguing that percentage plans are "gerrymandered to achieve . . . a particular racial and ethnic result"). Though constitutional, these programs are a convoluted and far less effective approach to harnessing racial diversity.

CONCLUSION

For the foregoing reasons, LCCR and the LCCR Education Fund respectfully request that the Court affirm the judgment entered by the Sixth Circuit in favor of the University of Michigan in *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), and affirm in part and reverse in part the judgment entered by the district court in *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000).

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* Counsel would like to recognize the significant contributions of Laura Riposo VanDruff to this brief.

APPENDIX

APPENDIX

Member Organizations, Leadership Conference on Civil Rights

A. Philip Randolph Institute

AARP

Affiliated Leadership League of and for the Blind of America

African Methodist Episcopal Church

African Methodist Episcopal Zion Church

Alaska Federation of Natives

Alaska Inter-Tribal Council

Alliance for Retired Americans

Alpha Kappa Alpha Sorority, Inc.

Alpha Phi Alpha Fraternity, Inc.

American Association for Affirmative Action

American Association for People with Disabilities

American Association of University Women

American Baptist Churches, U.S.A. — National Ministries

American Civil Liberties Union

American Council of the Blind

American Ethical Union

American Federal of Government Employees, AFL-CIO

American Federation of Labor — Congress of Industrial Organizations

American Federation of State, County & Municipal Employees, AFL-CIO

American Federation of Teachers, AFL-CIO

Appendix

American Jewish Committee

American Jewish Congress

American Nurses Association

American Postal Workers Union, AFL-CIO

American Society for Public Administration

American Speech-Language-Hearing Association

American-Arab Anti-Discrimination Committee

Americans for Democratic Action

Anti-Defamation League of B'nai B'rith

Asian Pacific American Labor Alliance

Associated Actors and Artists of America — AFL-CIO

Association for Education and Rehabilitation of the Blind and Visually Impaired

Building & Construction Trades Department — AFL-CIO

Catholic Charities, USA

Center for Community Change

Center for Women Policy Studies

Children's Defense Fund

Church of the Brethren — World Ministries Commission

Church Women United

Coalition of Black Trade Unionists

Common Cause

Communications Workers of America

Community Transportation Association of America

Congress of National Black Churches

Delta Sigma Theta Sorority, Inc.

Appendix

Disability Rights Education and Defense Fund, Inc.

Division of Homeland Ministries-Christian Church (Disciples of Christ)

Epilepsy Foundation of America

Episcopal Church — Public Affairs Office

Evangelical Lutheran Church in America

Families USA

Federally Employed Women

Feminist Majority

Friends Committee on National Legislation

GMP International Union

Hadassah, The Women's Zionist Organization of America

Hotel and Restaurant Employees and Bartenders International Union

Human Rights Campaign

Improved Benevolent and Protective Order of Elks of the World

Industrial Union Department — AFL-CIO

International Association of Machinists and Aerospace Workers

International Association of Official Human Rights Agencies

International Brotherhood of Teamsters

International Human Rights Law Group

International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO

International Union, United Automobile Workers of America

Appendix

Iota Phi Lambda Sorority, Inc.

Japanese American Citizens League

Jewish Community Centers Association

Jewish Council for Public Affairs

Jewish Labor Committee

Jewish Women International

Judge David L. Bazelon Center for Mental Health Law

Kappa Alpha Psi Fraternity

Labor Council for Latin American Advancement

Lawyers Committee for Human Rights

Lawyers' Committee for Civil Rights Under Law

League of Women Voters of the United States

Mashantucket Pequot Tribal Nation

Mexican American Legal Defense and Educational Fund

Na'Amat-USA

NAACP Legal Defense and Educational Fund, Inc.

National Alliance of Postal & Federal Employees

National Asian Pacific American Legal Consortium

National Association for Equal Opportunity in Higher Education

National Association for the Advancement of Colored People

National Association of Colored Womens Clubs, Inc.

National Association of Community Action Agencies

National Association of Community Health Centers

National Association of Human Rights Workers

Appendix

National Association of Negro Business & Professional Women's Clubs, Inc.

National Association of Protection and Advocacy Systems

National Association of Social Workers

National Bar Association

National Black Caucus of State Legislators

National Catholic Conference for Interracial Justice

National Coalition on Black Civic Participation

National Committee on Pay Equity

National Conference of Black Mayors, Inc.

National Congress for Community Economic Development

National Congress for Puerto Rican Rights

National Congress of American Indians

National Council of Catholic Women

National Council of Churches of Christ in the U.S.

National Council of Jewish Women

National Council of La Raza

National Council of Negro Women

National Council on Independent Living

National Education Association

National Employment Lawyers Association

National Fair Housing Alliance

National Farmers Union

National Federation of Business and Professional Women Clubs, Inc.

National Federation of Filipino American Associations

National Gay & Lesbian Task Force

National Institute for Employment Equity

National Korean American Service and Education Consortium, Inc.

National Legal Aid & Defender Association

National Low Income Housing Coalition

National Neighbors

National Office for Black Catholics

National Organization for Women

National Partnership for Women & Families

National Political Congress of Black Women, Inc.

National Post Office Main Handlers, Watchmen, Messengers & Group Leaders

National Puerto Rican Coalition

National Sorority of Phi Delta Kappa, Inc.

National Urban League

National Women's Law Center

National Womens Political Caucus

Native American Rights Fund

Newspaper Guild

NOW Legal Defense and Education Fund

Omega Psi Phi Fraternity, Inc.

Organization of Chinese Americans, Inc.

PACE International Union

People For the American Way

Phi Beta Sigma Fraternity, Inc.

Presbyterian Church, (USA)

Project Equality, Inc.

Puerto Rican Legal Defense and Education Fund, Inc.

Retail Wholesale & Department Store Union, AFL-CIO

Service Employees International Union

Sigma Gamma Rho Sorority, Inc.

Southeast Asia Resource Action Center

Southern Christian Leadership Conference

The Association of Junior Leagues, Inc.

The Association of University Centers on Disabilities

The Justice Project

The National Conference for Community and Justice

The National PTA

Union of American Hebrew Congregations

Unitarian Universalist Association

UNITE!

United Association of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry

United Brotherhood of Carpenters and Joiners of America

United Church of Christ — Commission for Racial Justice Now

United Farm Workers of America, AFL-CIO

United Food and Commercial Workers International Union

United Methodist Church — General Board of Global Ministries Women's Division

United Methodist Church — General Board of Church and Society

Appendix

United Mine Workers of America

United Rubber, Cork, Linoleum & Plastic Workers of America

United States Student Association

United Steelworkers of America

United Synagogue of Conservative Judaism

U.S. Catholic Conference

Women of Reform Judaism

Women's American ORT

Women's International League for Peace and Freedom

Workers Defense League

Workmen's Circle

YMCA of the USA, National Board

YWCA of the USA, National Board

Zeta Phi Beta Sorority, Inc.

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Inner City Broadcasting Corporation

92 60

Nos. 02-0241 & 02-0516

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In The
Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, ET AL.,

Respondents,

and

JENNIFER GRATZ and PATRICK HAMACHER

Petitioners,

v.

LEE BOLLINGER, ET AL.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE NATIONAL URBAN LEAGUE, THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE OF LOS ANGELES, AND THE NATIONAL RAINBOW/PUSH COALITION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) 13, 27

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 28

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) 16, 17

Miller v. Johnson, 515 U.S. 900 (1995) 28

Missouri v. Jenkins, 515 U.S. 70 (1995) 11

Regents of University of California v. Bakke, 438 U.S. 265 (1978) ..... *passim*

Village of Arlington Heights v. Metropolitan Housing Auth., 429 U.S. 252 (1977) 27

BOOKS, ARTICLES AND REPORTS

Bernard E. Anderson, *The Black Worker: Continuing Quest for Economic* Parity, in National Urban League, *The State of Black America 2002*, 51 (2002) 8

William G. Bowen and Derek Bok, *The Shape of The River* (1999) 7, 14

William D. Bradford, *Black Family Wealth in the United States*, in *The State of Black America 2000*, 103 (2000) 8

Erica Frankenberg, Chungmei Lee, & Gary Orfield, *A Multiracial Society With Segregated Schools: Are We Losing The Dream?*, (January 2003), *available* at www.civilrightsproject.harvard.edu 10, 11, 24

TABLE OF AUTHORITIES – Continued

Page

Rudolph W. Guiliani, *Combating Terrorism*, 16 N.D. J. L. Ethics & Pub. Pol'y 57 (2002) 8

David A. Harris, *'Driving While Black' And Other African-American Crimes: The Continuing Relevance of Race to American Criminal Justice, in The State of Black America 2000*, 259 (2000) 8

Catherine L. Horn and Stella M. Flores, Percent Plans in College Admissions: A Comparative Analysis, (Feb. 2003), *available* at http:\www.civilrightsproject harvard.edu 20, 24, 27, 28

John F. Kain and Daniel M. O'Brien, Hopwood and the Top 10 Percent Law: How They Have Affected the College Enrollment Decisions of Texas High School Graduates (2002), *available* at http://www.utdallas.edu.research/greenctr 23, 25

Gary M. Lavergne and Bruce Walker, Implementation and Results of the Texas Automatic Admissions Law, *available* at http://www.utexas.edu/student research/reports/admissions/hb.588.report_ 23, 27

Mark C. Long, *Race And College Admission: An Alternative to Affirmative Action*, (2002), *available* at http://home.gwu.edu/marklong 25

Glenn C. Loury, *Foreword, in* William G. Bowen and Derek Bok, *The Shape of The River* (1999) 15, 18

Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern American Democracy* (1944) 7

Gary Orfield, *Introduction to Diversity Challenged: Evidence on the Impact of Affirmative Action* (2001) 7, 8

TABLE OF AUTHORITIES – Continued

Page

Franklin D. Raines, *What Equality Would Look Like: Reflections on the Past, Present and Future,* in *The State of Black America 2002,* 13 (2002)..... 8

Joetta L. Stack, *'No Child' Law Vies for Scarce Resources*, Education Week, Jan. 8, 2003.....26

Walter W. Stafford, *The National Urban League's Survey: Black America's Under-35 Generation*, in *The State of Black America 2001,* 19 (2001)..... 8

Billy J. Tidwell, *Parity Progress and Prospects: Racial Inequalities in Economic Well-Being*, in *The State of Black America 2000*, 287 (2000)..... 8

Leland Ware and Antoine Allen, *The Geography of Discrimination: Hypersegregation, Isolation, and Fragmentation Within the African-American Community, The State of Black America* 2002, 69 (2002).....10

LEGISLATIVE AND EXECUTIVE MATERIALS

General Accounting Office, *Per-Pupil Spending Differences Between Selected Inner City and Suburban Schools Varied by Metropolitan Area,* (2002).....11

H.R. Rep. 107-063, 107th Cong., 1st Sess. (2001).....11

Hearing of the Foreign Operations, Export Financing, and Related Programs Subcommittee of the House Appropriations Committee (Testimony of Secretary of State Powell), 107th Cong., 2d Sess. (Feb. 13, 2002)..... 8

TABLE OF AUTHORITIES – Continued

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Remarks of the President on the First Anniversary of The No Child Left Behind Act, Jan. 8, 2003, *available* at http://www.whitehouse.gov/news/releases/2003/01/20030108-4.html 12

Remarks of the President, Hispanic Heritage Month, Oct. 9, 2002, *available* at http://www.whitehouse.gov/newsreleases2002/10/ 200021009-1.html..... 8

Statement of President George W. Bush Upon Signing H.R.1, 38 Weekly Comp. Pres. Doc. 26 (January 8, 2002) 26

The No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 101, 115 Stat. 425 (2001).....12

U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 2002* (2002).....11

U.S. Department of Education, National Center for Education Statistics, *Urban Schools: The Challenge of Location and Poverty,* (1996) 10

U.S. Department of Education, Executive Summary of The No Child Left Behind Act.....26

INTEREST OF *AMICI CURIAE*[1]

NATIONAL URBAN LEAGUE ("NUL")

Founded in 1910, NUL is the oldest and largest community-based movement devoted to empowering African-Americans to enter the economic and social mainstream. NUL seeks to accomplish its mission by ensuring that African-American children are well-educated and equipped for economic self-reliance; by helping adults attain economic self-sufficiency through good jobs, homeownership, and entrepreneurship; and by guaranteeing civil rights through the eradication of barriers to equal participation in society. In keeping with its mission, NUL supports race-conscious admissions policies at colleges and universities that, as part of the overall mission of higher education institutions to promote academic diversity, seek to ensure the meaningful representation in classrooms and on campuses of qualified African-American students.

SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE OF LOS ANGELES ("SCLC-LA")

The mission of SCLC-LA is to promote the philosophy of Dr. Martin Luther King, Jr. SCLC-LA believes that social change can be accomplished through racial understanding, and that, in turn, racial understanding can be

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[1] The parties have consented to the filing of this brief. Their consent letters are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for amici curiae certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than counsel for amici has made a monetary contribution to the preparation and submission of the brief.

achieved through greater racial diversity in higher education.

THE NATIONAL RAINBOW/PUSH COALITION ("RPC")

RPC seeks to move the nation and the world toward racial justice and harmony. Founded by the Rev. Jesse L. Jackson, RPC derives its strength from the nation's racial and ethnic diversity. It supports efforts of higher education institutions to tap into that diversity as a means of enhancing the richness and quality of the learning environment.

SUMMARY OF ARGUMENT

The pivotal question before this Court is whether, twenty-five years after *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), race still maters in American life. Petitioners claim that it does not, and ask this Court to repudiate Justice Powell's ruling in *Bakke* that universities can consider race as one factor in student admissions as a means of achieving their overarching interest in fostering a rich and diverse learning environment on campuses and in classrooms. Justice Powell was right. Race mattered then, and it still matters today. Overwhelming social science evidence that went unchallenged by Petitioners provides a strong empirical foundation for what Justice Powell believed to be the self-evident proposition that, because race does matter, greater racial diversity in the learning environment in higher education enhances the quality of the learning environment itself and redounds to the benefit of society as a whole.

Race continues to be salient in American life because racial differences continue to shape our experiences and perspectives. These differences often manifest themselves them in a troubling racial divide, particularly in K-12 public education. The reasons for the divide are many. But whatever the cause, racial disparities inevitably shape our experiences and perspectives. Race-conscious admissions policies that seek to foster a diverse learning environment do not assume, however, that the continued salience of race shapes a uniform black viewpoint. The policies assume only that race shapes the experiences and perspectives of all blacks in some way, not in the same way.

To say that race shapes experiences and perspectives so as to enable a person to contribute towards the enhancement of the learning environment in higher education is not a normative judgment about that person's character or worth. Indeed, the assumption that racial diversity makes a difference in the learning environment can teach the valuable moral lesson that race has nothing to do with character or worth.

The United States tenders no analysis in support of its argument that this Court should decide these cases solely on the ground that so-called "percentage plans" for student admissions are an efficacious race-neutral means of fostering a racially diverse learning environment in higher education. The only facts that the United States cites are raw statistics that it asks this Court to accept at face value. When scrutinized, however, the statistics do not point the rosy picture of minority enrollment in the percentage plan states that the United States paints.

The United States also glosses over a battery of other transparent flaws in the percentage plans that cast

substantial doubt on whether they are efficacious alternatives or even race-neutral to begin with. The United States fails to consider the risk that percentage plans may dilute the quality of the student body because they guarantee admission based solely on one factor, high school class rank, to the exclusion of all other criteria to which colleges and universities traditionally look in assessing whether an applicant is prepared for, and can contribute to, a challenging learning environment. The United States also fails to consider that percentage plans impose costs on society because their dependency on the de facto segregation of high schools has the effect of condoning and perpetuating the racial divide in K-12 public education. And the United States fails to consider whether the percentage plans actually are race-conscious under the basic tenet of constitutional law that an ostensibly race-neutral measure is race-based if it is intended to have a racially identifiable impact.

ARGUMENT

I. THIS COURT SHOULD REJECT PETITIONERS' ARGUMENT THAT RACE NO LONGER MATTERS IN AMERICAN LIFE AND REAFFIRM THE PROPOSITION, WHICH WAS SELF-EVIDENT TO JUSTICE POWELL IN *BAKKE* AND WHICH STILL RINGS TRUE TODAY, THAT BROADER RACIAL DIVERSITY IN THE STUDENT BODY IN HIGHER EDUCATION ENHANCES THE LEARNING ENVIRONMENT AND LEADS TO PROFOUND SOCIETAL BENEFITS.

At bottom, Petitioners' arguments are driven by a single proposition: race no longer matters in American life.

(Pet. Br., *Gratz*, at 15.) Petitioners thus proclaim that there is no need for colleges and universities to consider the race of applicants in their admissions processes, and no need for institutions of government to consider race for any purpose. Petitioners' notion that race has become irrelevant has no grounding in reality.

A. Social Science Evidence That Went Unchallenged Provides A Strong Empirical Foundation For The Premise Of Justice Powell's *Bakke* Opinion That, Because Race Matters in American Life, Expanding Racial Diversity In Colleges And Universities Will Expand The Richness And Quality Of The Learning Environment There And Produce Benefits For Society As A Whole.

For a quarter of a century, our nation's higher education institutions have been guided by Justice Powell's opinion in *Bakke*, which held that colleges and universities may consider the race of applicants as one of many factors in admissions decisions to achieve the overarching interest in fostering a rich and diverse learning environment in higher education. *Bakke*, 438 U.S. at 312-13.

The premise of Justice Powell's *Bakke* opinion was a simple one: race matters in American life. Indeed, to Justice Powell, that proposition stated the obvious. Given the central importance of race in our society, Justice Powell believed that race inevitably shaped the experiences and perspectives that students bring with them to the campus and classroom. Because race matters, Justice Powell reasoned that broader racial diversity in the learning environment in higher education was bound to lead to broader diversity in the learning environment

itself. And because race matters, he also reasoned that greater racial diversity in the learning environment would redound to the benefit of society as a whole by exposing students to the talents and views of persons from all walks of life, by dismantling stereotypes and preconceptions, and by conveying fundamental lessons about tolerance and understanding – lessons that students could apply and impart in their daily lives after graduation. *Id.* at 312-13, 316.

The pivotal question confronting this Court in these cases is whether, twenty-five years after *Bakke*, race still matters. Petitioners claim that it does not, and ask this Court to repudiate Justice Powell's *Bakke* opinion.[2] This Court should decline to do so. Justice Powell was right. Race mattered then, and it still matters today.

Petitioners' assertion that race no longer matters is truly remarkable in the face of the overwhelming social science evidence presented in these cases. *See The Compelling Need for Diversity in Higher Education*. This evidence, which Petitioners did nôt challenge, leaves no room for doubt that race matters. It provides a strong empirical foundation for what Justice Powell believed to be the self-evident proposition that greater racial diversity in the learning environment in higher education enhances the quality of the learning environment itself and produces significant benefits to society as a whole. In short, the

[2] The United States does not join Petitioners' call for the repudiation of Justice Powell's *Bakke* opinion and the rejection of his premise that race matters in American life. Petitioners are, however, joined by several other amici, including Ward Connerly, Pacific Legal Foundation, and the Center for Equal Opportunity.

evidence makes a powerful case for race-conscious admissions in our colleges and universities.[3]

The conclusions reached in the social science evidence presented in these cases are not aberrational. "One of the most consistent findings of social research and government statistics in the United States is that race does make a difference and the differences are often profound." Gary Orfield, *Introduction to Diversity Challenged: Evidence on the Impact of Affirmative Action*, 13 (2001).

B. Race Continues To Be Salient Because Racial Differences Shape Our Experiences And Perspectives.

The continued salience of race is not categorically bad, or a sign that we are hopelessly mired in a great "American dilemma" about race. Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern American Democracy* (1944). In fact, there are ample reasons to

[3] The evidence includes an expert report submitted by William G. Bowen, formerly the President of Princeton University and now the President of the Mellon Foundation. Bowen has devoted years of study to the subject of the impact of racial diversity in higher education. His earlier work greatly informed Justice Powell's *Bakke* opinion. For Justice Powell, it was more than enough that leading educators such as Bowen had reached the considered judgment that because race shapes the experiences and perspectives of students, efforts to promote racial diversity in higher education would expand the diversity of the learning environment to the betterment of all. *Bakke*, 438 U.S. at 313 n.48. More recently, Bowen, along with Derek Bok, the former President of Harvard University, co-authored *The Shape of The River* (1999), a pathbreaking study (summarized in Bowen's expert report) that demonstrates the continued validity of Justice Powell's *Bakke* opinion and the continued salience of race in American life.

embrace racial differences. It is now firmly embedded in our social and political consciousness that the nation's diversity is a source of its strength. *See, e.g.*, Remarks of the President, Hispanic Heritage Month, Oct. 9, 2002, *available* at http://www.whitehouse.gov/newsreleases 2002/10/200021009-1.html; Rudolph W. Guiliani, *Combating Terrorism,* 16 N.D. J. L. Ethics & Pub. Pol'y 57, 62 (2002); *Hearing of the Foreign Operations, Export Financing, and Related Programs Subcommittee of the House Appropriations Committee* (Testimony of Secretary of State Powell), 107th Cong., 2d Sess. (Feb. 13, 2002).

In many respects, however, racial differences manifest themselves today in a deep and troubling divide. Despite the strides this nation has made over time in breaking down barriers to opportunity, we still see racial gaps in wealth, health, and employment.[4] Despite significant racial healing, we still see a dramatic disparity in the relative faith that blacks and whites place in government institutions and our legal process.[5] The racial divide even

[4] *See* Compelling Need, Report of Thomas J. Sugrue, at 39-46. *See also* Bernard E. Anderson, *The Black Worker: Continuing Quest for Economic Parity, in* National Urban League, *The State of Black America 2002*, 51 (2002) [hereinafter "*SOBA*"); Franklin D. Raines, *What Equality Would Look Like: Reflections on the Past, Present and Future, in SOBA 2002,* 13 (2002); Walter W. Stafford, *The National Urban League's Survey: Black America's Under-35 Generation, in SOBA 2001*, 19, 41 (2001); William D. Bradford, *Black Family Wealth in the United States, in SOBA 2000*, 103, 106-07 (2000); Billy J. Tidwell, *Parity Progress and Prospects: Racial Inequalities in Economic Well-Being, in SOBA 2000*, 287, 288 (2000).

[5] See Orfield, at 16; Compelling Need, Report of Thomas Sugrue, at 46-48; David A. Harris, *'Driving While Black' And Other African-American Crimes: The Continuing Relevance of Race to American Criminal Justice, in SOBA 2000*, 259, 261-63 (2000).

extends to the "perception of race itself as a salient feature in modern American society." Compelling Need, Report of Eric Foner, at 79.[6]

The reasons for the racial divide are many. But whatever the cause, the racial divide inevitably shapes our experiences and perspectives. *Id.* at 80. ("As long as the historic memory and current reality of racial inequality remain alive, so too will profound differences in how black and white Americans understand the nation's past, present, and future."); *id.*, at 237, Report of William G. Bowen (it is "a fact of life in contemporary America that the perspectives of individuals are often affected by their race as by other aspects of their background.").

1. The Educational Experience Of Students In Public Schools - From Kindergarten Through Twelfth Grade Diverges Along Racial Lines.

Experiences and perspectives are formed early on in primary and secondary education. Where we went to school, who was there with us, and what we learned influence who we are and how we interact with the world around us. Race plays a significant role in shaping these formative experiences and perspectives because race is salient to the make-up and quality of the nation's public schools, from kindergarten through twelfth grade.

[6] As Professor Foner has described this phenomenon, "most whites tend to think that race has only a minor impact on the daily experiences and future expectations of Americans whatever their background," whereas "[m]ost nonwhites feel that race still matters a great deal." Compelling Need, Foner Report, at 79.

K-12 educational experiences diverge along racial lines because the make-up of public schools commonly diverges along racial lines. Five decades after *Brown v. Board of Education*, 347 U.S. 483 (1954), de facto racial segregation of the nation's public schools is widespread. *See* Erica Frankenberg, Chungmei Lee, & Gary Orfield, *A Multiracial Society With Segregated Schools: Are We Losing The Dream?*, 4 (2003), *available* at www.civilrightsproject.harvard.edu [hereinafter "Frankenberg"].

For instance, 75% of black students attend predominately minority public schools (*i.e.*, schools that are more than 50% minority). 37% of black students attend public schools that are "intensely segregated" (*i.e.*, schools that are 90-100% minority.) And 1 out of every 6 black students attends public schools that are virtually all minority. *Id.* at 28, 31, 40.

Because public school students typically attend schools in their own neighborhoods, racial segregation in grades K-12 mirrors patterns of residential segregation and patterns of poverty that all too frequently engulf minority neighborhoods. *See* Compelling Need, Sugrue Report, at 27; Leland Ware and Antoine Allen, *The Geography of Discrimination: Hypersegregation, Isolation, and Fragmentation Within the African-American Community, SOBA 2002*, 69 (2002). For example, 1 out of 5 black students lives in 27 "central city" school districts in which the majority of the residents, who are predominately minority, live in poverty. *See* Frankenberg, at 53; *see also* Ware and Allen, *SOBA 2002*, 69 ("today's African Americans who reside in the nation's inner cities live in . . . extreme racial isolation. . . ."); U.S. Department of Education, National Center for Education Statistics, *Urban Schools: The Challenge of Location and Poverty*, 8, 11

(1996) (urban public schools are more likely to serve minority students and are more likely to be located in impoverished pockets of cities).

The racial divide in public school education in grades K-12 transcends region: the percentage of black students in predominately minority and intensely segregated schools has increased nationwide over the last decade. Frankenberg, at 38. This racial divide also transcends class: because "[r]esidential segregation has led to a concentration of poverty in urban areas," even middle class minority students in our cities have "direct experience with poverty and its consequences." Compelling Need, Sugrue Report, at 18. And the racial divide transcends the boundary between city and suburb: black exposure to white students in public schools in suburban districts has fallen since 1986, because many public schools in those districts have become increasingly minority as large numbers of minorities have moved from cities to suburbs. Frankenberg, at 61.

Public schools that are predominately minority are not *necessarily* inferior. *See Missouri v. Jenkins*, 515 U.S. 70, 119 (1995) (Thomas, J., concurring). The rub is that, "[w]ith few exceptions, separate schools are still unequal schools." Frankenberg, at 11. Compared to predominately white schools, there are fewer credentialed teachers, library books, and advanced placement courses in predominately minority schools; the facilities in minority schools are older and outmoded; parental involvement is less pronounced; and average student proficiency in reading and math is markedly lower. *See* U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 2002*, 54 (2002); H.R. Rep. 107-063, 107th Cong., 1st Sess. (2001); General Accounting

Office, *Per-Pupil Spending Differences Between Selected Inner City and Suburban Schools Varied by Metropolitan Area*, 17 (2002). These stark differences in the quality of K-12 public education further confirm the continued salience of race in American society.

It is telling that alleviating racial disparities in public education is among the core purposes of the federal government's most recent education initiative, The No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 101, 115 Stat. 425 (2001). This major legislation, which passed with strong bipartisan support, and which the President has described as a signature of his administration,[7] demonstrates that the nation's leadership understands that race is still salient.

2. Racial Differences In The Experience Of Public School Students From Kindergarten Through Twelfth Grade Shape The Perspectives Of Students In Higher Education Institutions.

Petitioners argue (Pet. Br., *Gratz*, at 41) that the academic diversity rationale for race-conscious admissions in higher education is "malleable." They claim that the true purpose of such policies is to remedy the historic societal discrimination that has engendered racial disparities in K-12 public education – a problem that is too amorphous to constitute a permissible predicate for race-based decisions.

[7] Remarks of the President on the First Anniversary of The No Child Left Behind Act, Jan. 8, 2003, *available* at http://www.whitehouse.gov/news/releases/2003/01/20030108-4.html.

See City of Richmond v. J. A. Croson Co., 488 U.S. 469, 490-91 (1989). Petitioners' argument misses the point.

Certainly, there is a connection between racial disparities and diversity in higher education. But it exists only because life experiences invariably shape one's perspective. Thus, the neighborhoods in which students have lived and the schools that they have attended before arriving at college will necessarily affect their outlook once they get there. Given the indisputable racial disparities in neighborhoods and schools, those disparities are part of the experiences that students bring with them to campuses and classrooms. *See* Compelling Need, Sugrue Report, at 43 ("In large part because of pervasive racial separation in residence, education, and opportunity, minorities and white Americans experience significantly different qualities of life. As a result, individuals from different racial and ethnic backgrounds have different expectations and perspectives on some of the most fundamental aspects of day-to-day life.").

This is not to say that racial diversity in higher education can be advanced only by those blacks who have had first-hand experience with racial disparity through attendance at inferior, predominately black public schools in impoverished predominately black neighborhoods. The movement to higher rungs of American society is a recent occurrence for many blacks. An upper class black student who has attended an elite all-white private school in an exclusive all-white neighborhood may be only a generation removed from an all-black public school in an impoverished all-black neighborhood. Thus, the sting of disparity may still hit home for him. Even if the student has not suffered disparity himself, he may have a view about the disparities that affect other blacks, let alone a view of

what it was like not to know disparity as a black person in an elite all-white private school in an exclusive all-white neighborhood. Either way, the views of this student, just like the student who has lived and breathed racial disparity on a daily basis, can make an important contribution to the racial diversity of the learning environment. *See* Bowen and Bok, *The Shape of the River*, at 280 ("[M]inority students of all kinds can have something to offer their classmates. The black student with high grades from Andover may challenge the stereotypes of many classmates just as much as the black student from the South Bronx.").

Petitioners argue that the academic diversity rationale for race-conscious admissions policies raises the specter that those policies will become a permanent feature of the landscape of higher education. (Pet. Br., *Gratz*, at 17.) That is a canard. To be sure, racial diversity is likely to be an important component of a quality learning environment in our colleges and universities for the indefinite future because race itself is likely to continue to matter. But that does not necessarily mean that race-conscious admissions policies will always be necessary to achieve the goal of racial diversity.

C. Race-Conscious Admission Policies That Seek To Foster Academic Diversity Do Not Presume That Race Shapes The Experiences And Perspectives Of All Persons Of A Particular Race In The Same Way.

Petitioners and several of their amici resort to the shop-worn claim that the academic diversity rationale for race-conscious admissions in higher education rests on a rigid presumption that all persons of a particular race

"think alike" and therefore will convey identical perspectives on each and every subject. (Pet. Br., *Gratz*, at 16; Amicus Curiae Br. of National Association of Scholars, at 12-13; Amici Curiae Br. of Center for Equal Opportunity, *et al.*, at 19-20.) That argument did not persuade Justice Powell in *Bakke*. It is no more persuasive now.

To be sure, race-conscious admissions policies that seek to foster diversity in higher education assume that all blacks share the experience of being black. But that assumption hardly means that all blacks think alike. It is no more reductionist than the assumption that all persons who grew up in rural America share the experience of growing up in rural America.

Beyond the initial assumption of a shared black experience, the crux of race-conscious admissions policies that seek to foster diversity is *individual* black experience – that is, each black person has his or her own sense of what it means to be black. Those policies thus assume only that race shapes experiences of all blacks in some way, not in the same way. Far from resting on the stereotypical notion that there is a single black view that all blacks share, race-conscious admissions policies in higher education work to break down those stereotypes. To take an obvious example, many blacks do not favor race-conscious admissions policies. But race-conscious admissions policies do not presume otherwise, and they welcome all voices, even ones that denounce the policies. Glenn C. Loury, *Foreword, in* William G. Bowen and Derek Bok, *The Shape of The River* (1999) at xxvii (race of minority opponents of affirmative action who "deny[] the relevance of race . . . helps to make relevant their denial").

The assumption behind race-conscious admissions policies is far more modest than the assumption behind the Federal Communication Commission's policies governing the race-conscious allocation of commercial broadcast licenses that were sustained in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990). Underpinning the FCC policies was the theory that expanding minority ownership of broadcast licenses would lead to more minority-oriented programming and more minority perspectives on radio and television. *Id.* at 590. In upholding the FCC policies, this Court distanced itself from the notion that there was a uniform minority viewpoint that all minority broadcasters would convey. *Id.* at 590-91. Nevertheless, the FCC policies did link the race of the owner of a broadcast license to the content of programming on the owner's station. Accordingly, the policies on their face were susceptible to the charge that they presumed that all minorities "think alike" in making their programming choices. *Id.* at 618 (O'Connor, J., dissenting); *id.* at 635 (Kennedy, J., dissenting).

The context of the FCC policies, commercial broadcasting, is also very different from the context of race-conscious admissions policies, higher education. As the dissenters in *Metro Broadcasting* saw it, the correlation between race and programming content was tenuous in commercial broadcasting because programming choices are "mediated by market forces" of viewer demands and tastes. *Id.* at 619 (O'Connor, J., dissenting). Any commercial radio or television station must respond to those forces if it wishes to "attract and retain audiences." *Id.* at 626. (O'Connor, J., dissenting). The majority agreed "that all station owners are guided to some extent by market demand in their programming decisions," but deferred to

the predictive judgment of the government "there may be important differences between the broadcasting practices of minority owners and those of their nonminority counterparts." *Id.* at 580.

The debate over the power of viewer and listener preferences to overcome the salience of race in television and radio programming choices that divided the Court in *Metro Broadcasting* has little bearing on race-conscious admission policies in higher education, because there is nothing on college campuses quite like the mediating force of the market. Teachers and peers are, in a sense, the audience for student expression on campus and in classrooms. But students are not expected to shed their experiences and tailor their perspectives to meet the demands of that "market." To do so would be antithetical to the long and proud tradition of academic freedom in higher education, which trades in the currency of a robust exchange of ideas. *Bakke*, 438 U.S. at 312.

In the end, Petitioners, along with their amicus Ward Connerly, say that any presumption about the relative contributions that people of different races can make to the learning environment in higher education violates the axiom that race is irrelevant in assessing the worth of individuals. (Pet. Br. at 14.) Petitioners' invocation of that axiom is misplaced.

First, recognizing that race shapes experiences before college, and hence affects the contributions that a person can make to the learning environment once there, is largely a cognitive point about that person's understanding of herself and the world around her. It is not a normative judgment about her character or worth. "One can hold that race is irrelevant to an individual's moral worth, that

individuals and not groups are the bearers of rights, and nevertheless affirm that, to deal effectively with these autonomous individuals, account must be taken of the categories of thought in which they understand themselves." Loury, at xxix (1999).

Second, giving favorable consideration to an applicant's race in the admission process on the assumption that his experiences have been shaped by race and that those experiences therefore can add something to the learning environment is not a value judgment on the content of character, any more than the favorable consideration of an applicant's roots in a rough and tumble part of rural America is a judgment that his character has more content than the applicant who was reared in an affluent suburb.

Finally, the assumption that race makes a difference in the learning environment in higher education actually can teach the valuable moral lesson that race has nothing to do with character or worth. *Id.* at xxix ("Conveying effectively the ultimate moral irrelevance of race in our society may require fundamental attention by [higher education institutions] to the racial composition of the learning environment.").[8]

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[8] As an extension of his assertion that race does not matter in American life, amicus Connerly is the primary sponsor of The Racial Privacy Initiative, a state-wide ballot measure in California that would prohibit government agencies from collecting any statistics about race or ethnicity. *See* http://www.racialprivacy.org. If successful, this initiative would disable the state from assessing whether and to what extent that there are disparities between blacks and whites in employment, income, wealth, access to health care, and the frequency of police

(Continued on following page)

II. THE UNITED STATES FAILS TO TENDER ANY ANALYSIS TO SUPPORT ITS ARGUMENT THAT THIS COURT SHOULD DECIDE THESE CASES SOLELY ON THE GROUND THAT "PERCENTAGE PLANS" FOR COLLEGE ADMISSIONS PROVIDE AN ALTERNATIVE MEANS OF ACHIEVING A RACIALLY DIVERSE LEARNING ENVIRONMENT THAT IS BOTH EFFICACIOUS AND RACE-NEUTRAL.

The United States does not join the Petitioners in asking this Court to repudiate Justice Powell's *Bakke* opinion and hold that race no longer matters in higher education admissions. Instead, the United States asks this Court to decide these cases solely on the ground that so-called "percentage plans" for admissions are both an efficacious and a race-neutral means of achieving the interest in a racially diverse learning environment in higher education that demonstrate that race-conscious

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traffic stops. More relevant here, the initiative would impair the ability of state higher education institutions to determine whether facially neutral admissions criteria have a discriminatory impact on minorities because the prohibition on collecting information on race or ethnicity would make it impossible for the college to comprehend fully the racial make-up of the applicant pool. The upshot of this quest for total desensitization to race is that higher education institutions could not even pursue the first line of attack in eliminating racial disparities: to "identify and discard facially neutral criteria that, in practice, tend to skew admissions in a manner that detracts from educational diversity." (U.S. Br., *Grutter*, at 17.) The regime envisioned by Connerly would eliminate racial differences, at least on paper, because there would be no meaningful way to evaluate whether racial differences exist. A ruling from this Court that race may no longer be considered in college admissions would lend cover to such schemes to remove race from the equation for any and all purposes.

admissions policies are not narrowly tailored to the interest and therefore are unconstitutional.

The United States' treatment of percentage plans is transparently superficial. With no supporting analysis, the United States declares the percentage plans to be both efficacious and race-neutral. The only facts the United States cites are raw statistics purporting to show that minority enrollment in public higher education institutions in the three states with percentage plans – Texas, Florida, and California – is equal to, in or excess of, minority enrollment in those states prior to the elimination of race-conscious admissions policies there. (U.S. Br., *Grutter*, at 17-22.) The United States says that the statistics speak for themselves and asks this Court to accept them face value. When scrutinized, however, the statistics do not paint the rosy picture that the United States paints. *See* Catherine L. Horn and Stella M. Flores, Percent Plans in College Admissions: A Comparative Analysis, at 50-51 (Feb. 2003), *available* at http://www.civilrightsproject harvard.edu.

Wholly apart from the serious concerns raised by its insistence that this Court should decide these cases on the basis of raw statistics that do not tell the story the United States wishes they did, the United States glosses over a battery of other transparent flaws that cast substantial doubt on whether the percentage plans are efficacious or are even race-neutral to begin with.

A. The United States Fails To Consider The Risk That Percentage Plans, Like Quotas, May Dilute The Quality Of The Student Body In Our Colleges And Universities.

The percentage plans guarantee admission to a higher education institution based on a single factor: high school

class rank. In their unwavering and mechanical reliance on one factor, the percentage plans bear a strong resemblance to racial quotas. And just like quotas, the plans may sacrifice the quality of the student bodies at our colleges and universities. The risk is inherent in the way that percentage plans treat class rank as a proxy for qualification. Ironically, the percentage plans actually may impose a greater threat to the quality of the learning environment in higher education than now-outlawed racial quotas ever did. At least under the quota system held unconstitutional in *Bakke*, factors besides race were assessed in making admissions decisions for those positions reserved for minorities: candidates had to compete against each other based on grades, test scores, and other criteria. By contrast, the percentage plans jettison every factor but one – high school class rank.

Colleges and universities typically evaluate the strength of an applicant's high school. An applicant with weaker grades at an intellectually challenging school may be more qualified for admission than an applicant with stronger grades at a less intellectually challenging school. In the same vein, an applicant with weaker grades who had to work during high school to help out his family or has made notable contributions to his school or community may be more qualified for admission than an applicant with stronger grades, but who had an easy ride through high school or who did not participate in extracurricular activities. None of these considerations matters under the percentage plans. The only thing that counts towards guaranteed admission to some college is high school class rank.

That percentage plans threaten to dilute the quality of the study body through their reflexive guarantee of admission to anybody who finishes above a certain mark in a

high school holds true whether the school is predominately minority or predominately white. In either case, graduating in the upper percentile of a class may not be difficult because the school's academic programs or the competition from classmates are not rigorous. And yet, the relative rigor of schools is irrelevant under the percentage plans: someone in a top percentile at a lesser school gains admission to a college based only on class rank, and that student's admission could close the door of that college to a more qualified student, white or black, from a better school.

Race-conscious admissions policies that consider race as one factor among many in the admissions process do not compromise quality. Under those policies, nobody is admitted or excluded based on any single factor. They represent a balanced and nuanced approach that seeks to admit only students who have the qualifications to compete in, and contribute to, the learning environment, based on a myriad of factors.

The record in these cases illuminates the risk that percentage plans may dilute the quality of the student body in colleges and universities. According to the uncontroverted expert testimony of William G. Bowen, the President of the Mellon Foundation: "So long as high schools differ so substantially in the academic abilities of their students and the level of difficulty of their courses, treating all applicants alike if they finished above a given high school class rank provides a spurious form of equality that is likely to damage the academic profile of the overall class of students admitted to selective institutions" Compelling Need, Bowen Report, at 240.

Subsequent studies have reinforced Bowen's concern. For example, one report found that the number of black

students at Texas' three most selective universities who graduated from challenging high schools in the state declined under the Texas percentage plan in 1999-2001. The study also found that black students who graduated from less challenging Texas high schools attended the three selective higher education institutions at the same rate under the percentage plan as they did under the previous admissions system in which race was considered.[9] Although the authors caution against drawing broad conclusions from this data, their findings suggest that the percentage plan is working to the detriment of black students who attend challenging high schools, but who do not make the class standing cut.

Texas' own report card on its percentage plan shows that standardized test scores of black and Hispanic students admitted in 1999-2001 under the Texas percentage plan are nearly 100 points lower than the scores of black and Hispanic students admitted outside the plan.[10] The validity of standardized tests as an indicator of qualifications for admission to higher education is disputed. *See* Compelling Need, Report of Claude M. Steele. But if the tests are valid, then Texas' report card suggests that blacks who are less qualified than other blacks are being admitted under the percentage plan in Texas.

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[9] John F. Kain and Daniel M. O'Brien, Hopwood and the Top 10 Percent Law: How They Have Affected the College Enrollment Decisions of Texas High School Graduates 8, 38 (2002) *available* at http://www.utdallas.edu.research/greenctr.

[10] See Gary M. Lavergne and Bruce Walker, Implementation and Results of the Texas Automatic Admissions Law, 18-20, *available* at http://www.utexas.edu/studentresearch/reports/admissions/hb.588.report_.

Because analysis of the impact of the percentage plans is only just beginning, it remains an open question whether the plans are diluting the quality of the student body at colleges and universities in the percentage plan states. At a minimum, that question must be considered before the plans can be deemed the *raison d'etre* for holding race-conscious admissions policies unconstitutional, as the United States blithely assumes.

B. The United States Fails To Consider That Percentage Plans Impose Costs On Society Because Their Dependency On De Facto Segregation In High Schools Has The Effect Of Condoning And Perpetuating The Racial Divide In K-12 Public Education.

The United States also fails to consider the potential societal costs that flow from the dependency of percentage plans on the de facto racial segregation of public high schools. The de facto racial segregation that characterizes much of K-12 public education in this country is particularly acute in the percentage plan states of California, Florida, and Texas. In California, 37% of black public school students attend intensely segregated schools. In Florida and Texas, about 1/3 of black public school students attend intensely segregated schools. Horn and Flores, at 27. The public schools in all three states are among the most racially segregated in the nation. Frankenberg, at 50.

The implications of the de facto racial segregation of public schools in California, Florida, and Texas are no mystery: (i) the top ranked students in graduating classes in scores of public high schools in those states are minority

because those schools are predominately or nearly all minority; and (ii) the percentage plans guarantee this contingent of students admission to higher education institutions in the three states solely by virtue of their high school class rank. As a practical matter then, it is de facto racial segregation that fuels the percentage plans by providing a large and steady supply of racially identifiable high schools that serve as feeders of minority students to higher education institutions in the percentage plan states.

This synergy between de facto racial segregation and percentage plans is perverse. A central imperative of our times is that racial disparities in K-12 public education must be resisted, not tolerated. The percentage plans conflict with that imperative because they prop up a racial divide: their success turns on the continued existence of racial disparities in K-12 public education. In racially integrated high schools, minorities are underrepresented in the top ranks of graduating classes, and so without the de facto racial segregation to ensure minority placement in top ranks of graduating classes, the percentage plans cannot work. *See* Mark C. Long, *Race And College Admission: An Alternative to Affirmative Action*, 41-48 (2002), *available* at http://home.gwu.edu/marklong; Kain and O'Brien, at 4.

In their amicus brief in support of Petitioners (at 10-16), the State of Florida and its Governor suggest that reforms to K-12 public education to alleviate racial disparities complement percentage plans in higher education. It can hardly be disputed that inferior K-12 public education is a root cause of minority underrepresentation in higher education, and that efforts to improve the quality of predominately minority public schools will better prepare

minority students for college. In turn, this will reduce the need for colleges and universities to maintain race-conscious admissions policies to achieve a racially diverse learning environment. Florida's K-12 reform program and the federal government's analogous No Child Left Behind initiative are steps in that direction. But those measures are in their nascent stages. *See* U.S. Department of Education, Executive Summary of The No Child Left Behind Act (required proficiency levels in reading and math are to be reached in 12 years). More fundamentally, alleviating the racial divide in K-12 public education is a major undertaking that requires a steep financial commitment – a commitment that may be difficult to sustain in a time of severe fiscal retrenchment at the state and local level. *See* Joetta L. Stack, *'No Child' Law Vies for Scarce Resources*, Education Week, Jan. 8, 2003.

In sum, there is much to be done before we can declare victory in the campaign to improve K-12 public education. See Statement of President George W. Bush Upon Signing H.R.1, 38 Weekly Comp. Pres. Doc. 26 (January 8, 2002) (No Child Left Behind Act is "just the beginning of change"). Until then, K-12 reforms, either alone or in tandem with percentage plans, are not efficacious substitutes for race-conscious policies designed to achieve a racially diverse student body that will enhance the quality of the educational environment, not dilute it.

C. The United States Fails To Consider Whether The Percentage Plans Actually Are Race-Conscious Because They Were Intended To Have A Racially Identifiable Impact.

The United States labels the percentage plans race-neutral, but calling the percentage plans race-neutral does

not make them so. There are credible arguments that the plans are actually race-conscious – arguments that the United States does not consider.

It is a basic tenet of constitutional law that an ostensibly race-neutral measure that is intended to have a racially identifiable impact is not neutral. *Village of Arlington Heights v. Metropolitan Housing Auth.*, 429 U.S. 252 (1977). The percentage plans arguably fall within the ambit of that tenet. While the plans may look facially neutral because many white students in the top ranks of predominately white high schools also stand to benefit, the primary purpose of the plans apparently is to capture a sizeable and racially identifiable subset of students in the top ranks of racially segregated high schools. *See* Lavergne and Walker, at 2; Horn and Flores, 15, 17, 18.

Notwithstanding the tenet that a facially neutral law that is designed to have discernible racial effects may be deemed race-based, preferences for small or new businesses are thought of as legitimate race-neutral alternatives to preferences for minority businesses, even if the government knows that a substantial subset of beneficiaries will be minority-owned businesses. *Croson*, 488 U.S. at 507; *id.* at 526 (Scalia, J., concurring). But that safe harbor of race-neutrality may not be availing to percentage plans. The demographics of de facto racial segregation in public high schools make it easy to ascertain the racial composition of a public high school. Indeed, the drafters of the percentage plans need only have looked to the boundaries of public school districts and the locations of the schools within them in order to calculate with a fair degree of precision the dimensions of the minority subset of public high school students in the top ranks of their class. Viewed

in that light, the percentage plans look like the gerrymandering of voting districts to create an intended impact of including or excluding voters along racial lines – ostensibly race-neutral measures that this Court has viewed with deep suspicion. *See Miller v. Johnson*, 515 U.S. 900 (1995); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

The common thread is that the racial impact of both percentage plans and racial gerrymandering can be readily identified geographically. By contrast, the subset of small or new businesses that are minority-owned cannot – that group of businesses may be dispersed and located in many neighborhoods. Furthermore, determining whether a minority-owned business even qualifies for a preference for small and new businesses requires the compilation of information about the size, resources, and age of that business.[11]

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[11] Even if the percentage plans are race-neutral, and even if they are efficacious for some institutions, the United States stumbles in offering the plans as a one-size-fits all prescription for every institution in the land. If the percentage plans make any sense at all, they work best at state institutions that recruit the bulk of their students from in-state. In its blunderbuss approach, United States ignores the fact that the applicant pool for admission to some of the country's top public institutions, including the University of Michigan, is national in scope. The United States also fails to explain how the percentage plans begin to speak to the admissions policies of private institutions that recruit students from beyond the boundaries of the states in which they are located. Horn and Flores, at 10. Finally, the United States blindly touts the percentage plans in its brief in *Grutter*, a case involving race-conscious admissions in a law school, even though percentage plans have not been applied to graduate and professional schools.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals in Case No. 02-241, and affirm the judgment of the district court in Case No. 02-516.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

BARBARA GRUTTER, *Petitioner* v. LEE BOLLINGER, *et al.*, *Respondents*

JENNIFER GRATZ, *et al.*, *Petitioners* v. LEE BOLLINGER, *et al.*, *Respondents*

On Writ of *Certiorari* to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION, *ET AL.*, IN SUPPORT OF RESPONDENTS

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Adarand Constructors, Inc. v. Mineta, 534 U.S. 103 (2001) 13

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 14

Ambach v. Norwick, 441 U.S. 68 (1979) 15

Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) 13

Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986) 7

Board of Educ., Island Trees Union Free Sch. Dist. v. Pico, 457 U.S. 853 (1982) 7

Brewer v. West Irondequoit Central Sch. Dist., 212 F.3d 738 (2d Cir. 2000) 20, 24

Brown v. Board of Educ., 347 U.S. 483 (1954) 7, 9, 15

Bustop Inc. v. Board of Educ., 439 U.S. 1380 (1978) 13

Ferguson v. City of Charleston, 532 U.S. 67 (2001) 13

Goss v. Lopez, 419 U.S. 565 (1975) 7, 8

Guardians Ass'n v. Civil Serv. Comm'n, 630 F.2d 79 (2d Cir. 1980) 23

Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358 (W.D. Ky. 2000) 14

Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) 7, 8

Hunter v. Regents of the Univ. of Cal., 190 F.3d 1061 (9th Cir. 1999) 23

Ingraham v. Wright, 430 U.S. 651 (1977) 7

Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) 12

Keyishian v. Board of Regents of the Univ. of the State of N.Y., 385 U.S. 589 (1967) 6

New Jersey v. T.L.O., 469 U.S. 325 (1985) 7

Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 137 F. Supp. 2d 1224 (W.D. Wash. 2001) 13, 21, 23

Plyler v. Doe, 457 U.S. 202 (1982) 7, 15

Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) 12, 16, 23

Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214 (1985) 6

Richmond v. J.A. Croson, 488 U.S. 469 (1989) 14

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) 8

Schenck v. United States, 249 U.S. 47 (1919) 6

Swann v. Charlotte Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) 8

Sweezy v. New Hampshire, 354 U.S. 234 (1957) 6

Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969) 6

United States v. Paradise, 480 U.S. 149 (1987) 24

Wessman v. Gittens, 160 F.3d 790 (1st Cir. 1998) 23

Wittmer v. Peters, 87 F.3d 916 (7th Cir. 1996) 14, 24

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) 18, 24

State Cases

Hartzell v. Connell, 679 P.2d 35 (Cal. 1984) 12

Rules, Regulations and Statutes

No Child Left Behind Act of 2001, 20 U.S.C. § 6301 (2002) 11, 20

No Child Left Behind Act of 2001, 20 U.S.C. § 7231(a)(4) (2002) 16

Title VI of the 1964 Civil Rights Act, 42 U.S.C.§ 2000d 1,4,13

Other Authorities

A. Carnevale & R. Fry, *Crossing the Great Divide: Can We Achieve Equity When*

Generation Y Goes to College? (Education Testing Service, 2000) 19

A.S. Wells & R. Crain, *Perpetuation Theory and Long-Term Effects of School Desegregation*, 64 REV. OF EDUC. RES. 531-555 (1994) 21

Brief for the United States as *Amicus Curiae* Supporting Petitioner in *Grutter, v. Bollinger* (No. 02-241) 24

Council of Great City Schools, *Adequate Financing of Urban Schools: An Analysis of State Funding of the New York City Public Schools, available at* www.cgcs.org (2002) 10-11

Education Finance Statistics Center, National Center for Educational Statistics, *at* http://www.nces.ed.gov/edfin...11

EDWIN C. DARDEN, ARTHUR L. COLEMAN & SCOTT R. PALMER, *From Desegregation to Diversity: A School District's Self-Assessment Guide on Race, Student Assignment and the Law* (National School Boards Association Council of Urban Boards of Education 2002)..... 12, 15, 16

Erika Frankenberg, *et al., A Multiracial Society with Segregated Schools: Are We Losing the Dream?* Report of the Civil Rights Project, Harvard University (Jan. 2003) 9, 10

James Banks, *Multicultural Education: Its Effects on Students' Racial and Gender Role Attitudes* HANDBOOK OF RESEARCH ON MULTICULTURAL EDUC. 617 (James Banks & Cherry McGee Banks eds., 1995)..... 17

James M. McPartland & Jomills H. Braddock II, *Going to College and Getting a Good Job: The Impact of Desegregation*, EFFECTIVE SCHOOL DESEGREGATION (Willis D. Hawley ed., 1981) 21

James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249 (1999) 10

Janet Ward Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students*, HANDBOOK ON RESEARCH ON MULTICULTURAL EDUC. (James A. Banks ed., 1995) 21

Jeanne Weiler, *Recent Changes in School Desegregation*, 133 ERIC CLEARINGHOUSE ON URBAN EDUC. DIGEST 4 (1998) 10

J.H. Braddock & J.M. McPartland, *The Social and Academic Consequences of School Desegregation* EQUITY AND CHOICE 5 (Feb. 1988)..... 22

John Boger, *Willful Colorblindness: The New Racial Piety and Resegregation of Public Schools*, 78 N.C. L. REV. 1719 (2000) 18

Julie F. Mead, *Conscious Use of Race as a Voluntary Means to Educational Ends in Elementary and Secondary Education: A Legal Argument Derived from Recent Judicial Decisions*, 8 MICH. J. RACE & L. 63 (2003)..... 14

Kati Haycock, *Good Teaching Matters . . . A lot*, THINKING K-16, 3-15 (Summer 1998)..... 11

Linda Darling Hammond, *Education, Equity and the Right to Learn*, in THE PUBLIC PURPOSE OF

EDUC. AND SCHOOLING 41 (John Goodlad & Timothy McMannon eds. 1997) 11

M.P. Dawkins & J.H. Braddock, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. OF NEGRO EDUC. 394 (1994) 17

N. Sonleitner & P.B. Woods, *The Effect of Childhood Interracial Contact on Adult Antiblack Prejudice*, 20 INT'L J. OF INTERCULTURAL REL. 1 (1996) 17

Overview of Race and Hispanic Origin: Census 2000 Brief, U.S. Census Bureau at 3 (Mar. 2001) 9

Paragraph 44, Independent Review (Report #18) – SFUSD Consent Decree, July 30, 2001 11

Patricia Gurin, *The Compelling Need for Diversity in Higher Education*, Expert Report (Jan. 1999) 18

Poppy Lauretta McLeod, *et al.*, *Ethnic Diversity and Creativity in Small Groups*, 27 SMALL GROUP RESEARCH 248 (May 1996) 20

Population by Race and Hispanic or Latino Origin for the United States: 1990 and 2000 Table 3, U.S. Census Bureau (Apr. 2001) 9

Projections of the Resident Population by Race, Hispanic Origin, and Nativity; Middle Series, 2050 to 2070, Population Projections Program, Population Division, US. Census Bureau (Jan. 13, 2000) 9

R.E. Mahard & R.L. Crain, *Research on Minority Achievement* in *Desegregated Schools in* THE CONSEQUENCES OF SCHOOL DESEGREGATION 103 (C. Rossell and W. Hawley eds.,1983) 21

R.E. Slavin, *Cooperative Learning and Intergroup Relations*, HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 628 (1995) 17

R.E. Slavin, *Effects of Biracial Learning Teams on Cross-racial Friendships*, 71 J. of EDUC. PYSCH. 381 (1979) 17

R.E. Slavin & N. Madden, *School Practices that Improve Race Relations*, 16 AM. EDUC. RES. J. 169 (1979) 17

Secretary Richard Riley, *Dear Colleague Letter*, U.S. Department of Education, Jan. 19, 2001 10

The Funding Gap: Low-Income and Minority Students Receive Few Dollars, Report of the Education Trust (Aug. 2002) 10

Transcript of Oral Argument *Virginia v. Black*, 553 S.E.2d 738 (Va. 2001) *cert. granted*, 122 S. Ct. 2288 (2002) (No. 01-1107) 19

W.T. Trent, *Why Desegregate? The Effect of School Desegregation on Adult Occupational Desegregation of African Americans, Whites and Hispanics*, (2) INT'L J. OF CONTEMP. SOC. (1994) 20

INTEREST OF THE *AMICI*[1]

The *Amici* are eleven organizations[2] involved in elementary and secondary education that share a profound

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[1] The *Amici* file this brief with the consent of all parties. No counsel for a party authored this brief in whole or in part. No person or entity, other than the *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

[2] The National School Boards Association ("NSBA") is a not-for-profit federation of state associations of school boards across the United States. NSBA represents the nation's 95,000 school board members who govern our nation's 14,772 local school districts.

The National Association of State Boards of Education is a nonprofit association that represents state and territorial boards of education.

The Public Education Network ("PEN") is a national organization of local education funds and individuals working to improve public schools and build citizen support for quality public education in low-income communities across the nation. PEN and its members are building public demand and mobilizing resources for quality public education on behalf of 10.6 million children in more than 1,200 school districts in 30 states and the District of Columbia.

The National Association of Secondary School Principals serves more than 34,000 education officials in middle level schools and high schools, including administrators, teachers, students, and others interested in the education and welfare of today's youth.

The National Association of Independent Schools ("NAIS") is a nonprofit organization of over 1,100 independent, elementary and secondary schools in the United States and abroad. NAIS also represents myriad other independent school associations across the country. NAIS member schools are implicated by the present cases under Title VI of the Civil Rights Act of 1964 to the extent the schools receive federal funds.

The Council of the Great City Schools is a coalition of 57 of the largest urban public school systems in the United States.

The Horace Mann League was founded in 1922 to perpetuate the ideals of Horace Mann, the founder of the American public school system. The League believes that the public school system of the United States is an indispensable agency for the perpetuation of the ideals of our democracy and a necessary unifying and dynamic influence in American life.

commitment to ensuring that all children receive a high-quality education that fully prepares them to succeed as productive citizens in our society. As part of that commitment, the *Amici* are strongly supportive of the authority of state and local education officials to promote the essential educational benefits of diversity, including racial and ethnic diversity, in a school's student body. The *Amici* submit this brief to draw this Court's attention to vital issues of law and educational policy of which the Court should be aware as it considers the present cases.

The elementary and secondary education setting is distinct in several ways from the higher education context at issue in these cases. The issues related to race–conscious policies in elementary and secondary schools are not directly before this Court. At the same time, this Court's ruling on the constitutional issues under consideration could affect the authority of elementary and secondary schools (public and private) to create the kinds of diverse educational environments that strengthen the educational experience for all students. Moreover, there are core

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Magnet Schools of America is a nonprofit educational organization formed to promote equity, excellence, innovation, and the reduction of minority isolation in American education.

The National Alliance of Black School Educators is a nonprofit organization of 5,000 members, constituting the largest network of black educators in the nation.

The National Association for Multicultural Education is the primary membership organization addressing issues of multicultural education throughout the United States.

The Michigan School Boards Association, an NSBA federation member, represents the public school boards of the state of Michigan. The Michigan Association of School Boards is composed of 600 boards of education committed to advancing the quality of public education in their state.

educational principles in the elementary and secondary education context that affirm the position of the University of Michigan with respect to its compelling interest in promoting the educational benefits of a diverse learning environment.

SUMMARY OF THE CASE

This is the consolidation of two cases, both challenging admissions policies of the University of Michigan under the Fourteenth Amendment to the U.S. Constitution and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

The plaintiffs in *Gratz v. Bollinger* challenged the admissions polices of the University of Michigan undergraduate program. The university's current admissions policy considers an applicant's race as one of several factors during the admissions process. The plaintiffs are a group of unsuccessful applicants who allege that both the admissions policy in place at the time they applied in 1997 and the current policy violate Title VI and the Equal Protection Clause.

Grutter v. Bollinger involves the admissions policy for the University of Michigan Law School. The plaintiffs are unsuccessful applicants who allege that the school's consideration of race, as one factor among many, in its admissions process violates Title VI and the Equal Protection Clause.

The University of Michigan contends that its interest in promoting the educational benefits of a diverse student body is a "compelling state interest" and the admissions policies are "narrowly tailored" to serve that interest.

SUMMARY OF THE ARGUMENT

Public education serves a vital role as a cornerstone of America's democratic society. Diversity, including racial and ethnic diversity, is a vital tool for ensuring a complete educational experience. Yet as our nation grows increasingly diverse, our nation's public schools are becoming increasingly segregated.

Particularly in the face of these conditions, the *Amici* urge this Court to preserve the range of discretion historically conferred upon state and local education officials to promote their core educational goals, including the educational benefits of diversity.

The establishment of a diverse student body in elementary and secondary schools promotes several core educational benefits for all students that can be sufficiently compelling to justify limited race-conscious policies. A strong basis in evidence shows that diversity enhances students' civic values, improves student learning, improves students' preparation for employment, and increases educational opportunities. Moreover, current law provides meaningful, judicially enforceable limiting principles that guide and restrict the discretion of school officials when pursuing compelling educational interests through race-conscious measures.

This Court should acknowledge the discretion afforded elementary and secondary education officials, acting within longstanding constitutional parameters, to pursue their core educational mission based on appropriate evidence — even when, in limited circumstances, their decisions may include the consideration of race.

ARGUMENT

I. In elementary and secondary education, constitutional principles are shaped by the unique mission of schools and the authority of education officials to pursue that mission.

Constitutional principles do not exist in a vacuum. Longstanding precedent regarding the application of constitutional standards establishes that context matters.[3] In the context of elementary and secondary education, federal courts have resolved constitutional issues with particular sensitivity to (1) the unique mission of public schools and (2) principles of federalism and judicial restraint.[4]

This Court has long held that constitutional rights are uniquely shaped by the mission and role of public education and must be interpreted "in light of the special characteristics of the school environment." *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969). When considering the application of constitutional rights in elementary and secondary education, under the First, Fourth, Fifth, Eighth, and Fourteenth Amendments, this Court has construed students' constitutional rights to permit school officials to carry out their educational mission.[5]

Moreover, this Court has long recognized that education is uniquely within the purview of state and local governments.[6] State and local education officials have education-policy expertise not possessed by federal courts.

> [P]ersistent and difficult questions of educational policy [are areas] in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. Education . . . presents a myriad of [sic] 'intractable economic, social and even philosophical problems.' . . . [T]he judiciary would be well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.

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[3] *See generally Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.) ("[T]he character of every act depends on the circumstances in which it is done.").

[4] Correspondingly, decisions of higher education officials that are within the "'four essential freedoms' of a university are entitled to judicial deference." *See Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the result), *cited with approval in Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985). Notably, principles of academic freedom (among others) afford discretion to higher education officials to pursue "that robust exchange of ideas which discovers truth 'out of a multitude of tongues.'" *Keyishian v. Board of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967). These principles inform the relative balance of constitutional values in the higher education arena.

[5] *See, e.g., Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986); *Board of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 868 (1982); and *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (all involving First Amendment rights); *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (involving Fourth Amendment rights); *Goss v. Lopez*, 419 U.S. 565 (1975) (involving Fifth Amendment rights); *Ingraham v. Wright*, 430 U.S. 651 (1977) (involving Eighth Amendment rights); *Plyler v. Doe*, 457 U.S. 202 (1982) (involving Fourteenth Amendment rights). In each of these cases, this Court balanced students' constitutional rights against the unique mission of the public school.

[6] This Court in *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954), stated that "education is perhaps the most important function of state and local governments."

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42-43 (1973). Moreover, state and local education officials have the primary authority and responsibility to make education policy decisions.[7] Thus, federal courts, including this Court, have long held that state and local education officials are entitled to substantial deference when pursuing their core educational mission.[8]

Taken together, these foundations call upon this Court to affirm the educational discretion properly vested in state and local education officials, acting within longstanding constitutional parameters, to pursue their core educational mission, including with regard to issues concerning race and racial diversity.[9]

II. Issues of race remain central to fulfilling the mission of elementary and secondary schools.

State and local education officials are responsible for the education of our nation's youth and the inculcation of values central to our diverse democracy. They must have the authority and discretion to make education policy judgments central to their core mission, including with regard to issues concerning race.

History and present conditions affirm an indisputable point in the context of elementary and secondary education: race matters.[10] Beginning with this Court's opinion in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), our nation has struggled, in fits and starts, to promote integration and equality of opportunity in public education, historically as a matter of law and more recently as a matter of sound education policy. Yet even as our nation grows more diverse, multicultural, and multilingual,[11] our public schools are in many places

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[7] *E.g., Goss v. Lopez*, 419 U.S. at 578 (1975) ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . . . By and large, public education in our Nation is committed to the control of state and local authorities."); *Hazelwood Sch. Dist. v. Kuhlmeier*, 480 U.S. 260, 273 (1988) ("This is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.") (citations omitted).

[8] As stated in *Swann v. Charlotte Mecklenburg Bd. of Educ.*, 402 U.S. 1, 17 (1971), "School authorities have wide discretion in formulating school policy."

[9] In general, throughout this brief, the term "race" is used to connote both "race" and "ethnicity." Further, the term "diversity" generally refers to diversity based on race and ethnicity as two – and only two – of several elements that constitute diverse learning environments in the elementary and secondary education context.

[10] The argument that race matters does not disavow the goal of building a "race blind" society (in the sense of a nation where people are not treated differently because of the color of their skin). Rather, the question is: What is more likely to achieve that goal -- permitting limited race-conscious actions where necessary to build diverse education environments where children can learn and grow together, or prohibiting any race-conscious action to promote diversity and thereby ensuring that students learn in increasingly segregated settings?

[11] Census data confirm that the fabric of the U.S. population in this century will be woven from racially diverse strands. Today, our nation's population is approximately 69.1 percent white/non-Hispanic, 12.5 percent Hispanic, 12.3 percent black, 3.6 percent Asian/Pacific Islander, and 0.9 percent American Indian/Alaska Native. *See Overview of Race and Hispanic Origin: Census 2000 Brief*, U.S. Census Bureau at 3 (Mar. 2001); *Population by Race and Hispanic or Latino Origin for the United States: 1990 and 2000*, Table 3, U.S. Census Bureau (Apr. 2001). By 2050, the percentage of the population that is white/non-Hispanic is projected to decrease to approximately 52.8 percent. *Projections of the Resident Population by Race, Hispanic Origin, and Nativity: Middle Series, 2050 to 2070*, Population Projections Program, Population Division, U.S. Census Bureau (Jan. 13, 2000). Among students enrolled in elementary and high schools today, approximately 61 percent are white/non-Hispanic, 17 percent are black, and 16 percent are Hispanic. Erika Frankenberg, *et al.*, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, Table 2, Report of the Civil Rights Project, Harvard University at 24 (Jan. 2003). Since 1968,

becoming more segregated,[12] with persistent gaps in educational opportunity and achievement.[13] These trends

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the proportion of white students enrolled in public schools has decreased by 5.9 percent, while the proportion of black students has increased by 1.8 percent and the proportion of Hispanic students has increased by 283 *percent*. *Id.* at 23. This increasing diversity is reflected in varying ways and degrees in all regions of the country, urban, suburban, and rural. *Id.* at 27.

[12] Today, nearly three-fourths of all black and Hispanic students attend predominantly minority schools, and more than one-third of black and Hispanic students attend schools with greater than 90 percent minority enrollment. Frankenberg, *et al.*, *supra* note 11 at 33. "The racial trend in the school districts studied is substantial and clear: [V]irtually all school districts analyzed are showing decreased levels of inter-racial exposure since 1986, suggesting a trend towards resegregation, and in some districts, these declines are sharp. Despite an increasingly racially diverse public school enrollment, white students in over one-third of the districts analyzed became more segregated." *Id.* at 4. *See also* James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249 (1999); Jeanne Weiler, *Recent Changes in School Desegregation*, 133 ERIC CLEARINGHOUSE ON URBAN EDUC. DIGEST 4 (1998). In addition, more than 85 percent of high-minority schools are also high-poverty schools, often struggling with the many challenges associated with concentrated disadvantage. Frankenberg, *et al.*, *supra*, note 11 at 36.

[13] Despite some important progress, data indicate that minority students have less access than nonminority students to key educational resources, and the funding necessary to secure those resources. *Dear Colleague Letter* from Secretary Richard Riley, U.S. Department of Education, Jan. 19, 2001 ("I am concerned about long-standing racial and ethnic disparities in the distribution of educational resources, including gaps in access to experienced and qualified teachers, adequate facilities, and instructional programs and support, including technology, as well as gaps in the funding necessary to secure these resources. Despite important progress, evidence shows that disparities in access to these educational resources remain – with too many minority children isolated in schools and school districts with far too little opportunity."). In most states, school districts with high minority enrollment receive fewer state and local funds than districts with low minority enrollment. *E.g.*, *The Funding Gap: Low-Income and Minority Students Receive Fewer Dollars*, Report of the Education Trust (Aug. 2002); Council of Great City Schools, *Adequate Financing of Urban Schools: An Analysis of State Funding of the New York City Public Schools,*

will continue if state and local school officials are not able to pursue multiple strategies to promote diversity and improve education for all children.[14]

Given these conditions, race matters to the core mission of elementary and secondary education in at least two fundamental ways: (1) to ensuring that all students are fully prepared to be productive citizens in our diverse democratic society; and (2) to ensuring that all students have the opportunity necessary to achieve high standards.

These goals are central to the mission of elementary and secondary education.[15] Moreover, diversity in a student

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available at www.cgcs.org (2002). This translates into fewer educational resources for minority students. For example, data show that, in many states, minority students have less access than nonminority students to highly qualified teachers with a college major in their subject area, even when controlling for poverty. *E.g.*, Kati Haycock, *Good Teaching Matters . . . A Lot*, 3 THINKING K-16, 3-15 (Summer 1998); Paragraph 44, Independent Review (Report #18) – SFUSD Consent Decree, July 30, 2001; Education Finance Statistics Center, National Center for Educational Statistics, *at* http://www.nces.ed.gov/edfin.

[14] In large part, the higher education community would be in a better position regarding diversity if diversity had been achieved already at the elementary and secondary level. Currently when students look to higher education, they are not starting on a "level playing field." Many of them are hampered by limited educational opportunities at the elementary and secondary level. This limits their aspirations and their possibilities for college and careers. It is also important to note that the extent to which "percentage plans" will promote diversity in higher education likely depends on the extent of segregation in elementary and secondary education. This creates the perverse situation under such plans whereby efforts to decrease racial segregation in public schools would also decrease diversity in public colleges and universities.

[15] *See, e.g.*, Linda Darling Hammond, *Education, Equity and the Right to Learn*, THE PUBLIC PURPOSE OF EDUC. AND SCHOOLING 41 (John Goodlad & Timothy McMannon eds., 1997); No Child Left Behind Act of 2001, 20 U.S.C. § 6301 *et seq.* (2002) (holding all states, districts, and schools accountable for closing achievement gaps, expressly including gaps

body, including racial and ethnic diversity, is a vital tool for achieving these goals[16] and preparing all students to reach their full potential and succeed in our society – intellectually, democratically, and economically.[17] With regard to issues of race, this Court should not categorically (and arbitrarily) limit state and local education officials to the constitutionally minimum steps[18] they are required to take to remedy prior discrimination.[19]

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among racial and ethnic subgroups, and supporting efforts to "foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stage of such students' education").

[16] *See, e.g., Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.) ("The atmosphere of 'speculation, experiment and creation' – so essential to the quality of higher education – is widely believed to be promoted by a diverse student body."); *Hartzell v. Connell*, 679 P.2d 35, 40-41 (Cal. 1984) (noting that "education serves as a 'unifying social force' among our varied population, promoting the cohesion based upon democratic values. The public schools bring together members of different racial and cultural groups and, hopefully, help them to live together 'in harmony and mutual respect.'").

[17] It is important to note in this sense that attention to diversity is designed to address contemporary issues, not to redress past wrongs. Further, this argument is not about *requiring* state and local education officials to take race-conscious actions to pursue the educational benefits of diversity or other nonremedial interests. Rather, the interest of the *Amici* is in ensuring that school officials have an appropriate range of educational options when making an array of context-specific decisions that affect the education of students they serve, including establishment of school attendance zones, establishment of student assignment policies, promulgation of transfer policies, establishment of magnet schools or special admissions academies, and adoption of policies that permit controlled choice. *See* EDWIN C. DARDEN, *ET AL.*, FROM DESEGREGATION TO DIVERSITY: A SCHOOL DISTRICT'S SELF-ASSESSMENT GUIDE ON RACE, STUDENT ASSIGNMENT AND THE LAW (National School Boards Association Council of Urban Boards of Education 2002).

[18] *See, e.g., Keyes v. School. Dist. No. 1*, 413 U.S. 189, 242 (1973) (Powell, J., concurring) ("Nothing in this opinion is meant to discourage school boards from exceeding minimal constitutional standards in promoting the

III. The educational benefits of diversity are sufficiently compelling to justify limited race-conscious actions.

This Court has held, under both the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, that race-conscious programs that confer material benefits[20] are

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values of an integrated school experience."); *Bustop, Inc. v. Board of Educ.*, 439 U.S. 1380, 1383 (1978) (Rehnquist, J.) (denying a stay of a race-conscious student assignment plan, saying that he doubted the constitutional need for such a plan but that "I have very little doubt that [the board] was permitted by the Constitution to take such action.").

[19] Moreover, to so limit state and local education officials to remedial interests in the context of the present cases would violate the long-standing tenet of this Court pursuant to which its constitutional rulings are based upon specific facts presented. *E.g., Ferguson v. City of Charleston*, 532 U.S. 67, 85 (2001) ("We decline to accept the dissent's invitation to make a foray into dicta and address other situations not before us."); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) ("[T]he importance of an issue should not distort the principles that control the exercise of our jurisdiction. To the contrary, 'by adhering scrupulously to the customary limitations on our discretion regardless of the significance of the underlying issue, we promote respect . . . for the Court's adjudicatory process.'") (citations omitted); *Ashwander v. Tennessee. Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (stating that this Court should refuse to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.").

[20] It is important to note that where race is used in elementary and secondary education, it is frequently considered as one factor among many when assigning students among similarly situated schools, which may not condition or deny material benefits to any student in a manner that would implicate strict scrutiny. *See, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 137 F. Supp. 2d 1224, 1230 (W.D. Wash. 2001), *rev'd on other grounds*, 285 F.3d 1236 (9th Cir. 2002), *withdrawn*, 294 F.3d 1084 (9th Cir. 2002) ("The Ninth Circuit has identified two different types of government programs that take race into account. On the one hand are 'affirmative action' programs. . . that use racial minority status as a positive factor, conferring a government benefit to members of a minority at the expense of those in the majority. On the other hand are measures, such as those designed to effect racially integrated public schools, that

subject to "strict scrutiny." Such programs will be upheld only where there is a sufficient basis in evidence to support the determination that the given program serves a "compelling interest" and is "narrowly tailored" to achieve that interest. *See, e.g., Adarand Constructors Inc. v. Pena*, 515 U.S. 200, 227 (1995). Although this establishes a high bar, a clear majority of this Court has held that "strict scrutiny" is not "fatal in fact." *Id.* at 237, 275.

In the elementary and secondary education context, there are several compelling nonremedial interests that can justify race-conscious policies.[21] Chief among these is the interest in promoting the educational benefits of diversity, including racial and ethnic diversity, in the school

seek to ensure that a benefit, available to all, is distributed in a manner that the governing body has decided will benefit the citizenry as a whole."); *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 380 (W.D. Ky. 2000) (dictum) ("[T]he Court concludes that as between two regular elementary schools, assignment to one or another imposes no burden and confers no benefit. The same education is offered at each school, so assignment to one or another is basically fungible. As a logical consequence, most courts have concluded that there is no individual right to attend a specific school in a district or to attend a neighborhood school."). For a thorough discussion of these cases see, Julie F. Mead, *Conscious Use of Race as a Voluntary Means to Educational Ends in Elementary and Secondary Education: A Legal Argument Derived from Recent Judicial Decisions*, 8 MICH. J. RACE & L. 63 (2003).

[21] Nonremedial interests may be as "compelling" as remedial interests. "A judge would be unreasonable to conclude that no other consideration except a history of discrimination could ever warrant a discriminatory measure unless every other consideration had been presented to and rejected by him." *Wittmer v. Peters*, 87 F.3d 916, 919 (7th Cir. 1996), (Posner J.), *cert. denied*, 519 U.S. 1111 (1997). The present cases before this Court do not implicate a school district's remedial interest (and obligation) to overcome discrimination, which clearly constitutes a compelling interest in the elementary and secondary education context (and others). *See Richmond v. J.A. Croson*, 488 U.S. 469, 491-92 (1989) (plurality opinion). This remedial interest of school districts to desegregate effectively is not addressed in this brief.

environment. In this sense, it is important to understand that diversity is not an end in itself. Rather, it is a tool that may be sought by state and local education officials because it can promote several core educational benefits for all students. It is those educational benefits of diversity, individually or collectively, that can be sufficiently compelling to justify the use of limited race-conscious policies. *See, e.g.*, Edwin C. Darden, *et al.*, FROM DESEGREGATION TO DIVERSITY: A SCHOOL DISTRICT'S SELF-ASSESSMENT GUIDE ON RACE, STUDENT ASSIGNMENT AND THE LAW 4 (National School Boards Association Council of Urban Boards of Education 2002).

A. Diversity prepares students to be productive citizens in our diverse democratic society.

Of primary relevance to the present cases, creating diverse learning environments promotes the compelling educational goal of preparing all students to become productive citizens in our diverse democratic society.[22]

As this Court made clear nearly 50 years ago: "[Education] is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment." *Brown*, 347 U.S. at 493.

Decades of experience and relevant research confirm the educational benefits of a diverse learning environment

[22] *See, e.g., Ambach v. Norwick*, 441 U.S. 68, 76 (1979) (discussing the "singular importance" of public elementary and secondary schools "in preparation of individuals as citizens and in the preservation of values on which our society rests"); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (recognizing "the public schools as the most vital civic institution for the preservation of a democratic system of government").

in the elementary and secondary education context – benefits that are integral to the mission and purpose of education in America.[23] These interests have been reinforced repeatedly by federal courts and by Congress.[24]

Instilling in all students the full range of knowledge, skills, and values necessary for success in our diverse, democratic nation and world is not something that can be fully achieved only through textbook learning. Simply put, children learn from their environments, not just from their books.

1. Diversity enhances students' civic values.

Creating a diverse learning environment in elementary and secondary education improves students' civic development by breaking down racial boundaries and stereotypes and by reinforcing the social and moral values of American democracy. A diverse learning environment can imbue students with the tolerance, respect, and confidence necessary to be good citizens in our increasingly diverse, democratic society. For example, studies show that students educated in diverse environments have an increased sense of civic engagement, are less likely to harbor

[23] *See, e.g.*, NSBA DIVERSITY GUIDE *supra* note 17 at 4-5 (describing the educational benefits of diversity in elementary and secondary education and providing a summary of social science research linking diversity to these benefits).

[24] *See, e.g., Bakke*, 438 U.S. at 312 (1978) (Powell, J.) ("The atmosphere of 'speculation, experiment and creation' – so essential to the quality of higher education – is widely believed to be promoted by a diverse student body. "); No Child Left Behind Act of 2001, 20 U.S.C.§ 7231(a)(4) (2002) ("It is in the best interests of the United States- (A) to continue the Federal Government's support of local educational agencies that are . . . voluntarily seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stage of such students' education.").

negative racial stereotypes, and are more likely to live and work in integrated settings.[25] Importantly, this benefit does not in any way depend on judgments about race and viewpoint. Whether diversity teaches students to recognize differences or similarities (or both), this civic mission will be greatly enhanced.

> [O]ne of the most important lessons the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous "melting pot" do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only "skin deep"; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process.

[25] *See, e.g.*, R.E. Slavin, *Cooperative Learning and Intergroup Relations*, HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 628 (1995) (cooperative learning in diverse schools can improve racial attitudes among all students, including increased cross-racial friendships, with effects sustained beyond the learning group); R.E. Slavin, *Effects of Biracial Learning Teams on Cross-racial Friendships*, 71 J. OF EDUC. PYSCH. 381 (1979) (controlled study showing positive effects of cooperative learning in diverse schools on increased cross-racial friendships, with effects sustained over time); M.P. Dawkins & J.H. Braddock, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. OF NEGRO EDUC. 394 (1994) (presenting several studies showing that students educated in diverse schools are more likely to attend diverse colleges, work in diverse settings, and live in diverse communities); N. Sonleitner & P.B. Woods, *The Effect of Childhood Interracial Contact on Adult Antiblack Prejudice*, 20 INT'L J. OF INTERCULTURAL REL. 1 (1996) (students who attended diverse schools had fewer negative racial stereotypes or prejudice, with effects sustained over the long term); R.E. Slavin & N. Madden, *School Practices that Improve Race Relations*, 16 AM. EDUC. RES. J. 169 (1979); James Banks, *Multicultural Education: Its Effects on Students' Racial and Gender Role Attitudes*, HANDBOOK OF RESEARCH ON MULTICULTURAL EDUC. 617 (James Banks & Cherry McGee Banks eds., 1995).

Wygant v. Jackson Bd. of Educ., 476 U.S. 276, 315 (1986) (Stevens, J., dissenting).[26]

2. Diversity improves student learning.

Creating a diverse learning environment in elementary and secondary education improves student learning by providing multiple experiences and perspectives that enrich the learning environment, both inside and outside the classroom. Evidence shows that diversity can promote a broader and deeper understanding of relevant issues among all students, and can improve students' critical-thinking skills by challenging their existing perspectives and encouraging them to examine issues from different points of view.[27] Though often misunderstood,

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[26] *See also, e.g.*, John Boger, *Willful Colorblindness: The New Racial Piety and the Resegregation of Public Schools*, 78 N.C. L. REV. 1719, 1765-66 (2000) ("As the world grows more racially and ethnically interdependent every year, reasonable educators might well conclude that every child has a compelling interest in learning more about children of other racial and ethnic backgrounds. From that exposure, children can see for themselves the role that racial background plays (or very often, does not play) in prompting a child to respond to good literature, think about civic issues, to work in groups, and to create new solutions for contemporary problems. Indeed, the pedagogical objective in assuring racially diverse classrooms seems founded not upon some chimerical stereotype about what African American children think or how Latino children behave, but on precisely the opposite view – that all children share many more things in common than they do differences and that the best device for overcoming lingering racial suspicions or prejudices is exposure, not separation.").

[27] *See, e.g.*, Patricia Gurin, *The Compelling Need for Diversity in Higher Education*, Expert Report (Jan. 1999) (study in higher education showing that "students who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills").

this interest is *not* based on the false notion that race somehow innately controls viewpoint – that all students of the same race view issues the same way, or that all students of different races view issues differently. Rather, it is based on the notion that a student's race or ethnicity – as well as multiple other factors – are likely to affect his or her life experiences and, in turn, his or her personal perspective on certain issues.[28] It is this experiential diversity that affects teaching and learning.

3. Diversity improves students' preparation for employment and economic success.

Creating a diverse learning environment in elementary and secondary education improves students' preparation for employment and further education. Evidence shows that diversity helps all students understand the value of diverse perspectives, become better problem-solvers, and function and communicate more effectively in diverse business settings and in our global marketplace.[29]

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[28] This Court need look no further than its own bench to appreciate the value that diversity brings by enriching discourse with a variety of perspectives and life experiences. For example, this Court in *Virginia v. Black* benefited in oral argument from its own diversity with the presence of personal perspectives on the effects of cross burning. Transcript of Oral Argument 22-24, *Virginia v. Black*, 553 S.E.2d 738 (Va. 2001), *cert. granted*, 122 S. Ct. 2288 (2002) (No. 01-1107).

[29] Evidence shows that employers value diversity and persons who are able to function effectively in diverse business settings. *See Investing in People: Developing All of America's Talent on Campus and in the Workplace*, (Business-Higher Education Forum, 2002); *see also* A. Carnevale & R. Fry, *Crossing the Great Divide: Can We Achieve Equity When Generation Y Goes to College?* (Education Testing Service, 2000). This is based in part on evidence showing that diverse work teams, including racially and ethnically diverse teams, generate ideas that are more creative, effective, and feasible than non-diverse teams, but only when diverse teams are able to work together effectively. *See* Poppy Lauretta McLeod *et al.*, *Ethnic Diversity and Creativity in Small Groups*, 27 SMALL GROUP RESEARCH, 248,

B. Diversity promotes other compelling nonremedial interests, such as ensuring high-quality educational opportunities for all students.

Racial and ethnic gaps in educational opportunity and achievement persist across the nation. [30] Closing these gaps is a compelling national priority that may necessitate race-conscious policies,[31] including efforts to promote diversity or prevent racial isolation. [32]

260-61 (May 1996) ("Diverse teams that actually utilized the variety of perspectives present outperformed the homogeneous teams."). Moreover, several studies show that students who learn in diverse environments are more likely to choose to work in diverse environments. *See, e.g.*, W.T. Trent, *Why Desegregate? The Effect of School Desegregation on Adult Occupational Desegregation of African Americans, Whites and Hispanics*, 31 INT'L J. OF CONTEMP. SOC. 273 (1994).

[30] *See supra* note 13.

[31] There is perhaps no clearer recognition of this fact – in both language and operation – than the recently enacted No Child Left Behind Act of 2001. The Act requires that every state hold every public school and district accountable for the performance of students overall and for each subgroup, including subgroups of racial, linguistic, and ethnic minorities. The Act further ties certain educational assistance and benefits for students, including rewards and sanctions, to accountability measures that are based in substantial part on the way different racial and ethnic subgroups perform on statewide assessments. Thus, this Act, which is at the heart of federal efforts to ensure a high quality education for all public school children, recognizes at its core that certain educational decisions may properly involve considerations of race and ethnicity, including decision regarding the allocation of resources. No Child Left Behind Act of 2001, 20 U.S.C. § 6301 *et seq.* (2002).

[32] *See, e.g., Brewer v. West Irondequoit Central Sch. Dist.*, 212 F.3d 738, 747–53 (2d Cir. 2000) (recognizing a school district's compelling interest in "reducing racial isolation resulting from de facto desegregation").

Research shows that racially isolated learning environments have a negative effect on educational opportunity and that diverse learning environments lead to improved educational opportunity and, thereby, achievement.[33] For example, studies show that attending diverse schools is positively related to improved academic achievement, attendance and graduation from college, and employment in professional positions, especially with regard to minority students. [34]

In sum, diversity in the student body promotes several compelling educational interests that accrue to all students, including enhanced civic values, improved teaching and learning, and improved preparation for employment.[35]

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[33] *See, e.g.*, R.E. Mahard & R.L. Crain, *RESEARCH ON MINORITY ACHIEVEMENT IN DESEGREGATED SCHOOLS* IN THE CONSEQUENCES OF SCHOOL DESEGREGATION 103 (C. Rossell & W. Hawley eds., 1983) (analysis showing positive effects of desegregation on black student achievement related to higher teacher expectations); A.S. Wells & R. Crain, *Perpetuation Theory and Long-Term Effects of School Desegregation*, 64 REV. OF EDUC. RES. 531-555 (1994) (desegregation leads to increased aspirations, higher levels of educational attainment, and increased occupational attainment); Janet Ward Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students*, HANDBOOK ON RESEARCH ON MULTICULTURAL EDUC. (James A. Banks ed., 1995). James M. McPartland & Jomills H. Braddock II, *Going to College and Getting a Good Job: The Impact of Desegregation*, EFFECTIVE SCHOOL DESEGREGATION (Willis D. Hawley ed., 1981).

[34] In describing research on the effect of integrated learning environments, a recent report by the Harvard University Civil Rights Project noted that "[s]tudents in integrated environments seem to perform better on tests, perhaps through the increased opportunities available to them . . . . Higher aspirations resulting from integrated schools have been linked to a difference in expectations: predominantly minority schools tend to transmit lower expectations to their students." Frankenberg *et al.*, *supra* note 11at 12-13 (footnotes omitted).

[35] *See, e.g., Parents Involved in Cmty. Sch*, 137 F. Supp. 2d at 1236 (holding that the Seattle School District had a compelling interest in promoting the

IV. Current federal law establishes judicially enforceable limiting principles that apply to race-conscious decisions made by state and local education officials.

Although state and local education officials are entitled to substantial deference to govern public schools in the best educational interest of all children, this deference is not without limits. Current federal law regarding the consideration of race establishes meaningful, judicially enforceable limiting principles that appropriately confine the discretion of education officials when pursuing diversity-related goals. As applied in elementary and secondary education, "strict scrutiny" generally requires that the purpose for considering race be directly related to the core educational mission and that the policy be precisely aligned with that mission. This is consistent with other arenas in which this Court has recognized the unique application of constitutional standards where a public school is seeking to fulfill its core educational goals. Given these limiting principles, the establishment by this Court of a bright-line rule prohibiting any consideration of race to promote diversity in the educational environment would inappropriately and unnecessarily impede the mission of the public schools.

Current federal law establishes that the nonremedial interests that are sufficiently "compelling" to allow for race-conscious decisions in elementary and secondary education

educational benefits of diversity, including enhanced civic values, improved teaching and learning, improved preparation for employment, and increased opportunity and achievement); J.H. Braddock & J.M. McPartland, *The Social and Academic Consequences of School Desegregation*, EQUITY AND CHOICE 5 (Feb. 1988) (providing an overview of research evidence showing that racially diverse schools are positively related to better race relations, increased academic achievement, integration in future employment, and more).

will be driven by the core educational mission of the institution, such as a school district's interest in promoting the educational benefits of diversity[36] or a laboratory school's interest in improving urban education in the state.[37] Far from being "amorphous" or "over expansive," *Wygant*, 476 U.S. at 276, this focus helps define the extent to which diversity may be pursued. For example, if public school officials seek to promote the educational benefits of diversity, neither mere "tokenism" nor simple "proportionality" will likely be justified. *See, e.g., Wessman v. Gittens*, 160 F.3d 790, 798 (1st Cir. 1998). Rather, school officials must exercise their judgment within those boundaries (and others) to seek an educationally justified critical mass of students necessary to promote the educational benefits of diversity.[38] Furthermore, education officials must have a strong basis in evidence to support their educational judgment that the use of race is necessary

[36] *See, e.g., Parents Involved in Cmty. Sch.*, 137 F. Supp. 2d at 1235-37.

[37] *See, e.g., Hunter v. Regents of the Univ. of Cal.*, 190 F.3d 1061, 1064 (9th Cir. 1999); *see also, Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996), *cert. denied*, 519 U.S. 1111 (1997) (upholding the use of race in the hiring of correctional officers at a juvenile "boot camp" to promote the core institutional goals of "pacification and reformation" of youth offenders).

[38] *See Bakke*, 438 U.S. at 316-18. (recognizing that a focus on numbers does not in itself constitute a "quota"). Notably, the question of how a federal court can conclude precisely what degree of diversity will fulfill mission-driven goals is a red herring. The "science" of education is not as precise as mathematics, *cf. Guardians Ass'n v. Civil Serv. Comm'n*, 630 F.2d 79, 89 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981) ("the science of testing is not as precise as physics or chemistry, nor its conclusions as provable"), where conclusions are, as often as not, purely formulaic. Instead, educational decision-making is dependent upon the experience and judgment of well-informed educators who arrive at conclusions based upon an array of evidentiary factors. Based on this fact, federal courts have consistently afforded a realm of discretion to educators, within defined parameters, to make case-specific, educational judgments that federal courts are ill equipped to second-guess.

to further their educational goals. *See Wygant*, 476 U.S. at 277-78; *Wittmer*, 87 F.3d at 919-20.

Moreover, federal courts have applied "narrow tailoring" principles in concrete ways in the elementary and secondary education context. For example, when public schools pursue the educational benefits of diversity, courts will examine whether public school officials have considered (and used where effective and feasible) race-neutral alternatives before using race-conscious policies. Thus, education officials may be required to use socioeconomic status or other characteristics, and not race, in student assignment to the extent that such action would be equally effective in promoting sufficient diversity to achieve its core educational goals.[39] Furthermore, courts will assess whether a particular use of race by public school officials overburdens any parties. This may in some cases limit diversity options, such as where demographic or geographic conditions would require busing students over long distances to attain sufficient diversity. Where public school officials consider race as one factor among many when assigning students among similarly situated schools, courts are more likely to find that the use of race imposes a constitutionally acceptable burden on all parties. In

[39] This does not mean that the mere existence of race-neutral alternatives – regardless of likely effect or feasibility – provides a sufficient foundation upon which to find a race-conscious policy constitutionally infirm. *But see* Brief for the United States as *Amicus Curiae* Supporting Petitioner in *Grutter v. Bollinger* at 17 – 22 (No. 02-241) (failing to evaluate the efficacy of race-neutral percentage plans in light of case-specific facts). This Court has recognized that there is a "balancing process" in determining what means to adopt. *See United States v. Paradise*, 480 U.S. 149, 171-73, 184 (1987) (rejecting proposed alternatives as "inadequate because [they] failed to address" some of the compelling interests at issue). Depending on the interest at issue, and the feasibility and effectiveness of race-neutral policies, there may in some cases be no appropriate race-neutral alternatives. *See Brewer*, 212 F.3d at 752.

contrast, where the use of race confers or denies a material benefit, a court might reach a different result.[40]

Finally, state and local education officials have come to rely on and apply current federal legal precedent governing the consideration of race in public education, including lessons drawn from this Court's opinion in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).[41]

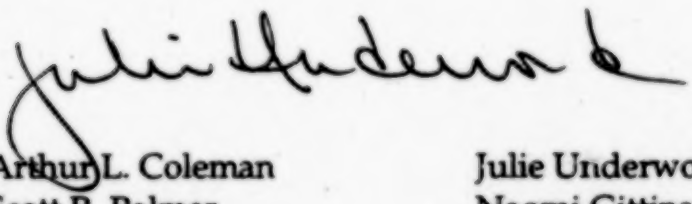
[40] See *supra* note 20.

[41] To assist in this effort, *Amicus* NSBA published the NSBA *Diversity Guide* referenced in this brief to provide guidance for school boards and other state and local education officials on when and how race may and may not be used under current federal law to promote the educational benefits of diversity.

CONCLUSION

For the foregoing reasons, the *Amici* respectfully request that this Court recognize the panoply of decisions that elementary and secondary education officials must make in order to fulfill their core educational mission for all students, and that this Court preserve the discretion of these officials, within longstanding constitutional parameters, to pursue their compelling diversity-related goals through limited race-conscious means.

Respectfully submitted,



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IN THE
Supreme Court of the United States

BARBARA GRUTTER,
Petitioner,
v.
LEE BOLLINGER, *et al.*,
Respondents.

JENNIFER GRATZ AND PATRICK HAMACHER,
Petitioners,
v.
LEE BOLLINGER, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

CONSOLIDATED BRIEF OF LT. GEN. JULIUS W. BECTON, JR., ADM. DENNIS BLAIR, MAJ. GEN. CHARLES BOLDEN, HON. JAMES M. CANNON, LT. GEN. DANIEL W. CHRISTMAN, GEN. WESLEY K. CLARK, SEN. MAX CLELAND, ADM. ARCHIE CLEMINS, HON. WILLIAM COHEN, ADM. WILLIAM J. CROWE, GEN. RONALD R. FOGLEMAN, LT. GEN. HOWARD D. GRAVES, GEN. JOSEPH P. HOAR, SEN. ROBERT J. KERREY ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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CASES — Page

Haig v. *Agee*, 453 U.S. 280 (1981) 7, 8, 27
Metro Broad., Inc. v. *FCC*, 497 U.S. 547 (1990)... 8, 27
Regents of the Univ. of Cal. v. *Bakke*, 438 U.S. 265 (1978)..... 5, 28
Sweatt v. *Painter*, 339 U.S. 629 (1950)..... 8, 28
Wittmer v. *Peters*, 87 F.3d 916 (7th Cir. 1996)..... 5, 28
Wygant v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986) 8, 27

EXECUTIVE ORDER

Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948)..... 11

RULE

Sup. Ct. R. 37.6 1

LEGISLATIVE HISTORY

Hearings By the House Special Subcomm. on Disciplinary Problems in the U.S. Navy, H.A.S.C. No. 93-13 (1972)..... 16
DoD Appropriations of 1974: Military Personnel: Hearing Before the Subcomm. on the Dep't of Def. of the House Comm. on Appropriations, 93rd Cong. (1974)..... 18
Report by the House Special Subcomm. on Discliplinary Problems in the U.S. Navy, H.A.S.C. Rep. No. 92-81 (1973)..... 15
H.R. Rep. No. 103-357 (1993)..... 24

OTHER AUTHORITIES

Air Force Instruction 36-2706 (Dec. 1, 1996)..... 12, 22
Air Force Policy Directive 36-2 (Oct. 1, 1996)..... 22

TABLE OF AUTHORITIES – continued

Page

Naval Academy Information Program Handbook (2002) 20, 21
Am. Council on Educ., *Service Academy Preparatory Schools Project, Final Report* (June 15, 1993)..... 24
B. Brubaker, *Prepping to Play Football for Navy*, Seattle Times, Apr. 21, 1996 ..... 23, 24
Cadet Command Headquarters, U.S. Army, Scholarship Fact Sheets: 2001 Profiles, *at* http://www.rotc.monroe.army.mil/scholarship_HPD/Scholarship%20information%20TOC/fact%20sheets.htm (last updated Oct. 2, 2002) 26
A. Clymer, *Service Academies Defend Use of Race in Their Admission Policies*, N.Y. Times, Jan. 28, 2003 ..... 19, 20, 22
Dep't of the Army, Pamphlet 600-26, *Army Affirmative Action Plan* (May 23, 1990)..... 12
Dep't of Def., Directive 1350.2 (Aug. 18, 1995)... 12
Dep't of Def., *Population Representation in the Military Services* (Nov. 1998) 18
1 Dep't of Def., *Report of the Task Force on the Administration of Military Justice in the Armed Forces* (Nov. 30, 1972), *reprinted in* 13 *Blacks in the United States Armed Forces: Basic Documents* (M. MacGregor, Jr. & B. Nalty eds., 1977)..... 16
Dep't of Def., Statistical Series Pamphlet No. 02-5, *Semiannual Race/Ethnic/Gender Profile By Service/Rank of the Department of Defense & Coast Guard* (Mar. 2002)..... 6, 7, 12, 17, 22
Dep't of the Navy, OPNAVINST 5354.1E, Equal Opportunity Policy (Jan. 22, 2001)..... 12
Dep't of the Navy, *Navy Affirmative Action Plan* (1991), *enclosed in* Dep't of Navy, OPNAV Instruction 5354.3D (Aug. 29, 1991)..... 12, 20

TABLE OF AUTHORITIES – continued

Page

Dep't of the Navy, SECNAVINST 1531.2A, U.S. Naval Academy Curriculum & Admissions Policy (Feb. 2, 1996) 20

Dep't of Justice, *Review of Federal Affirmative Action Programs, Report to the President* (July 19, 1995) 12, 13, 17, 18

D. Dickerson, *How to Keep Elite Collges Diverse*, U.S. News & World Rep., Jan. 5, 1998 23

P. Grier, *The Case for Academics*, Air Force Mag., July 1993 24

L.M. Hanser & A.E. Robyn, *Implementing High School JROTC Career Academies* (2000) 26

L. Healy, *Learning to Lead*, Military News, June 18, 2001 22

Col. M. Jones, Dir. of Admissions, USMA Admissions: The Corps. Starts Here (2002), *at* http: //www. USMA. edu/ PublicAffairs/ Club Conference02./wppcpres0402.ppt 19

D. Maraniss, *United States Military Struggles to Make Equality Work*, Wash. Post, Mar. 6, 1990 ..... 6, 12, 16

LTC E.J. Mason, U.S. Army War Coll. Strategy Research Project, *Diversity: 2015 and the Afro-American Army Officer* (1998) 6, 7, 16

L. Morris, U.S. Army, CBSP Fact Sheet 02 (Sept. 26, 2002), *at* http://www.rotc.monroe.army.mil/scholarship__HPD/Scholarship%20information%20TOC/fact%20sheets.htm 26

Office of the Assistant Sec'y of Def., *Population Representation in the Military Services: Fiscal Year 2000* (Nov. 2001), *available at* http://www.dod.mil/prhome/poprep2000/html/chapter4/chapter4_3.htm 25

TABLE OF AUTHORITIES – continued

Page

Office of the Undersec'y of Def. Personnel & Readiness, Dep't of Def., *Career Progression of Minority and Women Officers* (1999) ..... *passim*

Gen. Colin Powell, Commencement Address, Bowie State University (1966), *reprinted in* 142 Cong. Rec. S9311 (daily ed. July 31, 1996) 27

President's Comm. on Equal Opportunity in the Armed Forces, *Equality of Treatment and Opportunity for Negro Military Personnel Stationed within the United States* (June 13, 1963), *reprinted in* 13 *Blacks in the United States Armed Forces: Basic Documents* (M. MacGregor, Jr. & B. Nalty eds., 1977) 15

President's Comm. on Equality of Treatment & Opportunity in the Armed Servs., *Freedom to Serve: Equality of Treatment and Opportunity in the Armed Services* (1950), *reprinted in Blacks in the Military: Essential Documents* (B. Nalty & M. MacGregor, Jr. eds., 1981) 14

U.S. Air Force Acad., *2001-2002 Catalog* (2001) 22

U.S. Air Force Acad., Information Sheet (2000) 23

U.S. Coast Guard, College Student Pre-Commissioning Initiative (CSPI), *at* http://www.uscg.mil/jobs/cspi.html (last visited Feb. 4, 2003) 22

U.S. Coast Guard Acad., Diversity & Retention (Oct. 2001), *at* http://www.members.aol.com/_ht_a/lyndahaley/academy/statistics.htm 21

U.S. Coast Guard Acad., MITE: Minority Introduction to Engineering, *at* http://www.cga/edu/admissions/summerprogramforjuniors/mite.htm (last visited Feb. 4, 2003) 21

TABLE OF AUTHORITIES – continued

Page

U.S. GAO, GAO/RCED-94-131, *Coast Guard: Cost for Naval Academy Preparatory School and Profile of Minority Enrollment* (Apr. 12, 1994) 24

U.S. GAO, GAO/NSIAD-94-95, *Military Academy: Gender and Race Disparities* (Mar. 17, 1994) 19, 20

U.S. GAO, GAO/NSIAD-93-54, *Naval Academy: Gender and Racial Disparities* (Apr. 1993) 21

U.S. GAO, GAO/NSIAD-93-244, *Air Force Academy: Gender and Racial Disparities* (Sept. 1993) 22

U.S. GAO, GAO/NSIAD-92-57, *DoD Service Academies: Academy Preparatory Schools Need A Clearer Mission and Better Oversight* (Mar. 1992) 23, 24

USMA Admissions Office, *Academy Getting Ready for Influx of New Cadets* (June 29, 2001), *at* http://www.USNA.edu/PublicAffairs/R//010629/influx.html 19

Letter from George Washington, United States President, to Alexander Hamilton (Sept. 1, 1796), *reproduced in* J. Ellis, *Founding Brothers: The Revolutionary Generation* (2001) 8

R. Worth, *Beyond Racial Preferences*, Washington Monthly, Mar. 1998 23

Adm. E. Zumwalt, Jr., *On Watch* (1976) 15

SCHOLARLY AUTHORITIES

T. Crackel, *West Point: A Bicentennial History* (2002) 19

J. Foner, *Blacks and the Military in American History: A New Perspective* (1974) 16

TABLE OF AUTHORITIES – continued

Page

F.M. Higginbotham, *Soldiers for Justice: The Role of the Tuskegee Airmen in the Desegregation of the American Armed Forces*, 8 Wm. & Mary Bill Rts. J. 273 (2000) 10, 11

M. MacGregor, Jr., *Integration of the Armed Forces 1940-1965* (1980) 11, 14

C. Moskos & J. Butler, *All That We Can Be: Black Leadership and Racial Integration the Army Way* (1996) ..... *passim*

B. Nalty, *Strength For The Fight: A History Of Black Americans In the Military* (1986) 6, 14, 15, 16, 17

M. Neiberg, *Making Citizen-Soldiers: ROTC and the Ideology of American Military Service* (2000) 17, 25

INTEREST OF *AMICI*

Amici are former high-ranking officers and civilian leaders of the Army, Navy, Air Force, and Marine Corps, including former military-academy superintendents, Secretaries of Defense, and present and former members of the U.S. Senate.[1] They are deeply interested in this case, because its outcome could affect the diversity of our nation's officer corps and, in turn, the military's ability to fulfill its missions. *Amici*'s judgment is based on decades of experience and accomplishment at the very highest positions in our nation's military leadership. The responsibilities highlighted below do not begin to describe the full scope of their service.

Lieutenant General Julius W. Becton, Jr. served in the U.S. Army for 40 years. He served five years as president of Prairie View A&M University, and subsequently served as Superintendent of the Washington, D.C. Public Schools.

Admiral Dennis Blair, retired 4-star, served as Commander in Chief, U.S. Pacific Command (1999-2002), where he directed all Army, Navy, Marine Corps and Air Force operations across more than 100 million square miles.

Major General Charles Bolden, retired astronaut and 2-star, was the nation's first African-American Marine astronaut. He flew four space shuttle missions, commanding two, including the mission placing the Hubble telescope into earth orbit.

Honorable James M. Cannon served as Chairman of the U.S. Naval Academy Board of Visitors under Presidents Reagan and George H.W. Bush. (1989-93).

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

Lieutenant General Daniel W. Christman, retired Army 3-star, was Superintendent of the U.S. Military Academy (1996-2001), where he had overall responsibility for admissions criteria at West Point.

General Wesley K. Clark served as Supreme Allied Commander, Europe (1997-2000), and Commander in Chief, U.S. Southern Command (1996-97).

Senator Max Cleland served as a combat officer in Vietnam and as Administrator of the U.S. Veterans Administration (1977-81). As U.S. Senator from Georgia (1997-2003), he chaired the Armed Services' Subcommittee on Personnel.

Admiral Archie Clemins, retired 4-star, served as Commander in Chief, U.S. Pacific Fleet (1996-99), the world's largest combined-fleet command.

Honorable William Cohen was the 20th Secretary of Defense (1997-2001). As U.S. Senator from Maine (1979-97), he chaired the Armed Services Committee's Seapower and Force Projection Subcommittee.

Admiral William J. Crowe, retired 4-star, was the 11th Chairman of Joint Chiefs of Staff (1985-89). He also commanded U.S. Naval Forces in the Persian Gulf and NATO Forces in Southern Europe and served as U.S. Ambassador to the United Kingdom (1993-97).

General Ronald R. Fogleman, retired 4-star, was Air Force Chief of Staff (1994-97) with overall responsibility for organizing and training the 750,000 active duty, Guard, Reserve and civilian members. He also served as Commander in Chief of U.S. Transcom (1992-94).

Lieutenant General Howard D. Graves, retired Army 3-star, was Superintendent of the U.S. Military Academy (1991-96), with responsibility for admissions criteria. Since 1999, he has served as Chancellor of the Texas A&M University system.

General Joseph P. Hoar, retired Marine 4-star, served as the Commander in Chief, U.S. Central Command (1991-94).

Senator Robert J. Kerrey received the Congressional Medal of Honor serving in the U.S. Navy SEAL special forces. He served as Nebraska governor (1983-87), U.S. Senator (1989-2001), and is the President of New School University.

Admiral Charles R. Larson, retired 4-star, was Commander in Chief, Pacific Fleet (1990-91), and Commander in Chief, U.S. Pacific Command (1991-94). He was also Superintendent of the Naval Academy (1983-86, 1994-98).

Senator Carl Levin is the Ranking Member of the Senate Armed Services Committee and, until January 2003, chaired that Committee, with oversight responsibilities for the armed services.

Honorable Robert "Bud" McFarlane, a retired Marine Corps officer, was President Reagan's National Security Advisor (1983-85), and also served as Deputy Director of the National Security Council.

General Carl E. Mundy, Jr., retired Marine Corps 4-star, was the Marine Corps Commandant (1991-95), and also served as Marine Corps Director of Personnel Procurement.

General Lloyd W. Newton, retired Air Force 4-star, commanded the Air Education and Training Command, where he was responsible for recruiting, training and educating all Air Force personnel, including the Air Force Recruiting Service, 13 bases, and the Air Force University.

Lieutenant General Tad J. Oelstrom, retired 3-star, was Superintendent, U.S. Air Force Academy (1997-2000), and is currently Director, National Security Program, Kennedy School, Harvard University.

Honorable William J. Perry was the 19th Secretary of Defense (1994-97), Deputy Secretary of Defense (1993-94) and Under Secretary of Defense for Research and

Engineering (1977-81). He is currently a Professor of Engineering at Stanford University.

Admiral Joseph W. Prueher, retired 4-star, served as Commander in Chief, U.S. Pacific Command (1996-99), Commandant of Midshipmen, U.S. Naval Academy, and U.S. Ambassador to China (1999-2001).

Senator Jack Reed is an Army veteran. As U.S. Senator from Rhode Island, he serves on the Armed Services Committee and chairs the U.S. Military Academy Board of Visitors.

Honorable Joseph R. Reeder, the 14th Under Secretary of the Army (1993-97), had oversight responsibility for admission criteria for the U.S. Military Academy and the ROTC programs at our nation's universities.

General H. Norman Schwarzkopf, retired 4-star, served as Commander in Chief, U.S. Central Command (1988-91), and overall Commander of Allied Forces during the Gulf War.

General John M.D. Shalikashvili, retired 4-star, was the 13th Chairman of the Joint Chiefs of Staff (1993-97), and served as Supreme Allied Commander, Europe (1992-93).

General Hugh Shelton, retired 4-star, was the 14th Chairman of Joint Chiefs of Staff (1997-2001). He also served as Commander in Chief, U.S. Special Operations Command (1996-97).

General Gordon R. Sullivan, retired 4-star, served as Army Chief of Staff (1991-95), with overall responsibility for organizing and training over 1 million active duty Guard, Reserve, and civilian members.

General Anthony Zinni, retired Marine 4-star, served as the Commander in Chief, U.S. Central Command (1997-2001), and as Special U.S. Peace Envoy to the Middle East (2002).

SUMMARY OF ARGUMENT

Based on decades of experience, *amici* have concluded that a highly qualified, racially diverse officer corps educated and trained to command our nation's racially diverse enlisted ranks is essential to the military's ability to fulfill its principal mission to provide national security. The primary sources for the nation's officer corps are the service academies and the ROTC, the latter comprised of students already admitted to participating colleges and universities. At present, the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC use limited race-conscious recruiting and admissions policies. Accordingly, these institutions rely on such policies, developed to comport with this Court's instruction in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978).

The military has made substantial progress towards its goal of a fully integrated, highly qualified officer corps. It cannot maintain the diversity it has achieved or make further progress unless it retains its ability to recruit and educate a diverse officer corps. This Court and others have recognized that in certain contexts, the government may take race-conscious action not only to remedy past discrimination, but to further other compelling government interests. See *Bakke*; *Wittmer* v. *Peters*, 87 F.3d 916 (7th Cir. 1996) (penological benefits justify consideration of race in selecting correctional officers; collecting similar cases). The rules should not be changed. The military must be permitted to train and educate a diverse officer corps to further our compelling government interest in an effective military.

More than 50 years ago, President Truman issued an executive order ending segregation in the United States armed services. That decision, and the resulting integration of the military, resulted not only from a principled recognition that segregation is unjust and incompatible with American values,

but also from a practical recognition that the military's need for manpower and its efficient, effective deployment required integration. Since that time, men and women of all races have trained and fought together in our armed services, from Korea to Vietnam to Afghanistan. Today, almost 40% of servicemen and women are minorities; 61.7% are white, and the remaining almost 40% are minorities, including 21.7% African-American, 9.6% Hispanic, 4% Asian-American and 1.2% Native American. Dep't of Def. ("DoD"), Statistical Series Pamphlet No. 02-5, *Semiannual Race/Ethnic/Gender Profile By Service/Rank of the Department of Defense & Coast Guard* 4 (Mar. 2002) ("*DoD Report*").

In the 1960s and 1970s, however, while integration increased the percentage of African-Americans in the enlisted ranks, the percentage of minority officers remained extremely low,[2] and perceptions of discrimination were pervasive. This deficiency in the officer corps and the discrimination perceived to be its cause led to low morale and heightened racial tension. The danger this created was not theoretical, as the Vietnam era demonstrates. As that war continued, the armed forces suffered increased racial polarization, pervasive disciplinary problems, and racially motivated incidents in Vietnam and on posts around the world. "In Vietnam, racial tensions reached a point where there was an inability to fight." D. Maraniss, *United States Military Struggles To Make Equality Work*, Wash. Post, Mar. 6, 1990, at A01 (quoting Lt. Gen. Frank Petersen, Jr.). By the early 1970s, racial strife in the ranks was entirely commonplace. B. Nalty, *Strength For The Fight: A History Of Black Americans In the Military* 308-10 (1986). The lack of minority officers substantially exacerbated the problems throughout the armed services. LTC E.J. Mason, U.S. Army War Coll. Strategy

[2] For example, at the end of the Vietnam War, only 3% of Army officers were African-American. Office of the Undersec'y of Def. Personnel & Readiness, *Career Progression of Minority and Women Officers* v (1999) ("*Career Progression*").

Research Project, *Diversity: 2015 and the Afro-American Army Officer* 2-3 (1998). The military's leadership "recognized that its racial problem was so critical that it was on the verge of self-destruction. That realization set in motion the policies and initiatives that have led to today's relatively positive state of affairs." *Id.* at 3.

"It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation." *Haig* v. *Agee*, 453 U.S. 280, 307 (1981) (internal quotations omitted). The absence of minority officers seriously threatened the military's ability to function effectively and fulfill its mission to defend the nation. To eliminate that threat, the armed services moved aggressively to increase the number of minority officers and to train officers in diverse educational environments. In full accord with *Bakke* and with the DoD Affirmative Action Program, the service academies and the ROTC have set goals for minority officer candidates and worked hard to achieve those goals. They use financial and tutorial assistance, as well as recruiting programs, to expand the pool of highly-qualified minority candidates in a variety of explicitly race-conscious ways. They also employ race as a factor in recruiting and admissions policies and decisions.

These efforts have substantially increased the percentage of minority officers. Moreover, increasing numbers of officer candidates are trained and educated in racially diverse educational settings, which provides them with invaluable experience for their future command of our nation's highly diverse enlisted ranks. Today, among active duty officers, 81% are white, and the remaining 19% are minority, including 8.8% African-American, 4% Hispanic, 3.2% Asian American, and .6% Native American. *DoD Report* at 4. A substantial difference between the percentage of African-American enlisted personnel (21.7%) and African-American officers (8.8%) remains. The officer corps must continue to be diverse or the cohesiveness essential to the military mission will be critically undermined. See *infra* at 17.

In specific contexts, the courts have approved race-conscious action to achieve compelling, but non-remedial government interests. For example, the government's interest in "the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part); *Metro Broad., Inc.* v. *FCC*, 497 U.S. 547, 568 (1990) (same) (citing *Bakke*). *Amici* submit that the government's compelling interest in promoting racial diversity in higher education is buttressed by its compelling national security interest in a cohesive military. That requires both a diverse officer corps and substantial numbers of officers educated and trained in diverse educational settings, including the military academies and ROTC programs. See *Haig*, 453 U.S. at 307; *Sweatt* v. *Painter*, 339 U.S. 629, 634 (1950) (students in racially-homogenous classrooms are ill-prepared for productive lives in our diverse society). President George Washington eloquently underscored the vital importance of direct association among diverse individuals in education and in the profession of arms:

> [T]he Juvenal period of life, when friendships are formed, & habits established that will stick by one; the Youth, or young men from different parts of the United States would be assembled together, & would by degrees discover that there was not that cause for those jealousies & prejudices which one part of the Union had imbibed against another part.... What, but the mixing of people from different parts of the United States during the War rubbed off these impressions? A century in the ordinary intercourse, would not have accomplished what the Seven years association in Arms did. [Letter from Pres. George Washington, to Alexander Hamilton (Sept. 1, 1796), *reproduced in* J. Ellis, *Founding Brothers: The Revolutionary Generation* 960-61 (2001).]

The crisis that mandated aggressive integration of the officer corps in the service academies and in ROTC programs is a microcosm of what exists in our society at large, albeit with potentially more severe consequences to our nation's welfare. Broad access to the education that leads to leadership roles is essential to public confidence in the fairness and integrity of public institutions, and their ability to perform their vital functions and missions.

At present no alternative exists to limited, race-conscious programs to increase the pool of high quality minority officer candidates and to establish diverse educational settings for officers. The armed services must have racially diverse officer candidates who satisfy the rigorous academic, physical, and personal prerequisites for officer training and future leadership. It is no answer to tell selective institutions such as the service academies or the ROTC automatically to admit students with a specified class rank, even if such a system were administratively workable and would result in a diverse student body. This one-dimensional criterion forces the admission of students with neither the academic nor physical capabilities nor the leadership qualities demanded by these institutions, damaging the corps and the military mission in the process. The military must *both* maintain selectivity in admissions *and* train and educate a racially diverse officer corps to command racially diverse troops. The device of admitting a top percentage will not simultaneously produce high quality and diversity.

Like numerous selective educational institutions, the military already engages in aggressive minority recruiting programs and utilizes the service preparatory academies and other programs to increase the pool of qualified minority candidates. These important steps are vital to the continuing integration of the officer corps. The fact remains: Today, there is no race-neutral alternative that will fulfill the military's, and thus the nation's, compelling national security

need for a cohesive military led by a diverse officer corps of the highest quality to serve and protect the country.

ARGUMENT

THE GOVERNMENT'S COMPELLING NATIONAL SECURITY INTEREST IN A DIVERSE OFFICER CORPS REQUIRES RACE-CONSCIOUS ADMISSIONS POLICIES FOR OFFICER TRAINING PROGRAMS.

The United States armed forces were ordered to desegregate more than 50 years ago. Today the enlisted ranks are fully integrated, and the military has confronted the absolute imperative of integrating its officer corps in furtherance of the compelling national security interest in an effective military. To that end, the services have programs that consider race *both* in selecting participants who broaden the pool of qualified individuals for the service academies and the ROTC *and* in admission to the service academies and ROTC scholarship programs. Currently, no alternative means to field a fully qualified, diverse officer corps exists. This limited use of race in furtherance of the compelling governmental interest it serves is, accordingly, constitutional.

1. Integration of the Military. African-Americans have fought for the United States in every war. F.M. Higginbotham, *Soldiers for Justice: The Role of the Tuskegee Airmen in the Desegregation of the American Armed Forces*, 8 Wm. & Mary Bill Rts. J. 273, 277 (2000). During peacetime, however, the United States once excluded or limited the number of African-Americans in the military. With the urgent need for manpower occasioned by war, numerical restrictions were lifted, but African-Americans were relegated to racially-segregated units and often to manual labor positions. *Id.* at 279; see also C. Moskos & J. Butler, *All That We Can Be: Black Leadership and Racial*

Integration the Army Way 16-29 (1996); M. MacGregor, Jr., *Integration of the Armed Forces 1940-1965*, at 412 (1980).

This situation began to change during World War II, when President Roosevelt revised racial policies for the armed services. Higgenbotham, *supra*, at 286-88. It was, however, President Truman's Executive Order 9981, signed on July 26, 1948, that set the United States military on its path to integration. See 13 Fed. Reg. 4313 (1948). On October 30, 1954, the armed forces announced that the last segregated unit had been abolished. Higgenbotham, *supra*, at 317.

Early on, President Truman's Committee on Equality of Treatment and Opportunity in the Armed Services had made the case that integration was a military necessity and that it would ensure efficiency and combat readiness. See MacGregor, *supra*, at 351-52, 355. "[S]ince maximum military efficiency demanded that all servicemen be given an equal opportunity to discover and exploit their talents, an indivisible link existed between military efficiency and equal opportunity." *Id.* at 355. Indeed, the history of the integration of the armed services demonstrates that integration was driven by the urgent need to recruit and effectively utilize military manpower.

The Army initially resisted President Truman's command to integrate, until heavy casualties and slow troop replacement during the Koean War required that African-American soldiers be assigned to fight with undermanned white units. Moskos & Butler, *supra*, at 30; MacGregor, *supra*, at 433-34. The Marines simultaneously integrated based on the same imperative. MacGregor, *supra*, at 460. The Air Force saw significant gains in efficiency with integration, because "problems of procurement, training, and assignment always associated with racially designated units [were] reduced by an appreciable degree or eliminated entirely." *Id.* at 409. With the move to the All Volunteer Force in 1973, the military necessity of "includ[ing] all Americans in the pool of potential recruits took on added

urgency." Dep't of Justice, *Review of Federal Affirmative Action Programs, Report to the President* § 7.5.1 (1995) ("*President's Report*").

Today, the military is one of the most integrated institutions in America. See, *e.g.*, Maraniss, *supra*, at A01. The modern military judgment is that full integration and other policies combating discrimination are essential to good order, combat readiness, and military effectiveness. DoD Directive 1350 requires the military to formulate, maintain and review affirmative action plans with established objectives and milestones. Dep't of Def., Directive 1350.2 § 4.4 (Aug. 18, 1995). Instruction 1350.2 describes such programs as a "military necessity," critical to "combat readiness and mission accomplishment." Each service, accordingly, has its own regulations and instructions implementing the DoD mandate, and each service has goals for officer accessions. See *Career Progression* at 19.[3]

As of March 2002, of the 1.1 million enlisted in the active duty forces, 61.7% were white, 21.7% African-American, 9.6% Hispanic, 1.2% Native American, 4.0% Asian American, and 1.8% were classified as "other." *DoD Report* at 4. In 1990, 24% of those who fought in Desert Shield/Desert Storm were African-American, and 30% of Army troops were African-American. Moskos & Butler, *supra*, at 35. Plainly, the missions of the United States

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[3] *See also, e.g.*, Dep't of the Navy, *Navy Affirmative Action Plan* (1991) ("*Navy Affirmative Action Plan*"), *enclosed in* Dep't of the Navy, OPNAV Instruction 5354.3D (Aug. 29, 1991) (setting goals for minority officer population and accessions); Dep't of the Navy, OPNAVINST 5354.1E, Equal Opportunity Policy § 4(a) (Jan. 22, 2001) (discrimination "adversely affect[s] good order and discipline, mission readiness, and prevent[s] our Navy from attaining the highest level of operational readiness"); Air Force Instruction 36-2706, at 1 (Dec. 1, 1996) (implementing DoD Instruction 1350.3); Dep't of the Army, Pamphlet 600-26, *Army Affirmative Action Plan* § 2-3 (May 23, 1990) (setting goals for officer accessions based on DoD 1350.3).

military services cannot be accomplished without the minority men and women who constitute almost 40% of the active duty armed forces. Moreover:

> the current leadership views complete racial integration as a military necessity – that is, as a prerequisite to a cohesive, and therefore effective, fighting force. In short, *success with the challenges of diversity is critical to national security*. Experience during the 1960s and 1970s with racial conflict in the ranks was an effective lesson in the importance of inclusion and equal opportunity. As a senior Pentagon official told us, "Doing affirmative action the right way is deadly serious for us – people's lives depend on it." [*President's Report* § 7.1 (emphasis supplied).]

2. Integration of the Officer Corps. Fully integrated enlisted ranks made integration of the officer corps essential to the effective operation of our military. But, the military did not learn this lesson without first experiencing the dangerous and destructive environment of a racially diverse enlisted corps commanded by an overwhelmingly white officer corps. As a direct result of the lessons learned in the 1960s and 1970s, the military is now fully committed to officer corps integration. And while the armed forces have made remarkable strides in achieving racial integration, the military cannot lose ground. It must continue actively to foster representation of minorities in the officer corps by recruiting the most promising members of minority communities so that the service academies and the ROTC programs can train and educate officers who fulfill our national security requirements.

(a) *The Lesson of History*. Almost as soon as President Truman ordered the integration of the armed forces, some in the military recognized the importance of integrating the

officer corps.[4] After integration, however, the armed forces did not produce a substantial number of minority officers for more than a generation. Both lingering discrimination and the formal educational qualifications for officers precluded quick racial integration of the officer corps. As a result, over time, the armed forces became a racial mix of diverse enlisted ranks commanded by an overwhelmingly white officer corps. In 1962, a mere 1.6% of all commissioned military officers were African-American. Nalty, *supra*, at 313.

The chasm between the racial composition of the officer corps and the enlisted personnel undermined military effectiveness in a variety of ways. For example, military effectiveness depends heavily upon unit cohesion. In turn, group cohesiveness depends on a shared sense of mission and the unimpeded flow of information through the chain of command. African-Americans experienced discriminatory treatment in the military, even during integration, but the concerns and perceptions of African-American personnel were often unknown, unaddressed or both, in part because the lines of authority, from the military police to the officer corps, were almost exclusively white. *Id.* at 228-29; MacGregor, *supra*, at 579-80. Indeed, "communication between the largely white officer corps and black enlisted men could be so tenuous that a commander might remain blissfully unaware of patterns of racial discrimination that black servicemen found infuriating." Nalty, *supra*, at 282.

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[4] For example, in its final report to President Truman, the committee charged with overseeing integration expressed "dissatisf[action] with the small number of [black] officers in the [N]avy," and urged the Navy to increase minority participation in the ROTC and to recruit aggressively in minority communities. President's Comm. on Equality of Treatment & Opportunity in the Armed Servs., *Freedom to Serve: Equality of Treatment and Opportunity in the Armed Services (1950)*, *reprinted in Blacks in the Military: Essential Documents* 275-76 (B. Nalty & M. MacGregor, Jr. eds., 1981).

The military's pre-Vietnam racial problems generally were suppressed during battle (*e.g.*, in Korea). During peacetime, violent incidents were met with attempts to improve military life for African-Americans, but minority representation in the officer corps remained static. For example, in 1963, a special committee appointed by President Kennedy recommended that every military organization appoint an officer with authority to address issues raised by African-American servicemen. President's Comm. on Equal Opportunity in the Armed Forces, *Equality of Treatment and Opportunity for Negro Military Personnel Stationed Within the United States* 27-32 (June 13, 1963) (Initial Report), *reprinted in* 13 *Blacks in the United States Armed Forces: Basic Documents*, item 10 (M. MacGregor, Jr. & B. Nalty eds., 1977) ("*Basic Documents*"). This recommendation proved woefully inadequate. Nalty, *supra*, at 291, 329; Report by House Special Subcomm. on Disciplinary Problems in the U.S. Navy, H.A.S.C. Rep. No. 92-81, at 17,671, 17,690 (1973) ("*Special Subcommittee Report*"). During the 1960s and 1970s, the military experienced a demoralizing and destabilizing period of internal racial strife.

Hundreds of race-related incidents occurred. For example, in the 1960s, racial violence among the Marines at Camp Lejeune was not uncommon. White officers were simply unaware of intense African-American dissatisfaction with job assignments and the perceived lack of respect from the Marine Corps. Nalty, *supra*, at 306-07. In the early 1970s, the Navy endured similar racial violence on board the *Constellation*, the *Kitty Hawk* and the *Hassayampa*. See generally *Special Subcommittee Report* at 17,674-79; Adm. E. Zumwalt, Jr., *On Watch* 217-32 (1976). In each case, the officer corps was caught off guard, unable to bring the situation under control, due to the absence of trust and communication between the predominantly white officer corps and frustrated African-American enlisted men.

Throughout the armed forces, the overwhelmingly white officer corps faced racial tension and unrest. "Fights between black and white soldiers were endemic in the 1970s, an era now remembered as the 'time of troubles.'" Moskos & Butler, *supra*, at 33. "In Vietnam, racial tensions reached a point where there was an inability to fight." Maraniss, *supra*, at A01 (quoting Lt. Gen. Frank Peterson, Jr.). African-American troops, who rarely saw members of their own race in command positions, lost confidence in the military as an institution. Mason, *supra*, at 2-3. And, African-American servicemen concluded that the command structure had no regard for whether African-Americans would succeed in military careers. 1 Dep't of Def., *Report of the Task Force on the Administration of Military Justice in the Armed Forces* 38-48, 59-66 (Nov. 30, 1972), *reprinted in* 13 *Basic Documents*, item 66.[5]

Making matters worse, many white officers had no idea how serious the problem was. "Violence and even death proved necessary to drive home the realization that the various assistant secretaries, special assistants, and even commanding officers had only the faintest idea what the black man and woman in the service were thinking." Nalty, *supra*, at 317. Ultimately, "[t]he military of the 1970s recognized that its race problem was so critical that it was on the verge of self-destruction." Moskos & Butler, *supra*, at 142.

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[5] African-American servicemen were looking for African-American officers both for support and as a visible indication that the military recognized African-Americans as valuable contributors. *Hearings By the House Special Subcomm. on Disciplinary Problems in the U.S. Navy*, H.A.S.C. No. 93-13, at 595 (1972) (testimony of Commander B. W. Cloud); J. Foner, *Blacks and the Military in American History: A New Perspective* 211 (1974) ("[t]he scarcity of black officers intensified black grievances."); *id.* at 223 ("[b]lack servicemen told the [NAACP] ... that if black officers were placed in command positions with white junior officers accountable to them, it would be a major step toward overcoming racial discrimination in the army"); Moskos & Butler, *supra*, at 33 (asking "[w]here was the black officer corps" of the late 1960s and early 1970s).

The painful lesson slowly learned was that our diverse enlisted ranks rendered integration of the officer corps a military necessity. M. Neiberg, *Making Citizen-Soldiers: ROTC and the Ideology of American Military Service* 166 (2000) ("[t]he military came ... to understand that having African American noncommissioned officers ... and regular officers was critical to both the operational efficiency of the military and to the creation of the more just and equal environment that military leaders ... wanted to create"); Nalty, *supra*, at 338 ("[b]y the time the draft ended ... the services had realized that discipline had to be maintained and that councils and committees, although helpful in easing racial tensions and otherwise promoting harmony within a unit, could not shoulder the responsibilities that rightly devolved upon the commander"). "Racial conflict within the military during the Vietnam era was a blaring wakeup call to the fact that equal opportunity is absolutely indispensable to unit cohesion, and therefore critical to military effectiveness and our national security." *President's Report* § 7.5.1.

(b) *Current Commitment To Racial Diversity In The Officer Corps.* Spurred by the lessons of the 1960s and 1970s, the armed forces have steadily integrated the officer corps since the end of the Vietnam conflict. In 1973, when the nation instituted its all-volunteer force, 2.8% of military officers were African-American. *Career Progression* at v. By March 2002, 8.8% of officers were African-American. *DoD Report* at 4. The representation of other minorities – Hispanics, Asian Americans and Native Americans – increased at an even faster rate over the same period. Minorities now comprise roughly 19% of all officers. *Id.*

The modern American military candidly acknowledges the critical link between minority officers and military readiness and effectiveness. "[T]he current leadership views complete racial integration as a military necessity – that is, as a prerequisite to a cohesive, and therefore effective, fighting force. In short, success with the challenge of diversity is

critical to national security." *President's Report* § 7.1. The military's continuing, race-conscious efforts to increase the percentage of minority officers have achieved some results, but this progress must continue. See Dep't of Def., *Population Representation in the Military Services* 4-8 (Nov. 1998). Accordingly, the armed forces strive to identify and train the best qualified minority candidates to serve as officers. *Infra* at 18-27. As we show, these efforts include race-conscious recruiting, preparatory, and admissions policies at the service academies and in ROTC programs – efforts that underscore the military's resolve to do what is necessary and effective to integrate the officer corps.

3. Race-Conscious Admissions Programs For Officer Education And Training. Our armed forces therefore have focused their efforts on expanding the pool of qualified minority applicants for the academies and the ROTC – the primary sources for officers. Increases in minority enrollment in these institutions obviously will increase the numbers of highly qualified, minority officers. *Career Progression* at 31. The service academies and ROTC employ limited, race-conscious admission programs and policies, both to expand the pool of minority applicants and to increase the number of minority participants. Moreover, increased minority representation in the officer corps enhances our ability to recruit highly qualified minorities into the enlisted ranks.

(a) *Army.* In 1973, testimony by Army leaders before the House Appropriations Subcommittee confirms that integration of the officer corps was essential to address the Army's race-related turmoil. The witnesses identified "[i]ncreasing the number of minority cadets at [West Point] and in the ROTC program" as a critical component of improving the Army's race relations. *DoD Appropriations of 1974: Military Personnel: Hearing Before the Subcomm. on the Dep't of Def. of the House Comm. on Appropriations*, 93d Cong., 308-09 (1974). The first program that succeeded in increasing minority representation was at West Point. In

1968, there were 30 African-American cadets at the Academy; by 1971, there were almost 100. T. Crackel, *West Point: A Bicentennial History* 238 (2002). The Army's successful integration of West Point continues. In 1993, minorities made up 16.5% of cadets, and the Class of 2005 is 25% minority, including 8% African-American (100 cadets) and 6% Hispanic (70 cadets). USMA Admissions Office, *Academy Getting Ready For Influx of New Cadets* (June 2001), *at* http://www.USNA.edu/PublicAffairs/R//010629/influx.html. Today, there are more than 300 African-American and 150 Hispanic cadets.

In order to integrate itself, and hence the Army officer corps, the U.S. Military Academy has self-consciously attempted "to balance the Corps" and therefore has "develop[ed] goals for each class for desired percentages of scholars, leaders, athletes, women, blacks, Hispanics and other minorities." U.S. GAO, GAO/NSIAD-94-95, *Military Academy: Gender and Race Disparities* 13 (Mar. 17, 1994) ("*USMA GAO Report*"). West Point's Superintendent sets yearly targets for minority admissions. *Career Progression* at 20. As Director of Admissions Colonel Michael L. Jones stated, "'We like to represent the society we come from in terms of the student body's undergraduate experiences. [H]aving a diverse student body allows personal growth in areas where people may not have gotten it otherwise. We want people to understand the society they will defend.'" A. Clymer, *Service Academies Defend Use of Race in Their Admissions Policies*, N.Y. Times, Jan. 28, 2003.

The Academy's specific percentage goals for minorities are based upon their "representation in the national population and in the national pool of college bound people, and their representation in the Army." *USMA GAO Report* at 13. See also Col. M. Jones, Dir. of Admissions, *USMA Admissions: The Corp Starts Here*, *at* http://www.USMA.edu/PublicAffairs/ClubConference02./wppcpres0402.ppt (USMA seeking 20-25% minorities). In pursuit of these goals,

"minorities [are] consistently offered admission [to West Point] at higher rates than whites [despite] lower academic predictor scores and lower academic, physical education, and military grades." *USMA GAO Report* at 2. This reflects the Academy's need to extend a greater number of offers to qualified minority candidates to achieve diversity. *Id.* In so doing, the Academy ensures that each minority candidate is highly qualified and has the potential to be an outstanding officer in the Army based on a broad range of factors.

(b) *Navy*. Like West Point, the U.S. Naval Academy aggressively recruits minority applicants and employs a limited race-conscious admissions policy. The instructions implementing the Navy Affirmative Action Plan directed the Navy to achieve "a minority officer inventory of six percent Blacks by end of FY2000, [and] three percent Hispanics by end of FY99." *Navy Affirmative Action Plan* at 10. They set a Significant Action Step of monitoring the "United States Naval Academy (USNA) actions to commission at least seven percent Black Navy officers annually starting with USNA Class of 1994" and ensuring "continued commissioning of at least four percent Hispanic Navy officers annually." *Id.* Additional Instructions issued in 1996 specifically stated that the "Naval Academy admissions procedures must support the primary objectives of selecting candidates who ... [r]epresent women and minorities in appropriate numbers in support of the Equal Opportunity Program of the Department of the Navy." Dep't of the Navy, SECNAVINST 1531.2A, U.S. Naval Academy Curriculum & Admissions Policy 1-2 (Feb. 2, 1996). As Naval Academy Dean of Admissions David Vetter stated, "'We want to build an officer corps that reflects the military services of which we are a part.'" Clymer, *supra*.

Substantial human and financial resources are devoted to recruiting and admitting minority students to the Academy. The *Naval Academy Information Program Handbook* 23-25 (2000) (internal working document) guides Academy-affiliated individuals who recruit high-school students,

making clear that minority recruitment is a high priority. See *id.* at 23-25. Each recruiting region and the admissions office itself has a minority recruitment specialist. Critically, a GAO Report, U.S. GAO, GAO/NSIAD-93-54, *Naval Academy: Gender and Racial Disparities* 8 (Apr. 1993) ("*Naval Academy GAO Report*"), stated:

> The Academy also considers desired class composition of minorities and women in its selection of applicants. The Academy uses the "Chief of Naval Operations' goals" as a basis for establishing targets. Its targets for Blacks are 7 percent and 4 percent for Hispanics, which are the same as for the fleet.... The Academy accepts a greater percentage of women and minorities to allow for attrition and still achieve the Chief of Naval Operations' accession goals.

The *Naval Academy GAO Report* further found that "a higher percentage of minorities who did qualify were admitted to the Academy than their white counterparts" and that "[a]verage success predictor scores were significantly higher for whites than for minorities." *Id.* at 37. The Report therefore concluded that "*[b]ecause of the lower qualification rate of minorities, the Academy makes offers of appointment to the majority of qualified minorities to achieve the Chief of Naval Operations' commissioning goals for minorities.*" *Id.* at 38 (emphasis supplied).[6]

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[6] The Coast Guard has numerous programs to recruit minority applicants, including the Minority Introduction to Engineering Program (a free week-long program for minority students interested in engineering and otherwise eligible for the Academy). U.S. Coast Guard Acad., MITE: Minority Introduction to Engineering, *at* http://www.cga.edu/admissions/summerprogramforjuniors/mite.htm (last visited Feb. 4, 2003). Minorities represent 18% of the Academy's class of 2004. *See* U.S. Coast Guard Acad., Diversity & Retention (Oct. 2001) *at* http://www.members.aol.com/_ht_a/lyndahaley/academy/statistics.htm. In addition, the Coast Guard operates the College Student Pre-Commissioning Initiative, which provides training, tuition and stipends to college students enrolled in historically African-American colleges and universities, Hispanic

(c) *Air Force*. Like other services, the Air Force has adopted a Policy Directive, instructing that "the Air Force will develop affirmative action programs which represent minorities, women, and persons with disabilities at all grade levels, in every employment category and in every major organizational element." Air Force Policy Directive 36-2 ¶ 2 (Oct. 1, 1996). See also Air Force Instruction 36-2706 § 1.1., at 7 (Dec. 1, 1996) (Air Force Equal Opportunity and Treatment Program improves mission effectiveness by combating discrimination and allowing "Air Force members [to] ris[e] to the highest level of responsibility possible").

The admissions policy of the Air Force Academy is set out in its catalog and in U.S. GAO, GAO/NSIAD-93-244, *Air Force Academy: Gender and Racial Disparities* (Sept. 1993) ("*Air Force GAO Report*"). The Academy compiles a list of candidates who meet minimum admission standards and then determines which eligible candidates will receive an offer. See U.S. Air Force Acad., *2001-2002 Catalog* 14 (2001). The *Air Force GAO Report*, at 33, states that "[o]n average, minorities had comparable physical fitness scores but lower academic admissions scores." From 1991-1995, 18% of minority applicants were deemed qualified for admission, compared with 28% of white applicants; but 76% of qualified minority candidates received offers, compared with 51% of white applicants. *Id.* at 35-36. Clearly, then, the Academy has an admissions policy that takes some limited account of race. See *id.* at 37-38 fig. 3.4 (admission score for minority students roughly 3000 points and for white students roughly 3200 points); Clymer, *supra* (quoting associate dean of

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Association of Colleges and Universities schools, and other approved institutions. *See* U.S. Coast Guard, College Student Pre-Commissioning Initiative (CSPI), *at* http://www.uscg.mil/jobs/cspi.html (last visited Feb. 4, 2003). The program is designed to increase minority junior officers in the Guard. *See* L. Healy, *Learning to Lead*, Military News, June 18, 2001. As of March 2002, minority officers constituted 13.7% of the Coast Guard officer corps. *See DoD Report* at 4.

admissions Rollie Stoneman, "'[race] certainly [is] one of any number of factors we consider'").

For 2000, 18% of enrolled students were members of a minority group. U.S. Air Force Acad., Information Sheet (2000) (unpublished) (on file with author).

(d) *Service Academy Preparatory Schools*. The service academy preparatory schools demonstrate both the importance the services place on integrating their officer corps and the race-conscious measures they employ to achieve that urgent need. Each service academy is associated with a federally-funded preparatory academy that is the single most significant source of minority candidates for that academy. See *Career Progression* at 35, 37; Moskos & Butler, *supra*, at 86; U.S. GAO, GAO/NSIAD-92-57, *DoD Service Academies: Academy Preparatory Schools Need A Clearer Mission and Better Oversight* 11 (Mar. 1992) ("*Academy Preparatory Schools GAO Report*"). For example, the Military Academy Preparatory School accounts for 20-40% of African-American students and 20-30% of Hispanic students at West Point, and these students are highly successful after admission. *Career Progression* at 37.[7] See also R. Worth, *Beyond Racial Preferences*, Washington Monthly, Mar. 1998, at 28 ("[b]ecause blacks score on average almost 200 points lower on the SAT than whites, [the Army preparatory school] has become an indispensable pipeline for bringing [blacks] into the officer corps"). Similarly, "[a]bout one-third of the minority midshipmen came from [the Naval Academy Preparatory School]." *Career Progression* at 38. See also B. Brubaker, *Prepping to Play Football for Navy*, Seattle Times, Apr. 21, 1996, at D3.

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[7] Army preparatory school graduates "leave West Point with somewhat lower than average GPAs, but with better ratings on various other leadership measures that military academies prize. And 78 percent of [preparatory school] alumni graduated from West Point in four years, a half-percentage point higher than average." D. Dickerson, *How To Keep Elite Colleges Diverse*, U.S. News & World Rep., Jan. 5, 1998, at 15.

"Almost all Coast Guard students at [the Navy's preparatory school] are minorities." Am. Council on Educ., *Service Academy Preparatory Schools Project, Final Report* 89 (June 15, 1993) ("*Am. Council on Educ. Report*"). Fully one-third of minority cadets at the Air Force Academy attend its preparatory school. P. Grier, *The Case for Academics*, Air Force Mag., July 1993, at 60.

The current mission of the preparatory schools is to prepare minorities, as well as enlisted men, women, and athletes, for the service academies. *Academy Preparatory Schools GAO Report* at 3 (the preparatory schools are important "because they prepare minorities and women for academy admission, and therefore promote diversity in the officer corps"); H.R. Rep. No. 103-357, at 676 (1993) (same). Each preparatory academy uses a race-conscious admission policy.

The Army preparatory school sets specific numeric goals. See *Am. Council on Educ. Report* at 41. Both the Navy and Air Force preparatory schools enroll about 40% minority students. *See* Brubaker, *supra*, at D3 (quoting J. Renard, Naval Academy Dean of Admission, calling the preparatory school "'truly an affirmative action success story'" because "[w]ithout [the prep school] he could not possibly meet Navy goals to boost minority representation at the academy to 29 percent"); *Am. Council on Educ. Report* at 28-29 (the Air Force Preparatory school is roughly 40% minority and is providing 30-50% of minority students at the Academy). The Coast Guard, too, sends students to the Navy's preparatory school to "expand the pool of minorities applying to the Coast Guard Academy." U.S. GAO, GAO/RCED-94-131, *Coast Guard: Cost for Naval Academy Preparatory School and Profile of Minority Enrollment* (Apr. 12, 1994) (the preparatory school has "improved the minority profile" at the Coast Guard Academy which is its "primary purpose").

(e) *ROTC Scholarships*. The ROTC produced 48% of active duty officers as of 2000.[8] Like the service academies, it is considered a prime pathway for a career as a military officer. *Career Progression* at 15, 17. Because Academy classes are small, the armed services initially saw the ROTC as the "obvious solution" to the problems created by the lack of minority representation in the officer corps. Neiberg, *supra*, at 167 (quoting Ben Cassiday, *Report to the AFROTC Advisory Panel* (Sept. 18, 1972)). For minorities, the ROTC continues to be a particularly significant vehicle for increasing representation in the officer ranks. Moskos & Butler, *supra*, at 84.

Like the service academies, the ROTC employs an aggressive race-conscious admissions program. Each service's ROTC program is tasked to meet its service's minority goals for commissioning officers. As a result, the ROTC's recruiting programs and strategies are overtly race conscious. For example, the Air Force "Gold Bar" program uses newly commissioned, minority ROTC graduates full time in an effort to recruit minorities for its ROTC. *Career Progression* at 42. The Navy ROTC tripled the number of African-Americans applying for a scholarship after the Secretary of the Navy set specific goals for minority officer accession in 1993. *Id.* In addition to their targeted recruiting efforts, the ROTC "administer[s] compensatory programs in an attempt to broaden the pool of minority candidates." *Id.* at 31. For example, the Junior ROTC purposefully targets inner city high schools and provides a program to address the special needs of this population as a way to increase the pool of minority officer candidates. *Id.* at 39-40. See also L.M.

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[8] *See* Office of the Assistant Sec'y of Def., *Population Representation in the Military Servs.*, tbl. 4.3 (Nov. 2001), *available at* http://www.dod.mil/prhome/poprep2000/html/chapter4/chapter4_3.htm. This number excludes so-called direct appointments for professionals (medical and legal professionals and clergy).

Hanser & A.E. Robyn, *Implementing High School JROTC Career Academies* (2000).

To obtain an ROTC scholarship, a candidate must be admitted to the hosting college or university. The pool of minority candidates at any given ROTC member institution is thus limited to the number of minority students admitted. In addition, the military services issue regulations that determine the number of scholarships allotted to each school (although there are a certain number of scholarship recipients not included in any school's allocation). See L. Morris, U.S. Army, CBSP Fact Sheet 02, ¶ 2 (Sept. 26, 2002), *at* http://www.rotc.monroe.army.mil/scholarship_HPD/Scholarship%20information%20TOC/fact%20sheets.htm. To increase the number of minority ROTC participants, the ROTC makes substantial numbers of scholarships available at historically African-American colleges and universities ("HBCUs") and at institutions with high Hispanic enrollment ("HMIs"). *Career Progression* at 34, 94. This allocation, by itself, ensures that a certain percentage of ROTC scholarships will be awarded to minority college students.

The program's limited race-conscious policies are also reflected in the gap between the SAT scores of minority scholarship recipients and average scholarship recipients. For example, the mean SAT score of recipients in 2001 was 1236 with an average high school GPA of 3.6, compared to the mean SAT score for HBCU scholarship recipients of 920 and average high school GPA of 2.9. See Cadet Command Headquarters, U.S. Army, Scholarship Fact Sheets: 2001 Profiles, figs. 1-2, *at* http://www.rotc.monroe.army.mil/scholarship_HPD/Scholarhip%20information%20TOC/fact%20sheets.htm (last updated Oct. 2, 2002). See also Moskos & Butler, *supra*, at 84.

The U.S. military's collective judgment is perhaps best summed up by General Colin Powell, in confirming his strong support for affirmative action: "In the military, we .... used Affirmative Action to reach out to those who were qualified,

but who were often overlooked or ignored as a result of indifference or inertia." Commencement Address, Bowie State University (1996), *reprinted in* 142 Cong. Rec. S9311, S9312 (daily ed., July 31, 1996).

4. Race Conscious Admissions Are Constitutional. The race-conscious admissions policies at the service academies and in the ROTC program serve compelling governmental purposes and are narrowly tailored to serve those purposes. Limited race-conscious admissions policies at civilian universities are constitutional for the same reason.

This Court and others have recognized that in certain contexts, race-conscious action that furthers compelling, non-remedial government interests is constitutional. The government's interest in racial diversity in higher education is compelling and supports the use of racial considerations in furthering that interest. *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring in part); *Metro Broad., Inc.*, 497 U.S. at 568 (same) (citing *Bakke*). Because racial diversity in higher education also is necessary to integrate the officer corps and to train and educate white and minority officers, it is essential to ensuring an effective, battle-ready fighting force. This is indisputably a compelling government interest. "It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation." *Haig*, 453 U.S. at 307 (internal quotations omitted).

As noted, the service academies and the ROTC are the primary sources of our officer corps, including those in the highest ranks. Entry through these avenues gives an officer a relative advantage for promotion and assignment. *Career Progression* at 25; *id.* at 62-63 ("minorities from selective colleges have significantly higher performance ratings" on officer reviews than their cohorts from less selective colleges). History has proven that these institutions must provide substantial numbers of minority officers for the services to field the diverse corps that is essential to military efficiency and effectiveness. Indeed, just as compelling

public safety and penological benefits justify consideration of race in the selection of police and correctional officers, even more compelling considerations of national security and military mission justify consideration of race in selecting military officers. Cf. *Wittmer*, 87 F.3d at 920.

Integration of the service academies and the ROTC also provides white and minority officers with the training and educational experience necessary to lead enlisted ranks that are 40% minority. In this connection, ROTC officer candidates are selected from those *already admitted* to host colleges and universities. These institutions must have sufficient minority enrollment so that their ROTC programs can, in turn, train and educate substantial numbers of qualified minority officers and provide officer candidates with a racially diverse educational experience. The military employs ROTC programs at HBCUs and HMIs to recruit high quality minority applicants in sufficient numbers, but preparing officer candidates for service, let alone *command*, in our racially diverse military is extraordinarily difficult in a racially homogenous educational setting. To paraphrase *Sweatt*, a future officer's most effective training and education cannot take place at an institution "in isolation from the individuals and institutions" that he or she will command. 339 U.S. at 634. "[T]he 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Bakke*, 438 U.S. at 312-13 (Powell, J., concurring) (quoting *Keyishan* v. *Board of Regents*, 385 U.S. 589, 603 (1967)).

The crisis that resulted in integration of the officer corps is but a magnified reflection of circumstances in our nation's highly diverse society. In the 1960s and 1970s, the stark disparity between the racial composition of the rank and file and that of the officer corps fueled a breakdown of order that endangered the military's ability to fulfill its mission. That threat was so dangerous and unacceptable that it resulted in immediate and dramatic changes intended to restore minority

enlisted ranks' confidence in the fairness and integrity of the institution. In a highly diverse society, the public, including minority citizens, must have confidence in the integrity of public institutions, particularly those educational institutions that provide the training, education and status necessary to achieve prosperity and power in America.

There is presently no workable alternative to limited, race-conscious programs to increase the pool of qualified minority officer candidates and establish diverse educational settings for officer candidates. Plainly, as respondents' briefs show, the alternative proposed by the United States – admission of students who achieve a specified class rank – is no alternative for private universities and colleges or for graduate schools or for any public institution with a national student body.

Equally to the point, the armed services must have racially diverse officer candidates who *also* satisfy the rigorous academic, physical, and personal prerequisites for officer training and future leadership. It is no answer to tell selective institutions, such as the service academies or the ROTC, automatically to admit students with a specified class rank, even if such a system were administratively workable. This lone criterion mandates the admission of students unable to satisfy the academic, physical, and character-related demands of the service academies or the officer training curriculum. Moreover, even if the pool of minority ROTC candidates remains quantitatively stable, such a policy will reduce the number of high quality minority candidates for ROTC scholarships. Minority candidates are not fungible in the way the government's proposed alternative suggests.

In the interest of national security, the military must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting. It requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective. Like our military

security, our economic security and international competitiveness depend upon it. An alternative that does not preserve both diversity and selectivity is no alternative at all.

Nor does telling the military to work harder to recruit high quality minority candidates make sense. Each service already has numerous aggressive minority recruiting programs and expends significant funds and human resources on service preparatory academies and other programs in efforts to increase the pool of qualified minority candidates. As the growing percentage of minority officers reveals, the military services are making substantial progress toward diverse, highly qualified leadership – progress envied by other institutions in our society. That progress must be protected and must continue. The admissions policies of the service academies and the ROTC reflect a collective military judgment – that the carefully tailored consideration of race in the admission and training of officer candidates is essential to an integrated officer corps and hence to our fighting force. Today, there is no race-neutral alternative that will fulfill the military's and the nation's compelling need for a diverse officer corps of the highest quality to serve the country.

CONCLUSION

The court of appeals' decision that racial diversity in higher education is a compelling state interest should be affirmed.

Respectfully submitted,

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IN THE

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BARBARA GRUTTER,

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-and-

JENNIFER GRATZ AND PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 6, 28
Ambach v. Norwick, 441 U.S. 68 (1979) 3
Brown v. Board of Education, 347 U.S. 483 (1954) 3
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 4, 30
Freeman v. Pitts. 503 U.S. 467 (1992) 17, 18
Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) 23
Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 4, 5
United Steelworkers of America v. Weber, 443 U.S. 193 (1979) 6, 16
Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982) 29, 30
Wygant v. Board of Education, 476 U.S. 267 (1986) 4, 23

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42 U.S.C. §§ 2000e-2000e-16 5
H.R.Rep. No. 914, 88th Cong., 1st Sess. (1963), *reprinted in* 1963 U.S. CODE CONG. & ADMIN NEWS 2355 16
109 CONG. REC. 11159 (1963) 4
110 CONG. REC. 6548 (1964) 15

MISCELLANEOUS

ABEL, RICHARD L., AMERICAN LAWYERS (1989) 5
Altonji & Blank, *Race and Gender in the Labor Market*, in 3 HANDBOOK OF LABOR ECONOMICS 3143 (Ashenfelter & Card, eds. 1999) 7, 11

TABLE OF AUTHORITIES—Continued

Antonio, *Student Interaction Across Race and Outcomes in College*, Paper presented at the Ann. Conf. of the Am. Ed. Research Ass'n (April 1998) 22
Bendick & Jackson, *Measuring Discrimination Through Controlled Experiments*, 23 REV. OF BLACK POL. ECON. 25 (1994) 10, 11, 16
Bertrand & Mullainathan, *Are Emily and Brandan More Employable than Lakisha and Jamal?: A Field Experiment on Labor Market Discrimination*, unpublished manuscript, University of Chicago School of Business (2002) 11-13
Blinder, *Wage Discrimination: Reduced Form and Structural Estimates*, 8 J. OF HUMAN RESOURCES 436 (1973) 8
Braddock, *School Desegregation and Black Assimilation*, 41 J. OF SOC. ISSUES 9 (1985) 28
Braddock, Crain, & McPartland, *A Long-Term View of School Desegregation: Some Recent Studies of Graduates as Adults*, 66 PHI DELTA KAPPAN 259 (Dec. 1984) 27, 28
Braddock, Dawkins & Trent, *Why Desegregate? The Effect of School Desegregation on Adult Occupational Desegregation of African Americans, Whites and Hispanics*, 31 INT. J. OF CONTEMP. SOC. 273 (1994) 25
Braddock & McPartland, *How Minorities Continue to Be Excluded from Equal Employment Opportunities: Research on Labor Market and Institutional Barriers*, 43 J. OF SOC. ISSUES 5 (1987) 27

TABLE OF AUTHORITIES—Continued

Page

Braddock & McPartland, *More Evidence on Social-Psychological Processes that Perpetuate Minority Segregation: The Relationship of School Desegregation and Employment Segregation,* Report No. 338 19-20, Center for Social Org. of Schools, Johns Hopkins Univ. (1983) 26-27

Braddock & McPartland, *Social-Psychological Processes that Perpetuate Racial Segregation: The Relationship Between School and Employment Desegregation*, 19 J. OF BLACK STUDIES 267(1989) 24, 26

Cook, *Cooperative Interaction in Multiethnic Contexts*, in GROUPS IN CONTACT: THE PSYCHOLOGY OF DESEGREGATION 155 (Miller & Brewer, eds. 1984) 20

Cotton, *Labor Markets and Racial Inequality*, in LABOR ECONOMICS: PROBLEMS IN ANALYZING LABOR MARKETS 183 (Darity, ed. 1983) 8

Crain, *School Integration and Occupational Achievement of Negroes*, 75 AM. J. OF SOC. 593 (1970) 26

CRAIN, ROBERT L. & CAROL S. WEISMAN, DISCRIMINATION, PERSONALITY, AND ACHIEVEMENT: A SURVEY OF NORTHERN BLACKS (1972) 26

CROSS, HARRY, GENEVIEVE KENNEY, JANE MELL, & WENDY ZIMMERMAN, EMPLOYER HIRING PRACTICES: DIFFERENTIAL TREATMENT OF HISPANIC AND ANGLO JOB SEEKERS (1990) 10

TABLE OF AUTHORITIES—Continued

Page

Darity, Guilkey, & Winfrey, *Explaining Differences in Economic Performance Among Racial and Ethnic Groups in the USA: The Data Examined*, 55 AM. J. OF ECON. & SOC. 411 (1996) 7, 8, 9

Darity & Mason, *Evidence on Discrimination in Employment: Codes of Color, Codes of Gender*, 12 J. OF ECON. PERSPECTIVES 63 (1998) 5, 9, 10, 14-15, 16

Dawkins & Braddock, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. OF NEGRO ED. 394 (1994) 25, 27

DeFreitas, *Ethnic Differentials in Unemployment among Hispanic Americans*, in HISPANICS IN THE U.S. ECONOMY 127 (Borjas & Tienda, eds. 1985) 8

Donohue & Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991) 6, 15

FEDERAL GLASS CEILING COMMISSION, A SOLID INVESTMENT: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL – RECOMMENDATIONS OF THE FEDERAL GLASS CEILING COMMISSION (1995) 5, 6

FEDERAL GLASS CEILING COMMISSION, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL—FACT-FINDING REPORT OF THE FEDERAL GLASS CEILING COMMISSION (1995) 6, 8, 15-16

TABLE OF AUTHORITIES—Continued

Page

Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733 (1998) 21

HOLZER, HARRY J., WHAT EMPLOYERS WANT: JOB PROSPECTS FOR LESS-EDUCATED WORKERS (1996) 13

Hurtado, *Linking Diversity and Educational Purpose: How Diversity Affects the Classroom Environment and Student Development*, in DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 187 (Orfield, ed. 2001) 22

Jensen, *Minorities Didn't Share in Firm Growth*, NAT'L L.J., Feb. 19, 1999, at 1 8

JOHN J. HELDRICH CENTER FOR WORKFORCE DEVELOPMENT, RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, A WORKPLACE DIVIDED: HOW AMERICANS VIEW DISCRIMINATION AND RACE ON THE JOB (2002) 7

Keith & Herring, *Skin Tone and Stratification in the Black Community*, 97 AM. J. OF SOC. 760 (1991) 9, 10

Kirschenman & Neckerman, *"We'd Love to Hire Them, But . . .": The Meaning of Race for Employers*, in THE URBAN UNDERCLASS 203 (Jencks & Peterson, eds. 1991) 13-14

Krueger, *Sticks and Stones Can Break Bones, But the Wrong Name Can Make a Job Hard to Find*, N.Y. TIMES, Dec. 12, 2002, at C2 11-12

TABLE OF AUTHORITIES—Continued

Page

McConahay, *Reducing Racial Prejudice in Desegregated Schools*, in EFFECTIVE SCHOOL DESEGREGATION: QUANTITY, QUALITY, AND FEASIBILITY 35 (Hawley, ed. 1981) 23

Moss & Tilly, *"Soft" Skills and Race: An Investigation of Black Men's Employment Problems*, Russell Sage Foundation Working Paper (1995) 13

Neckerman & Kirschenman, *Hiring Strategies, Racial Bias, and Inner City Workers*, 38 SOC. PROBLEMS 433 (1991) 16

Orfield & Whitla, *Diversity and Legal Education: Student Experience in Leading Law Schools*, in DIVERSITY CHALLENGED EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 143 (Orfield, ed. 2001) 22

PASCARELLA, ERNEST T. & TERENZINI, PATRICK T., HOW COLLEGE AFFECTS STUDENTS: FINDINGS AND INSIGHTS FROM TWENTY YEARS OF RESEARCH (1991) 23-24

Pettigrew, *Intergroup Contact Theory*, 49 ANN. REV. PSYCH. 65 (1998) 20

Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students*, in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 597 (Banks, ed. 1995) 25, 26, 27

TABLE OF AUTHORITIES—Continued

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Sigelman, Bledsoe, Welch, & Combs, *Making Contact? Black-White Social Interaction in an Urban Setting*, 101 AM. J. SOC. 1306 (1996)	20, 25-26
Sigelman & Welch, *The Contact Hypothesis Revisited: Black-White Interaction and Positive Racial Attitudes*, 71 SOC. FORCES 781 (1993)	20
Trent, *Outcomes of School Desegreation: Findings from Longitudinal Research*, 66 J. OF NEGRO ED. 255 (1997)	25
Wells & Crain, *Perpetuation Theory and the Long Term Effects of School Desegregation*, 64 REV. OF ED. RESEARCH 531 (1994)	27
WILSON, WILLIAM JULIUS, WHEN WORK DISAPPEARS (1996)	14
Wilson, Woodrow, *Princeton for the Nation's Service*, in 1 THE PUBLIC PAPERS OF WOODROW WILSON: COLLEGE AND STATE 450 (Baker & Dodd, eds. 1925)	3
Wood & Sonleitner, *The Effect of Childhood Interracial Contact on Adult Antiblack Prejudice*, 20 INT. J. INTERCULTURAL REL. 1 (1996)	21
Woodbury, *Culture and Human Capital: Theory and Evidence or Theory Versus Evidence* in LABOR ECONOMICS: PROBLEMS IN ANALYZING LABOR MARKETS 239 (Darity, ed. 1993)	9-10
Zwerling & Silver, *Race and Job Dismissals in a Federal Bureaucracy*, 57 AM. SOC. REV. 651 (1992)	13

INTEREST OF THE AFL-CIO

The American Federation of Labor & Congress of Industrial Organizations (AFL-CIO) is the largest organization of working men and women in the United States, consisting of 65 national and international unions representing over 13 million members.[1] Many of these members teach, work, and study on the campuses of public universities and colleges. The American Federation of Teachers (AFT), for example, represents approximately 125,000 faculty and staff members at universities and colleges and over one million teachers and others in public schools.

Moreover, while unions have not been immune from the virus of discrimination, for the past half century unions have been at the forefront of efforts to end employment discrimination. Again, to cite just one example, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) created a Fair Practices and Anti-Discrimination Department in 1946 and for over 40 years has secured anti-discrimination provisions in its contracts with the big three domestic automakers. The UAW, headquartered in Michigan, filed a brief in support of the University in the Court of Appeals.

Most fundamentally, virtually every graduate of the University of Michigan and its Law School, as well as graduates of comparable institutions of higher education, will leave academia and enter the workplace as an owner, manager, supervisor, union officer, union member, and/or employee. In the workplace, these graduates will be expected

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[1] Pursuant to Rule 37.3(a), the parties have lodged letters with the Court consenting to the filing of briefs *amicus curiae* in both *Grutter v. Bollinger*, No. 02-241, and *Gratz v. Bollinger*, No. 02-516. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person, other than *amicus* and its counsel, made a monetary contribution to its preparation or submission.

to honor a set of fundamental public policies, including the command that they not discriminate on the basis of race or national origin. The experience of the AFL-CIO teaches that the unique opportunities to interact with people from other races and ethnic groups on a university campus—at the threshold of the workplace—that are fostered by the admissions policies at issue in this case, will have substantial, positive impact on students, making them better citizens in our democracy as well as more productive members of society. Specifically, the challenged policies will reduce employment discrimination.

SUMMARY OF ARGUMENT

There is a compelling governmental interest in eliminating employment discrimination. While such discrimination is unlawful, a vast body of evidence reveals its persistence, its resistance to prohibition, and its pernicious effects.

Among the most clearly documented educational benefits of the diverse student body created by the challenged admissions policies is the reduction of stereotypes and prejudices that lead to discrimination.

Multiple, long-term, national studies of both primary and secondary as well as higher education document a link between interaction with students of diverse races and ethnic backgrounds and a reduced resistance to working with such people after graduation. These studies demonstrate that White, African-American and Hispanic students schooled with diverse peers are more likely to work in integrated workplaces. Thus, the challenged admissions policies further the compelling governmental interest in equal employment opportunity.

ARGUMENT

Introduction

In 1902, Woodrow Wilson, then President of Princeton University, eloquently stated:

> The college should seek to make the men whom it receives something more than excellent servants of a trade or skilled practioners of a profession. It should give them elasticity of faculty and breadth of vision, so that they shall have a surplus of mind to expend, not upon their profession only, for its liberalization and enlargement, but also upon the broader interests which lie about them, in the spheres in which they are to be, not breadwinners merely, but citizens as well, and in their own hearts, where they are to grow to the stature of real nobility. [Woodrow Wilson, *Princeton for the Nation's Service*, in 1 THE PUBLIC PAPERS OF WOODROW WILSON: COLLEGE AND STATE 450 (Baker & Dodd, eds. 1925).]

The words of President Wilson are even more true of a great public university like the University of Michigan. In linking education and citizenship, his words suggest that we begin by inquiring into the function of public universities in a democracy. Public universities do not exist solely to convey benefits on individuals, advantaging them in the competitive market. Public universities exist because, as a nation, we believe in the value of education—not only that education makes people more productive as economic actors, but, more fundamentally, that education makes people better citizens of our democracy. In contrast to schools in closed societies elsewhere in the world that teach intolerance and hatred, our public universities are dedicated to instilling the principles of critical inquiry, openness, and respect for all people.

This Court has repeatedly recognized the role of public education in a democracy. "The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). "[E]ducation . . . is the very foundation of good citizenship." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

One of the "values on which our society rests" is equal treatment of all people regardless of race, ethnicity, and national origin. Equal treatment is required not only of government in most instances, but also of citizens within the workplace. Justice O'Connor has stated, "the dream of a Nation of equal citizens," requires not only a government that does not make pernicious racial distinctions, but "a *society* where race is irrelevant to personal opportunity and achievement." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505-06 (1989) (emphasis added). The most important domain in which this goal of equal treatment must be realized in order to fulfill the promise of American life is the workplace. As President John F. Kennedy stated to Congress on introducing the Civil Right Act, "There is little value in a Negro's obtaining the right to be admitted to hotels and restaurants if he has . . . no job." 109 CONG. REC. 11159 (1963).

The focus here is not remedial. The focus is not on "sins committed in the past," but rather, "we . . . ask whether the [University's] action advances the public interest in educating children for the future." *Wygant v. Board of Education*, 476 U.S. 267, 313 (1986) (Stevens, J., dissenting). The University appropriately sought to advance forward looking, educational objectives "of paramount importance in the fulfillment of its mission." *Regents of the University of California v. Bakke*, 438 U.S. 265, 313 (1978) (Powell, J.).

The University presented compelling evidence of the educational benefits of the diverse student body created by the challenged admissions policies. We trace in greater detail just one of these benefits—the reduction of prejudice and stereotypes that lead to discrimination—and we trace that benefit through the door of higher education into the workplace.

I. THE COMPELLING INTEREST IN REDUCING EMPLOYMENT DISCRIMINATION

In 1964, the United States Congress declared employment discrimination based on race, color, and national origin unlawful. *See* 42 U.S.C. §§ 2000e-2000e-16. The national project embodied in Title VII of the 1964 Civil Rights Act is ongoing. We demonstrate below that as important to the success of this project as legal prohibition, lawsuits, damages or injunctions are the lessons learned through the interaction with diverse peers enabled by the admissions policies at issue.

A. The Persistence of Employment Discrimination

Let us not forget that it was only forty years ago that employers openly discriminated on the basis of race. When the parents of the students on both sides of these cases were entering the workplace, many of its doors still bore signs reading for whites only. For example, the Washington Post of January 3, 1960, ran an ad for "NURSE (practical) white, for small nursing home, Silver Spring area." Darity & Mason, *Evidence on Discrimination in Employment: Codes of Color, Codes of Gender*, 12 J. OF ECON. PERSPECTIVES 63, 66 (1998). As recently as 1943, the American Bar Association did not admit African-Americans to membership. R. ABEL, AMERICAN LAWYERS 103 (1989). As Justice Brennan recognized in *Bakke*, "massive official and private resistance prevented . . . attainment of equal opportunity . . . in the professions." *Id.*, 438 U.S. at 371 (Brennan, J., concurring in part and dissenting in part).

Lamentably, employment discrimination is not a thing of the past. In 1995, the Federal Glass Ceiling Commission, a bipartisan commission created by Congress whose members were appointed by President George H.W. Bush, found, "Workplace discrimination presents a significant glass ceiling barrier for minorities." A SOLID INVESTMENT: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL-RECOMMENDATIONS OF THE FEDERAL GLASS

CEILING COMMISSION 15 (1995). "Many judgments on hiring and promotion are made on the basis of . . . the color of skin," the Commission's fact-finding report concluded. GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL-FACT-FINDING REPORT OF THE FEDERAL GLASS CEILING COMMISSION (1995). In 1995, this Court recognized, "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995). In other words, "The problem that Congress addressed in 1964 remains with us." *United Steelworkers of America v. Weber*, 443 U.S. 193, 204 n. 4 (1979).

Scholars have documented the stubborn persistence of employment discrimination with varying forms of measurement which we summarize in this subsection.

While the number of employment discrimination claims is only a rough proxy for the "unfortunate reality" of discrimination, it is significant that "the volume of federal employment discrimination litigation has grown spectacularly, many times faster than the overall federal civil caseload." Donohue & Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 983-84 (1991). The number of employment discrimination claims filed in federal courts has increased from less than 350 per year in 1970 to approximately 9,000 in 1983. *Id.* at 985. The number of employment discrimination cases rose by 2,166% between 1970 and 1989 compared to a 125% increase in the entire civil docket. *Id.* The same upward trend is found at the Equal Employment Opportunity Commission. GLASS CEILING COMM., A SOLID INVESTMENT, at 39.[2]

[2] Surveys also reveal that many workers – whether or not they file a charge or lawsuit – believe they have been discriminated against. A survey conducted by the Center for Survey Research and Analysis at the University of Connecticut revealed that 28% of African Americans and 22% of Hispanics believe they had been treated unfairly at work because of their race. JOHN J. HELDRICH CENTER FOR WORKFORCE DEVELOPMENT, RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, A WORKPLACE DIVIDED: HOW AMERICANS VIEW DISCRIMINATION AND RACE ON THE JOB 11 (2002).

Another indicator of persistent employment discrimination is the gap between the wages earned by African-American and White workers. A comprehensive review of the literature concludes, "Such differentials have been remarkably persistent and have actually increased in the last 15 years among blacks versus whites." Altonji & Blank, *Race and Gender in the Labor Market*, in 3 HANDBOOK OF LABOR ECONOMICS 3143, 3249 (Ashenfelter & Card, eds. 1999). The "Hispanic/white wage gap has [also] risen among both males and females in recent years." *Id.* at 3145. Black and Hispanic men earn about two-thirds of what White men earn on an hourly basis and Black and Hispanic women earn slightly over one-half what White women earn. *Id.* at 3146. These differentials exist across the employment spectrum. For example, African-American men with professional degrees earn 21% less than their White counterparts. GLASS CEILING COMM., GOOD FOR BUSINESS, at 9.

Annual earnings show an even larger differential "suggesting that weeks and hours worked are lower among minorities." Altonji & Blank, *Race and Gender*, at 3147. Black mean per capita income was just over 60% of the national average according to both the 1980 and 1990 census. Darity, Guilkey, & Winfrey, *Explaining Differences in Economic Performance Among Racial and Ethnic Groups in the USA: The Data Examined*, 55 AM. J. OF ECON. & SOC. 411, 414 (1996). According to the 1990 census, while 13% of the population lived below the poverty line, 30% of Black people lived in poverty. *Id.* at 413, 414. Indeed, the gap between Black and White unemployment grew between 1963

and 1989. Cotton, *Labor Markets and Racial Inequality*, in LABOR ECONOMICS: PROBLEMS IN ANALYZING LABOR MARKETS 183, 190-91 (Darity, ed. 1993). In 1990, the proportion of unemployed Black workers was 2.77 times that of White workers. *Id.* at 191. Hispanic workers are similarly more likely to be unemployed, controlling for relevant differences in personal and labor market characteristics. DeFreitas, *Ethnic Differentials in Unemployment among Hispanic Americans*, in HISPANICS IN THE U.S. ECONOMY 127, 154-56 (Borjas & Tienda, eds. 1985).

Minorities are scarce in high-paying jobs. In law practice, a 1989 survey of the nation's 250 largest firms found that 98% of partners were White, less than 1% Black, and less than ½% Hispanic. Jensen, *Minorities Didn't Share in Firm Growth,* NAT'L L.J., Feb. 19, 1999, at 1. At the top of the corporate ladder, 97% of senior managers at Fortune 1000 industrial and Fortune 500 service companies are White, .6% are African-American, .4% Hispanic. GLASS CEILING COMM., GOOD FOR BUSINESS, at 9. The 1990 census revealed that only 14% of Black men held professional or managerial jobs compared to 26% of all men. Darity, Guilkey, & Winfrey, *Explaining Differences*, at 413, 414-15.

Some of the racial gap in hourly and yearly earnings can be explained by differences in education, training, experience and other legitimate qualifications, but studies reveal that credentials explain less than half of the racial gap in male workers' earnings. Darity, Guilkey, & Winfrey, *Explaining Differences*, at 413, 419. Princeton economist Alan S. Blinder estimated that 40% of racial wage differences can be attributed to "outright discrimination in rates of pay" and another 30% to "discrimination in achieving the other endogenous variables (such as education, occupation)." Blinder, *Wage Discrimination: Reduced Form and Structural Estimates*, 8 J. OF HUMAN RESOURCES 436, 447 (1973). These studies conclude that the wage data from sources such as the official census provides "systematic evidence of

discriminatory differentials affecting the wages of . . . black, Native American, and . . . men of Hispanic origin." Darity, Guilkey, & Winfrey, *Explaining Differences*, at 420.

Although a few scholars ascribe differences in wages, income and job type that remain after controlling for objective qualifications to unmeasurable but relevant differences in "culture," there is "a growing body of evidence" to the contrary in studies that "use[] color or 'skin shade' as a natural experiment to detect discrimination." Darity & Mason, *Evidence on Discrimination*, at 71. "[T]hese studies . . . look at different skin shades within a particular ethnic group at a particular place and time" in order to "control for factors of culture and ethnicity other than pure skin color." *Id.* One such study found statistically significant differences in occupation and income among Blacks of different skin tones ranging from "very dark" to "very light" with personal incomes for "very light" 65% greater than for "very dark." Skin tone remained related to income "net of parental socioeconomic status, education, occupation, and [other] sociodemographic variables." Keith & Herring, *Skin Tone and Stratification in the Black Community*, 97 AM. J. OF SOC. 760, 768-69, 772-73 (1991). This result is replicated in numerous, similar studies of African-Americans and Hispanics. *See* Darity & Mason, *Evidence on Discrimination*, at 71-72.

Indeed, when these studies are turned on their head, holding color constant and varying culture, by comparing black skinned people of differing ancestries, black skinned workers suffer the same consequences of their color regardless of culture. *See generally id.* at 83. Thus, Michigan State University Professor Stephen A. Woodbury found that while Blacks of West Indian origin earn more than other Blacks, largely because they have more relevant, positive characteristics, Blacks of West Indian descent also earn less than Whites and the gap cannot be explained based on similar differences in relevant characteristics. Woodbury, *Culture*

and Human Capital: Theory and Evidence or Theory Versus Evidence in LABOR ECONOMICS 239, 248. "These facts suggest," two scholars conclude, "that the effects of skin tone are not only historical curiosities from a legacy of slavery and racism, but present-day mechanisms that influence who gets what in America." Keith & Herring, *Skin Tone*, at 777.

Even more direct evidence of the stubborn persistence of employment discrimination is found in empirical research using testers. In the 1990s, the Urban Institute conducted a series of carefully controlled studies using matched pairs of applicants for entry-level positions, trained to minimize dissimilarity in the quality of their self-presentation, with resumes designed to give them equal credentials. *See* Darity & Mason, *Evidence on Discrimination*, at 78-79. The studies found that African-American males were three times as likely to be turned down for a job as White males, and Hispanic males were also three times as likely to be turned down as non-Hispanic White males. *Id.* at 79. Other studies have found that White testers are close to 10% more likely to receive interviews than African-Americans; once they are interviewed, half of the White testers are hired compared to only 11% of African-Americans; and among those hired, White testers are offered an average of 15 cents per hour more than African-Americans. *See id.* at 79 (*citing* Bendick & Jackson, *Measuring Discrimination Through Controlled Experiments*, 23 REV. OF BLACK POL. ECON. 25, 32 (1994)). A similar study conducted under contract with the General Accounting Office using Hispanic and Anglo testers found comparable evidence of discrimination. H. CROSS, G. KENNEY, J. MELL & W. ZIMMERMAN, EMPLOYER HIRING PRACTICES: DIFFERENTIAL TREATMENT OF HISPANIC AND ANGLO JOB SEEKERS 3 (1990) (Anglos received 33% more interviews than Hispanics and 52% more job offers). Two scholars describe the significance of these rates of disparate treatment:

> A typical job seeker applies for a number of jobs in the course of one search for employment. If one job application in five is infected by discriminatory treatment, then the probability that a minority job seeker experiences discrimination during a multiple-application search approaches 100 percent. Such findings suggest that virtually every minority participant in the non-professional American labor market is likely to be touched by discrimination. [Bendick & Jackson, *Measuring Discrimination*, at 34.].[3]

The comprehensive survey presented in the Handbook of Labor Economics concludes, "The [tester] studies to date generally suggest that hiring discrimination continues to occur." Altonji & Blank, *Race and Gender*, at 3194.

The strong evidence of the persistence of employment discrimination provided by testing has recently been confirmed in a study using resumes which were randomly assigned African-American or White identified names. Bertrand & Mullainathan, *Are Emily and Brendan More Employable than Lakisha and Jamal?: A Field Experiment on Labor Market Discrimination*, unpublished manuscript, University of Chicago School of Business (2002) (*reported in* Krueger, *Sticks and Stones Can Break Bones, But the Wrong*

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[3] These studies also produce compelling anecdotal evidence of discrimination.

> The Washington Post carried an advertisement for a restaurant supervisor in the Washington suburbs. An African American tester who went to the restaurant was told that he would be called if the restaurant wished to pursue his application. Minutes later, a white tester with equivalent credentials followed the same procedure. He was called later the same day to schedule an interview, interviewed the day after that, and subsequently offered the position. Meanwhile, the African American tester made four follow-up calls to reiterate his interest in the position, including one after the white tester refused the job offer. No response was received to these calls. [*Id.* at 33.]

Name Can Make a Job Hard to Find, N.Y. TIMES, Dec. 12, 2002, at C2).[4] In this study, professors at the University of Chicago School of Business and Massachusetts Institute of Technology Department of Economics created a set of resumes using those posted on job search websites and divided them into high and low quality based on labor market experience, gaps in employment, and skills. *Id.* at 6. The names were taken from birth certificates with racially distinctive names being those having the highest ratio of frequency in one racial group compared to frequency in the other racial group (with distinctiveness verified through a survey). *Id.* at 7-8.

During 2001 and 2002, the scholars responded to over 1,300 help-wanted ads, sending almost 5,000 re. umes, in each case, two high-quality and two low-quality, one of each drawn at random to receive an African-American name and the other a White name. *Id.* at 9. The study found a differential call-back rate of 50% "that can solely be attributed to the name manipulation." *Id.* at 11. "[T]hese results imply that a White applicant should expect an average one call back for every 10 ads she or he applies to; on the other hand, a[n] African American applicant would need to apply to 15 different ads to achieve the same result." *Id.* The study also found that "African Americans experience much less of an increase in call-back rates [compared to Whites] for the same improvements in their credentials." *Id.* at 14-15. "[E]mployers simply seem to pay less attention or discount more the characteristics listed on the resumes with African American sounding names" so that "African Americans have

[4] The experiment was designed to eliminate three criticisms of testing research—that matched pairs of applicants can never be exactly identical, that testers know the purpose of the research which may generate conscious or unconscious motives to generate data consistent or inconsistent with a finding of discrimination, and that it is difficult to generate a large sample using testers. *Id.* at 5.

little to gain (in terms of reduced discrimination) from improving their credentials." *Id.* at 16, 25. The authors of the study conclude, "we find huge differences in call-back rates by race. . . . Since applicants' names are randomly assigned, this gap can only be attributed to the race-specific names, suggesting that employers discriminate (quite a bit) on the basis of race." *Id.* at 3. The inescapable conclusion is "that discrimination is an important factor in why African Americans do poorly in the labor market." *Id.* at 25.[5]

Moreover, once hired, numerous studies reveal that, "other things being equal, blacks are about twice as likely as whites to be laid off or fired." Zwerling & Silver, *Race and Job Dismissals in a Federal Bureaucracy*, 57 AM. SOC. REV. 651, 651 (1992). A study of the Postal Service conducted in the early 1990s by professors at Brown University and the University of Iowa found that, "regardless of length of employment, job category, or personal characteristics, blacks were still more than twice as likely as whites to be fired." *Id.* at 657. It concluded, "Clearly, racial differences in dismissals persist after controlling for human capital variables and job category." *Id.* at 658.

While employers seldom expressly acknowledge discrimination, surveys of employer and employee attitudes reveal the stereotypes and prejudices that underlie such unlawful practices. "Surveys consistently find an expressed preference for co-workers who are homogeneous by race." Moss & Tilly, *"Soft" Skills and Race: An Investigation of Black Men's Employment Problems*, Russell Sage Foundation Working Paper (1995). *See also* Kirschenman & Neckerman, *"We'd Love to Hire Them, But . . .": The Meaning of Race*

[5] Further evidence of discrimination in hiring is found in data revealing that both suburban employers and employers with more White customers hire a lower percentage of Black applicants. H. HOLZER. WHAT EMPLOYERS WANT: JOB PROSPECTS FOR LESS-EDUCATED WORKERS 94-103 (1996).

for Employers, in THE URBAN UNDERCLASS 203, 211 (Jencks & Peterson, eds. 1991). Harvard University Sociologist William Julius Wilson analyzed the results of a survey of a representative sample of employers providing entry-level jobs in his book WHEN WORK DISAPPEARS (1996). He found that a large majority of those who commented on inner-city workers' traits expressed views of Blacks that were coded as "negative." *Id.* at 112. A similar survey by two University of Chicago scholars found that 37.7% of employers ranked Blacks' work ethic last among racial and ethnic groups. Kirschenman & Neckerman, *We'd Love to Hire Them*, at 210. The views openly expressed by employers in these studies are highly revealing, but space allows just one example. A suburban drug store manager said:

> [I]n my business I think overall [black men] tend to be known to be dishonest. I think that's too bad but that's the image they have.
>
> . . . .
>
> . . . . They're known to be lazy. . . .
>
> (Interviewer: I see. How do you think that image was developed?)
>
> Go look in the jails [laughs]. [*Id.* at 221.]

Indeed, 13.4% of the employers in Wilson's survey actually acknowledged employment discrimination was a reason why inner-city black males cannot find jobs. WILSON, WHEN WORK DISAPPEARS, at 118.

A comprehensive survey of the empirical evidence by Professors William A. Darity Jr. of the University of North Carolina and Patrick L. Mason of Florida State University published in the Journal of Economic Perspectives in 1998 concluded, "The direct evidence . . . confirms the persistence of discriminatory practices in employment." Darity & Mason, *Evidence on Discrimination*, at 81. The result is that "Blacks, especially black men, continue to suffer significantly reduced

earnings due to discrimination and the extent of discrimination." *Id.* at 76.

B. The Resistance of Discrimination Rooted in Prejudice and Stereotypes to Prohibition

The forms of employment discrimination these studies document have not been eliminated by legal prohibition and are not likely to be. While the primary aim of Title VII was to eliminate discrimination in hiring, research reveals that such discrimination persists and is the least susceptible to legal sanction. "The crux of the problem" addressed by Congress was "to open employment opportunities for Negroes in occupations which have been traditionally closed to them." 110 CONG. REC. 6548 (1964) (Senator Humphrey). Yet the proportion of employment discrimination cases in federal court and charges filed with the EEOC challenging *hiring* discrimination has plummeted. Donohue & Siegelman, *Changing Nature*, at 984, 1015. One obvious reason for this shift in the focus of litigation is that absent express exclusionary policies, most applicants who are discriminated against in hiring never know it and thus do not experience the same sense of grievance as an employee who is discriminated against during employment or in termination even if the effects of discrimination in hiring are equally or even more pernicious. Two scholars observe, "If a job applicant is told that an advertised position has already been filled or that another applicant has been hired who is more qualified, the disappointed job seeker typically does not have sufficient information to confirm or contradict these assertions." Bendick & Jackson, *Measuring Discrimination*, at 26.

Two primary causes of employment discrimination, particularly in hiring, are stereotypes and prejudice arising out of the physical separation of people of differing races and ethnic groups that exists in our society. The Glass Ceiling Commission concluded, "Research consistently identifies

stereotypes, along with prejudice and bias, as a barrier to job advancement." GOOD FOR BUSINESS, at 71. Scholars who study employment discrimination conclude that "[e]mployers seem to possess strong racial . . . preferences in hiring. These preferences are the consequence of enduring stereotypical beliefs." Darity & Mason, *Evidence on Discrimination*, at 81. Two scholars of the labor market explain, hiring "[d]ecisions are often made on limited information—typically, a one-page resume and an interview averaging perhaps twenty minutes. It is therefore not surprising that interviewers' judgments of individuals are influenced by generalizations about the applicant's demographic group that the interviewer may have formed over a lifetime." Bendick & Jackson, *Measuring Discrimination*, at 41-42.[6]

This Court has recognized that enforcement alone will not eliminate employment discrimination, rather, Congress "intended" the "statutory words . . . as a spur or catalyst to cause 'employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.'" *Weber*, 443 U.S. at 204 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)). Indeed, at the very moment it passed the Civil Rights Act containing Title VII, Congress recognized, "No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities." H.R.Rep. No. 914, 88th Cong., 1st Sess., pt. 1, at 18 (1963), *reprinted in* 1963 U.S. CODE CONG. & ADMIN NEWS 2355, 2393.

[6] The role of prejudice and stereotype is confirmed by evidence that firms that rely on skills tests instead of subjective evaluation hire more African-American workers controlling for firm size, racial composition of surrounding area, and occupation. Neckerman & Kirschenman, *Hiring Strategies, Racial Bias, and Inner City Workers*, 38 SOC. PROBLEMS 433, 443 (1991).

Contact with diverse peers during higher education can induce precisely the form of "self-examin[ation]" this Court has identified as essential to the elimination of discrimination in employment, as we demonstrate in Section II.

II. THE ADMISSIONS PROGRAMS FURTHER THE COMPELLING INTEREST IN REDUCING DISCRIMINATION

The University's compelling case establishing the educational benefits of a diverse student body rests on two foundations. First, the vast majority of Americans function in segregated settings until they reach college. Thus, higher education presents a unique opportunity and, from the vantage of the workplace, the last opportunity, to foster interaction between diverse individuals. Second, interaction with diverse individuals during higher education is likely to produce positive results due both to students' stage of intellectual, social, and moral development and to the unique environment on college campuses. Empirical research confirms the educational benefits of interaction with diverse peers during higher education.

A. Segregation in the U.S. Prior to College

"[R]esidential segregation 'is a national . . . phenomenon," Justice Scalia recognized in *Freeman v. Pitts*. 503 U.S. 467, 502 (1992) (Scalia, J., concurring) (*quoting Keyes v. School Dist. No. 1, Denver*, 413 U.S. 189, 223 (1973) (Powell, J., concurring in part and dissenting in part)). University of Pennsylvania Professor Thomas J. Sugrue detailed the staggering degree of residential segregation in his expert report and concluded, "Americans of different races and ethnicities . . . live in worlds that have a long history of separation and are still, to a great extent, separate." ERs 18.[7]

[7] The University's expert reports are collected in *The Compelling Need for Diversity in Higher Education* which is cited here as ERs.

Segregated housing patterns lead directly to segregation in schools. "The effect of changing residential patterns on the racial composition of schools, though not always fortunate, is somewhat predictable. Studies show a high correlation between residential segregation and school segregation." *Freeman*, 503 U.S. at 495. Again Professor Sugrue detailed the degree of school segregation and concluded, "American primary and secondary schools are seldom diverse." ERs 18.

Contemporary segregation in schools has been held largely to be beyond the reach of legal remedies. "Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. . . . Residential housing choices, and their attendant effects on the racial composition of schools, present an ever-changing pattern, one difficult to address through judicial remedies." *Freeman*, 503 U.S. at 495.

Surveying the extent of residential and primary and secondary school segregation, Professor Sugrue concluded, "There are unfortunately few places in American society where people of different backgrounds interact, learn from each other, and struggle to understand their differences and discover their commonality." ERs 49. The consequences are obvious:

> Residential and educational distance fosters misconceptions and mistrust. It affords little or no opportunity to disrupt the perpetuation of racial stereotypes that are a basis and justification for racial separation. The high degree of separation by race reinforces and hardens perceptions of racial difference. [ERs 18.]

In sum, this separation "is a seedbed for misinformation, hostility, and fear"—the roots of discrimination. ERs 19.

B. The Conditions for Contact on Campus

University of Michigan Psychology Professor Patricia Gurin explained in her expert report the two reasons why higher education presents a "special opportunity" to disrupt the perpetuation of racial stereotypes. ERs 100. First:

> Students come to universities at a critical stage of their development, a time during which they define themselves in relation to others and experiment with different social roles before making permanent commitments to occupations, social groups, and intimate personal relationships. In addition, for many students college is the first sustained exposure to an environment other than their home communities. [ERs 100.]

Second, the environment on campuses contains elements long found to be critical to positive interaction among diverse individuals: "the presence of diverse others; equality among peers; and discussion under rules of civil discourse." ERs 107-08.

Together, Professors Sugrue and Gurin point out why higher education i government's last, best hope for preventing discrimination in the workplace.

C. The Benefits of Contact With Diverse Peers in Higher Education

1. *Reduction of Stereotypes and Bias*

Professor Gurin found, "The long-term pattern of racial separation noted by many social scientists can be broken by diversity experiences in higher education," thereby lessening stereotypes, prejudices and fears as well as the resulting discrimination such separation breeds. ERs 101. She documented a positive relationship between a diverse student body and students' racial attitudes persisting after graduation.

Professor Gurin's finding is not novel and does not rest on new theoretical foundations. Stated in most basic terms, the

theory is that contact between groups, under the correct conditions, reduces prejudice. This theory has been tested and validated in countless studies. For example, in what has been described as "the most extensive laboratory test of the intergroup contact hypothesis," researchers demonstrated "impressive change of potential practical significance." Pettigrew, *Intergroup Contact Theory*, 49 ANN. REV. PSYCH. 65, 79 (1998) (the cited study is discussed in Cook, *Cooperative Interaction in Multiethnic Contexts*, in GROUPS IN CONTACT: THE PSYCHOLOGY OF DESEGREGATION 155, 156-60 (Miller & Brewer, eds. 1984)). A survey of the literature reports, "The idea that familiarity breeds positivity has usually been sustained . . . particularly when people interact under conditions of relative equality." Sigelman, Bledsoe, Welch, & Combs, *Making Contact? Black-White Social Interaction in an Urban Setting*, 101 AM. J. SOC. 1306, 1307 (1996). While the degree of positive effect varies across studies, two scholars found, "In some instances, the positive effects of interracial contact are modest, but even these modest effects, aggregated over millions of black and white Americans, have the potential to ease the prevailing climate of race relations. And in some instances, the positive effects of interracial contact are substantial." Sigelman & Welch, *The Contact Hypothesis Revisited: Black-White Interaction and Positive Racial Attitudes*, 71 SOC. FORCES 781, 793 (1993).

Just as the theoretical foundation of Professor Gurin's findings are not novel, neither are her empirical findings. The positive effects of increasing students' contact with diverse peers both on reducing fear and prejudice and, as a consequence, increasing the likelihood of living and working in integrated settings after graduation were extensively documented in the first decades of school desegregation and, in the past few years, in studies of diversity in higher education. Two scholars' recent survey of the research found, "The effects of contact on prejudice have been tested in a

variety of settings that include school and colleges . . . . [and p]revious research has generally concluded that equal status, non-competitive contact erodes stereotypes, and contributes to a moderation in racial prejudice." Wood & Sonleitner, *The Effect of Childhood Interracial Contact on Adult Antiblack Prejudice*, 20 INT. J. INTERCULTURAL REL. 1, 2 (1996).

Countless studies of primary and secondary schools confirm these findings. A review of the research by the Chair of the Sociology Department at Notre Dame University concluded, "This research is fairly consistent in reporting that black and white students in desegregated schools are less racially prejudiced than those in segregated schools" and "that interracial contact in desegregated schools leads to an increase in interracial sociability and friendship." Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733, 745 (1998). Moreover, the research finds that these positive effects continue into adulthood. "Findings show that . . . childhood interracial contact promotes real and lasting improvement in racial attitudes into adulthood, both through the disconfirmation of negative racial stereotypes and through a direct effect on prejudice itself." Wood & Sonleitner, *The Effect of Childhood Interracial Contact*, at 14-15.

These findings are also replicated in studies of higher education as well as primary and secondary schools. Using surveys conducted among almost 9,000 college students at over 100 institutions when they were freshman in 1991 and 1992 and again in 1996, Stanford University Professor of Education Anthony L. Antonio found that the type of contact increased by the challenged admissions policies—dining, studying, and socializing with someone from a different racial/ethnic group as well as having a roommate of a different racial/ethnic group—were all positively related to growth in "cultural knowledge/understanding" (including both knowledge of and "ability to get along with people of a

different race/culture"), especially among white students. Antonio, *Student Interaction Across Race and Outcomes in College*, Paper presented at the Ann. Conf. of the Am. Ed. Research Ass'n 7, 8, 18 (April 1998). A survey of students at over 300 colleges and universities conducted by the UCLA Higher Education Research Institute found a significant positive relationship between studying with someone from a different racial group or ethnic background and growth in "acceptance of people of different races/cultures." Hurtado, *Linking Diversity and Educational Purpose: How Diversity Affects the Classroom Environment and Student Development*, in DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 187, 192-93, 196-98 (Orfield, ed. 2001). A survey conducted by the Gallup Poll of students at Harvard and the University of Michigan Law Schools found both that the students reported more contact with people of different races and ethnicities in college and law school than while growing up or in high school and that the vast majority of students reported that the diversity of the student body had enhanced their ability to work effectively and get along with members of other races. Orfield & Whitla, *Diversity and Legal Education: Student Experience in Leading Law Schools*, in DIVERSITY CHALLENGED, at 143, 155-59.[8]

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[8] Recognizing that the educational benefits the University seeks to advance through the challenged admissions policies are dependent on contact between diverse students—contact in classrooms, in the cafeteria, in dorm rooms, and on playing fields—makes it clear why a critical mass of minority students is necessary. Professor Gurin's report explained why "[a]dequate representation" was necessary to produce the benefits of contact and to avoid negative effects associated with severe under-representation, linked the identified educational benefits specifically to the "interaction with diverse peers afforded by Michigan's degree of structural diversity," and compared long-term outcomes from institutions with different percentages of minority students. ERs 116-18, 153. The University's logic is consistent with findings from earlier studies of school desegregation which found that absent a critical mass of minority students such students would "protect themselves by attempting to isolate themselves from the larger group" and thus the conditions for "maximizing contact and friendship formation" would be lost. McConahay, *Reducing Racial Prejudice in Desegregated Schools*, in EFFECTIVE SCHOOL DESEGREGATION: QUANTITY, QUALITY, AND FEASIBILITY 35, 39-40 (Hawley, ed. 1981).

It is critical to understand that the benefits of a diverse student body do not rest on stereotypes or the assumption that all African-American, Hispanic, or Native American students think alike, or think differently than White students, because, as Justice O'Connor wrote in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), "the interest in diversity of viewpoints provides no legitimate, much less important, reason to employ race classifications apart from generalizations impermissibly equating race with thoughts and behavior." *Id.* at 615 (O'Connor, J., dissenting). The fundamental lesson the University imparts through a diverse student body is not that people with different skin colors think differently, but precisely the opposite—that such stereotypes and the prejudice they lead to should be discarded based on meaningful engagement with individual students of different races and ethnic groups holding many different views and coming from many different backgrounds. As Justice Stevens explained in *Wygant*, "one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous 'melting pot' do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only 'skin deep'; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process." 476 U.S. at 315 (Stevens, J., dissenting). Here, the lesson is taught not by teachers but by students, and it is well recognized that "the influence of peers may be as great or greater than that of faculty." E. PASCARELLA & P.

TERENZINI, HOW COLLEGE AFFECTS STUDENTS: FINDINGS AND INSIGHTS FROM TWENTY YEARS OF RESEARCH 313 (1991). Sustained, individual contact with diverse students during higher education provokes critical thinking and breaks down stereotypes precisely because it contradicts the "generalizations" criticized by Justice O'Connor which are formed during earlier, ordinarily segregated stages of life.

2. *Benefits in the Workplace*

The empirical research demonstrates not only that students carry the lessons learned from interaction with diverse peers into adulthood, it specifically demonstrates that they carry those lessons into the workplace.

Considering data from nearly 200 colleges and universities and their students four and nine years after entry, Professor Gurin found that attending an institution with a more diverse student body "resulted in more diverse . . . work associates nine years after college entry." ERs 115. Attending a college or university with a diverse student body "had dramatic long-term effects on the likelihood that white students . . . would . . . work in diverse settings after college." ERs 116. Here again, Professor Gurin's results are simply confirmation of previous, long-term studies.

Surveying the literature on school desegregation in 1989, two Johns Hopkins University scholars found that "both Blacks and Whites who attended desegregated schools were more likely to function in desegregated environments in later life." Braddock & McPartland, *Social-Psychological Processes that Perpetuate Racial Segregation: The Relationship Between School and Employment Desegregation*, 19 J. OF BLACK STUDIES 267, 269 (1989). Specifically, "Blacks who had White work associates . . were shown to be significantly less likely to have attended a minority (segregated) high school." *Id.* at 271. In other words,

"earlier desegregation experience[] . . . has an independent [positive] effect . . . on the racial composition of . . . coworker groups." *Id.* This is true "across gender groups and labor-market sectors." *Id.* at 274. In fact, experience in a desegregated school has an even more positive relationship on "desegregation in work environments" than experience in an integrated neighborhood. *Id.* at 286. This finding has been confirmed in two studies of data generated by multiple, massive, long-term national surveys published in the mid-1990s. These studies found that "school racial composition has a strong, statistically significant, and positive effect on the likelihood that Blacks will have White coworkers and that Whites will have Black coworkers." Trent, *Outcomes of School Desegregation: Findings from Longitudinal Research*, 66 J. OF NEGRO ED. 255, 256 (1997). "The . . . results are unequivocal: school desegregation experience is the major determinant of the likelihood that African Americans, Mexican Americans and Whites will work in firms with a higher percent white for African Americans and Mexican Americans and a higher percent non-white for Whites." Braddock, Dawkins & Trent, *Why Desegregate? The Effect of School Desegregation on Adult Occupational Desegregation of African Americans, Whites and Hispanics*, 31 INT. J. OF CONTEMP. SOC. 273, 280 (1994). This correlation is independent of residential segregation, occupation, age and other possible influences. *Id. See also* Dawkins & Braddock, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. OF NEGRO ED. 394, 402 (1994); Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students*, in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 597, 610 (Banks, ed. 1995) ("In the area of employment, there is . . . evidence that school desegregation breaks down intergroup barriers."); Sigelman, *et al.*, *Making Contact*, at 1323 ("as is

true for blacks, having attended an integrated school as a child increases whites' adult contact with blacks"); Crain, *School Integration and Occupational Achievement of Negroes*, 75 AM. J. OF SOC. 593, 597 (1970) ("convincing evidence . . . that Negro alumni of integrated schools are in 'integrated' jobs"); R. CRAIN & C. WEISMAN, DISCRIMINATION, PERSONALITY, AND ACHIEVEMENT: A SURVEY OF NORTHERN BLACKS 161-63 (1972) ("Alumni of integrated schools are more likely to move into occupations traditionally closed to blacks.")

While many factors contribute to this positive relationship between desegregated education and integrated work lives, it is clear that one important causal factor is the lessening of negative racial stereotypes among both African-American and White students. National surveys show that breaking the pattern of racial segregation in schools lessens "social-psychological barriers" to later interracial contact. Braddock & McPartland, *Social Psychological Processes*, at 285. In plain terms, "cross-race contacts in desegregated schools reduce White students' negative racial stereotypes and fears of hostile reactions in interracial situations, [making] these White students as adults . . . less resistant to Blacks being admitted into coworker . . . groups." *Id.* "Whites in desegregated schools frequently show a decrease in their often initially high levels of fear and avoidance of African Americans, and an increasing willingness and ability to work with them." Schofield, *Review of Research*, at 610. On the other side of the racial divide, Blacks who attended segregated schools perceive co-workers in majority white workplaces as less friendly than coworkers in majority black workplaces and rate the competence of white supervisors substantially lower than black supervisors while these differences are either insignificant or substantially smaller for Blacks who attended desegregated schools. Braddock & McPartland, *More Evidence on Social-Psychological Processes that Perpetuate Minority Segregation: The*

Relationship of School Desegregation and Employment Segregation, Report No. 338 19-20, Center for Social Org. of Schools, Johns Hopkins Univ. (1983). An examination of data from a national, longitudinal survey found that "black, Latin, and white graduates of segregated schools perceive racially-mixed work groups as less friendly than racially-homogeneous ones. . . . Respondents from desegregated schools make . . . much less of a distinction." Schofield, *Review of Research*, at 610.[9] Other scholars have confirmed, through data drawn from similar, national surveys, that "attending desegregated schools improves the attitudes of both blacks and whites toward future interracial situations." Braddock, Crain, & McPartland, *A Long-Term View*, at 262. Indeed, this finding has been replicated for Whites, Blacks and Hispanics. Dawkins & Braddock, *The Continuing Significance of Desegregation*, at 402; Wells & Crain, *Perpetuation Theory and the Long Term Effects of School Desegregation*, 64 REV. OF ED. RESEARCH 531, 551 (1994).[10]

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[9] These studies show not only that Black students who attended segregated schools are more likely to be averse to working in an integrated setting, but that they are also are more likely to *believe* they are being discriminated against both in college and in employment settings than Black students who attended desegregated schools. Braddock, Crain, & McPartland, *A Long-Term View of School Desegregation: Some Recent Studies of Graduates as Adults*, 66 PHI DELTA KAPPAN 259, 262 (Dec. 1984).

[10] The interactions produced by the admissions programs at issue will have a positive impact not only on attitudes that will be carried into the workplace, but on social networks that will also play a role in determining what workplace students enter. Most employers rely on inexpensive and informal hiring procedures such as referrals from current employees. Braddock & McPartland, *How Minorities Continue to Be Excluded from Equal Employment Opportunities: Research on Labor Market and Institutional Barriers*, 43 J. OF SOC. ISSUES 5, 7-8 (1987). Because of continued segregation in housing and schools, "black job seekers are primarily tied to social networks composed of other blacks who, on the

After reviewing the research on school desegregation, racial attitudes, and employment, one scholar concluded, "The claims of formal contact theory may be too modest with respect to school desegregation. . . . [T]he positive effects of school desegregation appear to be far reaching, and include lifelong social integration and occupational attainment." Braddock, *School Desegregation and Black Assimilation*, 41 J. OF SOC. ISSUES 9, 17 (1985). Three of the principle scholars involved in this research for the past 30 years, conclude, "we now have considerable evidence that school desegregation is a necessary step to insure equality of economic opportunity to minorities in U.S. society." Braddock, Crain, & McPartland, *A Long-term View*, at 264.

In sum, the evidence presented by the University; basic experimental research on social contact; long-term, nation-wide studies of school integration; and studies of diversity in higher education all confirm that the interaction of diverse students during higher education reduces stereotypes and prejudices and thus allows these students to enter the workplace significantly more likely to comply with the command that they not discriminate on the basis of race, color or national origin.

III. THE ADMISSIONS PROGRAMS ARE NARROWLY TAILORED

The University and other *amici* will demonstrate that the admissions policies "are narrowly tailored measures that further compelling governmental interests." *Adarand*, 515 U.S. at 227. We write separately only to address the existence of race-neutral alternatives.

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average, are not as well situated to know about many desirable job openings." *Id.* at 8 This results in what has been called "social network segregation." *Id.* Successful school desegregation disrupts this process and leads to significantly more African-American students entering integrated workplaces. *Id.* at 9.

A. There Are No Race-Neutral Alternatives

An explicit objective of the admissions policies at issue is to obtain a student body that is racially and ethnically diverse as well as diverse along other dimensions. The educational benefits of the policies discussed above, most obviously, reducing prejudice and increasing tolerance, cannot be obtained unless this race-conscious objective is achieved. The United States argues that "diversity" can be attained through "race-neutral" means such as the percentage plans adopted in California, Texas and Florida. *Grutter*, Brief of the U.S. at 8.[11] But this equivocal position is analytically flawed.

If the University were to rely on the degree of residential and school segregation described above by attempting to achieve its race-conscious objective through facially race-neutral means, such as admitting the top 10% of students from all public high schools, its action would not be "a race-neutral alternative[]" under the Constitution as the United States suggests. Rather, the action would be the mirror image of the anti-busing initiative held unconstitutional by this Court in *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982). That initiative "nowhere mention[ed] 'race' or 'integration,'" yet this Court held that "despite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes." *Id.* at 471. Because of the existence of residential and consequent school segregation, Washington voters were able to use facially race-neutral means—limitations on busing—to achieve a race-conscious objective—the perpetuation of segregation. Similarly, the United States proposes that the University could rely on the same residential and consequent school segregation to achieve a race-conscious goal—a diverse student body—through facially race-neutral means—such as

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[11] Obviously, this argument has no application to the Law School.

a 10% plan. In *Seattle School Dist.*, this Court held that the facially-neutral initiative was "inherently suspect." *Id.* at 485. For the same reasons, the United States has not proposed any truly race-neutral means of achieving the University's legitimate race-conscious objectives.

Thus, the United States advances not a race-neutral alternative but a disingenuous one. The United States posits that "[m]easures that ensure diversity . . . are important components of government's responsibility to its citizens." *Grutter*, Brief of the U.S. at 8. But if "ensur[ing] diversity" means what it must mean in order to achieve the objectives sought here, i.e. ensuring racial and ethnic diversity, then the "[m]easures" endorsed by the United States are not race-neutral. As Justice O'Connor wrote in *J.A. Croson*, "'[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment . . . , it is especially important that the reasons for any such classifications be clearly identified and unquestionably legitimate.'" 488 U.S. at 505 (*quoting Fullilove v. Klutznik*, 448 U.S. 448, 533-35 (1980) (Stevens, J., dissenting)). In this case, the University has "clearly identified" the reasons for its race-conscious policies. These reasons are "unquestionably legitimate." The policies are surely not rendered unconstitutional because the same race-conscious objectives can be pursued in a less forthright manner, as the United States suggests.[12]

CONCLUSION

For the above-stated reasons, this Court should hold that the challenged admissions policies are constitutional.

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[12]The University and other *amici* will demonstrate that the "race-neutral" alternatives pointed to by the United States cannot, in fact, achieve the objectives sought here.

Respectfully submitted,

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Nos. 02-241 & 02-516

IN THE

Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

—v.—

LEE BOLLINGER, *et al.*,

Respondents.

JENNIFER GRATZ and PATRICK HAMACHER,

Petitioners,

—v.—

LEE BOLLINGER, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR *AMICI CURIAE* SENATORS THOMAS A. DASCHLE, EDWARD M. KENNEDY, HILLARY RODHAM CLINTON, JON S. CORZINE, RICHARD J. DURBIN, JOHN EDWARDS, RUSSELL D. FEINGOLD, JOHN F. KERRY, MARY L. LANDRIEU, FRANK R. LAUTENBERG, CHARLES E. SCHUMER AND DEBBIE STABENOW IN SUPPORT OF RESPONDENTS

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Adarand Constructors, Inc. v. *Peña*, 515 U.S. 200 (1995) 6, 7, 8

Alexander v. *Sandoval*, 532 U.S. 275 (2002) 25

Atkins v. *Virginia*, 536 U.S. 304 (2002) 25

BMW of North America, Inc. v. *Gore*, 517 U.S. 559 (1996) 28

Board of Education of the Westside Community Schools v. *Mergens*, 496 U.S. 226 (1990) 26

Bob Jones University v. *United States*, 461 U.S. 574 (1983) 23

Brown v. *Board of Education of Topeka*, 347 U.S. 483 (1954) 11

Burnham v. *Superior Court of California, County of Marin*, 495 U.S. 604 (1990) 25

Burson v. *Freeman*, 504 U.S. 191 (1992) 25

City of Cleburne, Texas v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) 24

City of Richmond v. *J.A. Croson Co.*,
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Coker v. *Georgia*,
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Conroy v. *Aniskoff*,
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Easley v. *Cromartie*,
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Food & Drug Administration v.
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Grove City College v. *Bell*,
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Illinois Brick Co. v. *Illinois*,
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J.E.B v. *T.B.*,
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Johnson v. *Transportation Agency, Santa Clara County, California*, 480 U.S. 616 (1987) 7

Landgraf v. *U.S.I. Film Products.*,
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Keyishian v. *Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967) 2, 22

McCarthy v. *Bronson*,
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McLeod v. *J.E. Dilworth Co.*,
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Miller v. *Johnson*,
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Mobile v. *Bolden*,
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Murray v. *Giarratano*,
492 U.S. 1 (1989) 28

Neal v. *United States*,
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Offutt v. *United States*,
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Patterson v. *McLean Credit Union*,
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Penry v. *Lynaugh*,
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Planned Parenthood of Southeastern Pennsylvania v. *Casey*, 505 U.S. 833 (1992) 8, 12

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Regents of the University of California v. *Bakke*,
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Regents of the University of Michigan v. *Ewing*,
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Republican Party of Minnesota v. *White*,
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Romer v. *Evans*,
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Stanford v. *Kentucky*,
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United States v. *Ballard*,
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United States v. *Gainey*,
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United States v. *Virginia*,
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Washington v. *Glucksberg*,
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Wittmer v. *Peters*,
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Wygant v. *Jackson Board of Education*,
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Brief for Respondents,
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534 U.S. 103 (2001) (No. 00-730) 28

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Brief for United States,
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Constitution and Statutes

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U.S. CONST. amend. XIV ..... *passim*

Age Discrimination Act of 1975,
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Civil Rights Act of 1964,
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(codified at 42 U.S.C. § 2000d) ..... *passim*

Civil Rights Act of 1991,
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Civil Rights Restoration Act of 1987,
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(codified at 42 U.S.C. § 2000d-4a *et seq.*).....14, 16

Emergency School Aid Act ,
Pub. L. No. 92-318, Title VII, §§ 701-720,
86 Stat. 235, 354-371 (1972) (repealed 1978).....17

Excellence in Mathematics, Science, and Engineering
Education Act, Pub. L. 101-589,
104 Stat. 2881 (1990) (repealed 1994).....20

Higher Education Amendments of 1992,
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(codified as amended in scattered sections
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Higher Education Amendments of 1998,
Pub. L. 105-244, 112 Stat. 1581 (1998)
(codified as amended in scattered sections
of 20 U.S.C. and 42 U.S.C.).....21

Magnet Schools Assistance Program,
Pub. L. No. 98-377, Title VII,
98 Stat. 1267, 1299-1302 (1984) (repealed 1988).....18

Improving America's Schools Acts of 1994,
Pub. L. 103-382, Title V, § 5101,
108 Stat. 3518, 3691 (1994) (amended 2002).....18

National Science Foundation Authorization Act of 2002,
Pub. L. 107-368, § 10, 116 Stat. 3034, 3049 (2002)
(codified at 41 U.S.C. § 1862n-1).....20

No Child Left Behind Act of 2001,
Pub. L. 107-110, 115 Stat. 1425 (2002),
(codified at 20 U.S.C. § 6301 *et seq.*).....18, 19, 20, 21

Rehabilitation Act Amendments of 1986,
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Voting Rights Act Amendments of 1982,
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(codified at 42 U.S.C. § 1973b) 14

Rules and Regulations

Notice of Proposed Policy Guidance,
56 Fed. Reg. 64,548, 64,549 (Dec. 10, 1991).....15

59 Fed. Reg. 8,756, 8761-62 (Feb. 23, 1994).....15

Legislative Material

H.R. 3330, 105th Cong. (1998) 17

110 CONG. REC. 6552 (1964) 6

142 CONG. REC. H5282 (1996).....17

H.R. Rep. No. 92-576 (1971).....17, 18

H.R. Rep. No. 102-411 (1991).....16

H. R. Rep. No. 102-447 (1992).....21

H. R. Rep. No. 102-1086 (1992).....16

H.R. Rep. No. 106-370 (1999).....21

H.R. Rep. No. 106-645 (2000).....21, 22

H.R. Rep. No. 107-229 (2001).....22

S. Rep. No. 92-61 (1971).....18

S. Rep. No. 96-49 (1979).....20

S. Rep. No. 101-412 (1990).....20

S. Rep. No. 106-261 (2000).....18

Letter from Representatives J.C. Watts (R-OK) and John Lewis (D-GA) (May 5, 1998) 17

Miscellaneous

Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195 (2002) 10, 11

WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: THE LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998) 12, 13

J.H. Braddock, et al., *Why Desegregate? The Effect of School Desegregation on Adult Occupational Desegregation of African Americans, Whites, and Hispanics*, 31 INT'L J. CONTEMP. SOC. 273 (1994).....10

T.L.C., *Thomas Carlyle and Affirmative Action*, 24 J. Blacks Higher Educ. 7 (Summer 1999).....12

Cathy J. Cohen & Michael C. Dawson, *Neighborhood Poverty and African American Politics*, 87 AM. POL. SCI. REV. 286 (1993) 13

Compelling Interest: Examining the Evidence on Racial Dynamics in Higher Education (Mitchell Chang, et al. eds.) 8

Julie Berry Cullen, et al., *Jockeying for Position: High School Student Mobility and Texas' Top-Ten Percent Rule* (unpublished manuscript Nov. 2002).....27

Erik Erikson, *Ego Development and Historical Change*, *in* 2 PSYCHOANALYTIC STUDY OF THE CHILD 359-96 (1946) 11

Michael A. Fletcher, *Race-Neutral Plans Have Limits in Aiding Diversity, Experts Say*, WASH. POST, Jan. 17, 2003, at A12.....27

Erica Frankenberg, et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* (Jan. 2003)...13

Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917 (1988).....24

Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521 (2002) 4

Expert Report of Patricia Gurin, in *Gratz* v. *Bollinger*, No. 97-75321 (E.D. Mich.) and *Grutter* v. *Bollinger*, No. 97-75928 (E.D. Mich.).....10, 11

Sylvia Hurtado, et al., *Enacting Diverse Learning Environments: Improving the Climate for Racial/Ethnic Diversity in Higher Education* (1999).....9

Sylvia Hurtado, *Linking Diversity and Educational Purpose*, *in* DIVERSITY CHALLENGED: EVIDENCE OF THE IMPACT OF AFFIRMATIVE ACTION (Gary Orfield, ed. Nov. 2001).....11

Carl Irving, *Texas's 'Top Ten-Percenters': In the Absence of Affirmative Action, the State Struggles to Increase Minority Enrollment*, National Cross-Talk (Summer 2002) 26

Donald R. Kinder & Tali Mendelberg, *Cracks in American Apartheid: The Political Impact of Prejudice Among Desegregated Whites*, 57 J. POL. 402 (1995) 13

ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992) 5, 25

Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381 (1998) 24

Patricia Mann, *The Educational Possibility of Multi-Racial/Multi-Ethnic College Classrooms*, in DOES DIVERSITY MAKE A DIFFERENCE? THREE RESEARCH STUDIES ON DIVERSITY IN COLLEGE CLASSROOMS (2000) 10

Geoffrey Maruyama & Jose F. Moreno, *University Faculty Views About the Value of Diversity on Campus and in the Classroom*, in DOES DIVERSITY MAKE A DIFFERENCE? THREE RESEARCH STUDIES ON DIVERSITY IN COLLEGE CLASSROOMS (2000) 10

DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID (1993) 13

Jeffrey F. Milem & Kenji Hakuta, *The Benefits of Racial and Ethnic Diversity in Higher Education*, in MINORITIES IN HIGHER EDUCATION 1999-2000: SEVENTEENTH ANNUAL STATUS REPORT (Deborah J. Wilds ed. 2000) 9

CHARLES C. MOSKOS & JOHN SIBLEY BUTLER, ALL THAT WE CAN BE: BLACK LEADERSHIP & RACIAL INTEGRATION THE ARMY WAY (1996) 22

Ron Nissimov, *UT Tailors Scholarship to Minority High Schools*, HOUSTON CHRON., Feb. 12, 2002, at 21 27

Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, in DIVERSITY CHALLENGED: EVIDENCE OF THE IMPACT OF AFFIRMATIVE ACTION (Gary Orfield, ed. Nov. 2001) 9

Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427 (1997) 5

Neil L. Rudenstine, *Student Diversity and Higher Learning*, in DIVERSITY CHALLENGED: EVIDENCE OF THE IMPACT OF AFFIRMATIVE ACTION (Gary Orfield, ed. Nov. 2001) 9

Expert Report of Thomas J. Sugrue, in *Gratz* v. *Bollinger*, No. 97-75321 (E.D. Mich.) and *Grutter* v. *Bollinger*, No. 97-75928 (E.D. Mich.) 13

Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996) 5

United States Commission on Civil Rights, Office for Civil Rights Evaluation, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education* (Nov. 2002) 27

Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 N.Y.U. L. REV. 1 (1997) 12

STATEMENT OF INTEREST*

Amici are United States Senators elected from different parts of the Nation. We submit this Brief to urge that the Court reaffirm Justice Powell's conclusion in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), that institutions of higher education have a compelling interest in the educational benefits of diversity and that such institutions may, consistent with the Constitution and Title VI, 42 U.S.C. § 2000d, adopt policies that include racial minority status as one of a number of factors considered in determining which academically qualified applicants will be offered admission.

As members of the branch to which the Constitution assigns responsibility for "enforc[ing], by appropriate legislation," the anti-discrimination guarantees of the Thirteenth and Fourteenth Amendments, *see* U.S. CONST. amends. XIII § 2, XIV § 5, and of Senate Committees with principal jurisdiction over our Nation's civil rights and education laws, *Amici* have devoted substantial attention to the vital issues implicated by the *Bakke* decision. We have worked to forge consensus on measures aimed at broadening educational opportunity and promoting inclusion. These efforts, we believe, have made our Nation better and stronger.

We submit this Brief to bring to the Court's attention the longstanding practices and considered judgments of the legislative branch of the federal government concerning the questions these cases present.

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* This brief was not authored in any part by counsel for a party, and no one other than *Amici* or their counsel made a monetary contribution to its preparation or submission. By letters on file with the Court, all parties have consented to its submission.

SUMMARY OF ARGUMENT

More than two decades ago, Justice Powell's *Bakke* opinion recognized the "paramount" importance of policies that promote racial diversity in higher education.

Over the years since then, the Executive and Legislative branch have resoundingly endorsed Justice Powell's view through a wide range of actions. Experience and substantial empirical evidence both have confirmed the correctness of Justice Powell's assessment. Indeed, admissions policies aimed at promoting diversity have strengthened our society, our economy, and our democratic institutions in ways that even he may not have foreseen. Such policies are inseparable from the core functions of higher education – broadening the minds of young adults and preparing them for citizenship – and are indispensable to overcoming the conditions of racial separation, inequality, misunderstanding and mistrust that continue to prevent our Nation from achieving its full promise.

In this Brief, we show that there is no reason for the Court to depart either from the result reached in *Bakke* or the legal principles articulated in Justice Powell's opinion. The *Bakke* decision was, we submit, entirely sound as a matter of constitutional and statutory interpretation, and the standards articulated in Justice Powell's opinion have proved intelligible to educators, legislators and courts alike.

Further, the intervening decades have seen no erosion in *Bakke*'s legal and factual underpinnings. Rather, in every important way, this Court's subsequent constitutional cases have built upon the key premises of Justice Powell's opinion, and recent social science research has documented, in concrete ways, what he understood to be an indisputable fact: that students benefit from "wide exposure to the ideas and mores of students as diverse as this nation of many peoples." 438 U.S. at 313 (Opinion of Powell, J.) (quoting *Keyishian* v. *Board of Regents of the Univ. of the State of New York*, 385 U.S. 589, 603 (1967)).

But there is an even stronger reason for continued adherence to *Bakke*. As we explain, Congress has remained free in the intervening years to revisit the *statutory* issue presented in *Bakke* and to thereby deny Justice Powell's opinion practical effect.

Yet Congress has not taken any step to undermine *Bakke*. On the contrary, both Congress and the Executive have concluded, over the course of long involvement with the issues, that Justice Powell's decision in *Bakke* was not only legally *controlling*, but that it was *correct* as a matter of fundamental policy. This conclusion has been subscribed to by members of both political parties, and has prevailed across administrations with different political philosophies. It has been expressed through numerous legislative acts, including significant amendments to Title VI itself; through rejection of proposals that would have undermined *Bakke*; through passage of other laws that can only be understood as endorsing *Bakke's* interpretation of Title VI; and through longstanding, congressionally endorsed Executive interpretation. Congress has appropriated hundreds of millions of dollars, including the federal funds received by Respondents in these cases, on the understanding that compliance with *Bakke is* compliance with federal law.

The significance of this record of careful, sustained attention and endorsement is at least twofold. First, under the Court's statutory interpretation precedents, it would be extraordinary to construe Title VI as making *unlawful* an admissions policy that is in all meaningful respects indistinguishable from the "Harvard Plan." That argument failed to persuade a Court majority 24 years ago, and since then Congress has treated Justice Powell's opinion as controlling.

Second, and no less important than the specific legislative measures passed in accordance with *Bakke*, is the broader congressional judgment these measures express: that diversity and inclusion in institutions of higher education are indispensable to attaining overarching

national goals. In revisiting Justice Powell's conclusion that the purposes served by admissions policies like those at the University of Michigan are "compelling," this Court may not lightly set aside the determinations of the branch of government elected by the people and endowed by the Constitution with responsibility for identifying what measures are "appropriate" to secure constitutionally guaranteed civil rights to all Americans.

The record of consideration and debate we discuss below vindicates Justice Powell's judgment that these important issues need not, and therefore should not, be the subject of a nationwide, judicially imposed admissions rule.

ARGUMENT

I. *BAKKE* WARRANTS CONTINUED ADHERENCE.

A. Justice Powell's Opinion Was Constitutionally Sound and Practically Viable.

Although it has sometimes been characterized as a "compromise," Justice Powell's *Bakke* opinion made no attempt to "broker" a political consensus between factions of the Court. His opinion instead represents a quintessentially *judicial* task: reconciling conflicting legal and constitutional imperatives in light of both a history of stark and reprehensible failure, *see Bakke*, 438 U.S. at 387-395 (Marshall, J., dissenting), and a "dream" for a future where racial inequality no longer divides Americans, *see City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 505-06 (1989).[1]

The evident virtues of Justice Powell's resolution are substantial. His opinion highlighted the dangers of reflexive, unthinking reliance on race, but it did not force all

[1] It might be said that Justice Powell's opinion was addressing "a condition, not a theory." *See United States* v. *Virginia*, 518 U.S. 515, 563 (1996) (Rehnquist, C.J., concurring); *see also* Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 522 (2002).

institutions of higher education to pursue a single course. It did not impose a nationwide rule that race could *not* be considered, but it also did not *require* institutions to adopt admissions policies based on the Harvard Plan.

Moreover, the standards Justice Powell's opinion established are well understood by educators, legislators and students, as well as by courts. Admissions policies that rely on quotas or treat race as determinative violate the law. By contrast, institutions that pursue the educational benefits of diversity are not disabled from considering race alongside other factors in deciding which academically qualified applicants to admit.

Thus, the opinion is important not only for what it resolved, but also for what it *left open* for others to decide. Educators retain substantial discretion, and at the same time the basic premises underlying the opinion remain open to debate and revision in the political process. *See* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 93 (1996) ("[I]t would be a democratic disaster if the Court were to issue a broad ruling that foreclosed democratic debate.").

Finally, at least implicit in Justice Powell's opinion was recognition that the legal materials the Court was called upon to apply in *Bakke* (and again here) – the Fourteenth Amendment and Title VI – do not specify clear answers to the question presented. This is because the Framers of the Fourteenth Amendment *did not* intend to foreclose government consideration of race *per se*. *See* Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 430-431 (1997) (collecting explicitly race-conscious statutes enacted by Reconstruction Congress); ANDREW KULL, THE COLOR-BLIND CONSTITUTION 67 (1992) (citing evidence that in drafting the Fourteenth Amendment, the Thirty-ninth Congress *rejected* proposed "color-blindness" language). Although it was forcefully asserted in *Bakke* that a different conception of "discrimination" – one referring to *any* distinction based on race – had animated Congress when it enacted Title VI, that

contention failed to persuade a majority of the Court. *Compare* 438 U.S. at 413-14 (Stevens, J., dissenting in part), *with* 438 U.S. at 284, 284-87 ("The concept of 'discrimination,' like the phrase 'equal protection of the laws,' is susceptible of varying interpretations.").[2]

B. There Is No Legitimate Reason, Let Alone Any "Special Justification," for Rejecting *Bakke*.

1. Subsequent Constitutional Rulings Build Upon Rather than Undermine *Bakke*.

Since *Bakke*, this Court's constitutional decisions have reaffirmed each of the key insights expressed in Justice Powell's opinion. His conclusion that strict scrutiny is the appropriate standard is now the law. *See Croson*, 488 U.S. at 493-94; *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 227 (1995). It is now also established, as was suggested by Justice Powell's endorsement of the Harvard Plan, that such review is not to be "fatal in fact." *Adarand*, 515 U.S. at 237.[3] Rather, strict scrutiny serves as a *means* for determining whether the purpose claimed to be advanced by a classification is the actual one, and if so, whether it is "benign." *See Croson*, 488 U.S. at 493.

Nor has intervening case law undermined the distinction between a rigid quota and a policy that considers race or gender as one of many factors. To the contrary, this Court has confirmed that the line between the two is "'is none the

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[2] The legislative history of Title VI provides substantial support for construing the statutory language, as Justice Powell did, in light of an overarching commitment to inclusion. *See, e.g.*, 110 CONG. REC. 6552 (1964) (statement of Sen. Humphrey) (arguing that the Civil Rights Act responded to the desire of excluded races "to be part of our national life" by advancing "the full participation of the American people in their society and in their community life").

[3] Indeed, we are reminded that: "This Court never has held that race-conscious decision making is impermissible in all circumstances." *Shaw* v. *Reno*, 509 U.S. 630, 642 (1993).

worse for being narrow.'" *Bakke*, 438 U.S. at 318 (quoting *McLeod* v. *Dilworth*, 322 U.S. 327, 329 (1944)). In *Johnson* v. *Santa Clara Transportation Agency*, 480 U.S. 616, 638 (1987), the Court upheld a public employer's use of gender as a "plus" in making a promotion decision, *see id.* at 652, 647-57 (O'Connor, J., concurring in judgment) (concluding that the policy satisfied Equal Protection standards). And in *Easley* v. *Cromartie*, 532 U.S. 234 (2001), the Court reaffirmed that only government action *predominantly* motivated by racial considerations raised constitutional problems. The reason for this distinction was the same one articulated in *Bakke*: "appearances do matter." *See Shaw* v. *Reno*, 509 U.S. 630, 647 (1993); *Bakke*, 438 U.S. at 319 n.53 (explaining that "'[j]ustice must satisfy the appearance of justice'") (quoting *Offutt* v. *United States*, 348 U.S. 11, 14 (1954)).

Any risk that race-based admissions policies will reinforce stereotypical "perception[s] that members of the same racial group . . . think alike," *Shaw*, 509 U.S. at 647, is eliminated when race is part of a broader process, and not singled out from other relevant considerations. Under those circumstances, as Justice Powell explained, a disappointed applicant has "no basis to complain of unequal treatment under the Fourteenth Amendment." *Bakke*, 438 U.S. at 318.

Additionally, while the level of judicial scrutiny is not to vary according to the race of the individual complainant, the Court has made clear that policies aimed at inclusion do not pose the same constitutional hazards as those that entail exclusion or separation. *See Adarand*, 515 U.S. at 229 (decision to require consistent strict scrutiny does not ignore the "difference between 'an engine of oppression' and an effort 'to foster equality in society'") (quoting dissent). When government undertakes to exclude a class of individuals on account of group membership, there is reason for concern that it is expressing contempt or stereotype about that class, *see Romer* v. *Evans*, 517 U.S. 620, 632 (1996); perpetuating and aggravating historic discrimination, *see Virginia*, 518 U.S. at 534; or impeding its citizens from

interacting with one another, *see Shaw*, 509 U.S. at 646-47. Inclusive policies, on the other hand, present no such concerns about the government's intentions. *Cf. Adarand*, 515 U.S. at 275 (Ginsburg, J., dissenting) (noting that judicial scrutiny should be "fatal" for "a *Korematsu*-type classification").[4]

Finally, the Court's recent cases refute the claim that strict scrutiny is incompatible with respect for educators' good faith judgments concerning "who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J. concurring); *see also, e.g., Regents of the Univ. of Michigan* v. *Ewing*, 474 U.S. 214, 225 (1985) (requiring restrained judicial review of academic decisions). Educational decisions, like those allocating political representation, are sensitive and complex; they implicate values that federal courts strive to respect, such as academic freedom and self–government. *See Miller* v. *Johnson*, 515 U.S. 900, 915 (1995) (citing Justice Powell's *Bakke* opinion).

2. *Bakke's* Factual Understandings Regarding the Benefits of Diversity Are Unassailable.

Nor can *Bakke* be grouped with decisions found to rest on a later-discredited "understanding of facts." *See Planned Parenthood of S.E. Pa.* v. *Casey*, 505 U.S. 833, 862-63 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.) (discussing *Plessy* v. *Ferguson*, 163 U.S. 537 (1896)).

On the contrary, an ever-mounting body of empirical and social science evidence confirms Justice Powell's conclusion that individual students and the Nation as a whole benefit from admissions policies that promote student diversity. *See generally Compelling Interest: Examining the*

[4] The constitutional distinction between categorical exclusion based on race or gender and individual decisions that are influenced by those considerations was highlighted in the dissenting opinion in *J.E.B.* v. *T.B.*, 511 U.S. 127, 156-63 (1994) (Scalia, J., dissenting).

Evidence on Racial Dynamics in Higher Education (Mitchell Chang, et al. eds.) (overview of research on race and higher education); Jeffrey F. Milem & Kenji Hakuta, *The Benefits of Racial and Ethnic Diversity in Higher Education, in* MINORITIES IN HIGHER EDUCATION 1999-2000: SEVENTEENTH ANNUAL STATUS REPORT 39-44 (Deborah J. Wilds ed., 2000) (overview of research on benefits of racial diversity in higher education); Sylvia Hurtado, et al., *Enacting Diverse Learning Environments: Improving the Climate for Racial/Ethnic Diversity in Higher Education* (1999) (review of research on racial diversity and campus climate).[5]

Student body diversity, these studies establish, can strongly and positively affect learning, both in and out of the classroom. *See* Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools, in*

[5] Recognition of the enlightening influence of diversity in education and the vital benefits that such diversity provides our democracy did not begin with *Bakke*. In *Sweatt* v. *Painter*, 339 U.S. 629 (1950), this Court firmly rejected the notion that a racially segregated law school could provide an "equal" legal education. The Court answered that a "law school . . . cannot be effective in isolation from the individuals and institutions with which the law interacts." *Id.* at 634. Likewise, in *United States* v. *Ballard*, 329 U.S. 187, 193 (1946), the Court rejected assertions that an "all male [jury] panel drawn from the various groups within a community will be as truly representative as if women were included [because. . . .] the factors which tend to influence the action of women are the same as those which influence the action of men – personality, background, economic status – and not sex." As the *Ballard* Court explained: "It is not enough to say that women when sitting as jurors neither act nor tend to act as a class," because "a community made up exclusively of one [sex] is different from a community composed of both." *Id.*

A century earlier, with civil war impending, Harvard's President, Cornelius C. Felton, "recognized an urgent need for universities to reach out more consciously to students from different parts of the country because gathering such students 'must tend powerfully to remove prejudices by bringing them into friendly relations.'" Neil L. Rudenstine, *Student Diversity and Higher Learning, in* DIVERSITY CHALLENGED: EVIDENCE OF THE IMPACT OF AFFIRMATIVE ACTION 32 (Gary Orfield, ed., Nov. 2001).

DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 143 (Gary Orfield, ed., Nov. 2001). Bringing together students with differing life experiences and perspectives broadens and deepens discussions; it engages students' critical thinking faculties and requires them to take seriously opposing, sometimes unfamiliar points of view. *Id.* at 160, 166-67; *see also* Geoffrey Maruyama & José F. Moreno, *University Faculty Views About the Value of Diversity on Campus and in the Classroom, in* DOES DIVERSITY MAKE A DIFFERENCE? THREE RESEARCH STUDIES ON DIVERSITY IN COLLEGE CLASSROOMS 9, 14-16 (2000) (hereinafter "DOES DIVERSITY MAKE A DIFFERENCE?").

A learning environment in which students encounter and discuss ideas with peers whose backgrounds and perspectives are different from their own "fosters conscious, effortful, deep thinking" rather than automatic, preconditioned responses. *Expert Report of Patricia Gurin,* in *Gratz* v. *Bollinger,* No. 97-75321 (E.D. Mich.) and *Grutter* v. *Bollinger,* No. 97-75928 (E.D. Mich.) (hereinafter "*Gurin Report*") at § V(B)(1)(6); *see also* Patricia Mann, *The Educational Possibility of Multi-Racial/Multi-Ethnic College Classrooms, in* DOES DIVERSITY MAKE A DIFFERENCE? 61, 69-70 (2000).

Research further establishes that the broad benefits to students are lifelong. Students of all races tend to continue the patterns of interracial interaction they learned in college. "In particular, whites who grew up in predominantly white neighborhoods, but attended colleges with relatively high proportions of minority students, are much more likely to have friends, neighbors, and co-workers of diverse racial backgrounds than their white neighbors who attended colleges with low racial diversity." Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny,* 77 N.Y.U. L. REV. 1195, 1223, 1222-25 (2002) (citing J.H. Braddock, et al., *Why Desegregate? The Effect of School Desegregation on Adult Occupational Desegregation of African Americans, Whites, and Hispanics,* 31 INT'L J. CONTEMP. SOC. 273, 281 (1994)).

Individuals educated in a diverse environment have been found to be more heterodox and less stereotype-driven in both their racial attitudes and their thinking about a broad array of public policy issues than peers educated in more homogeneous settings.

That higher education plays such a pivotal role is no happenstance. As Professor Gurin explains, individuals "in late adolescence and early adulthood are at a critical stage of development," where they "experiment with different social roles before making permanent commitments to an occupation, to intimate relationships, to social groups and communities, and to a philosophy of life." *Gurin Report,* at § V(B) (citing, *inter alia,* Erik Erikson, *Ego Development and Historical Change, in* 2 PSYCHOANALYTIC STUDY OF THE CHILD 359-96 (1946)). The result at institutions that "take advantage of this developmental stage," *see id.,* and enroll diverse student bodies is greater "acceptance of people with different races/cultures, cultural awareness, tolerance of people with different beliefs, and leadership abilities." Sylvia Hurtado, *Linking Diversity and Educational Purpose, in* DIVERSITY CHALLENGED 198.

Not only has it been shown that "students who experienced diversity in classroom settings and in informal interactions showed the most [civic and cultural] engagement *during college,*" *Gurin Report,* at § IV (emphasis supplied), but the evidence attests to the strong, persistent links between educational diversity and democracy. *See Brown* v. *Board of Educ.,* 347 U.S. 483, 493 (1954).

Students educated in heterogeneous environments are better prepared for citizenship. Experiences of heightened exposure to and engagement with peoples of different races and cultures foster an increased sense of commonality across racial and cultural lines and an elevated ability to understand the perspectives of others. *See Gurin Report* at § V; *see* Anderson, 77 N.Y.U. L. REV. at 1204 ("Democracy is a form of governance in which a collective will is forged on the basis of open discussion among equals. It requires a

robust civil society in which citizens from all walks of life interact freely on terms of equality.").

As Bowen's and Bok's comprehensive study documents, admissions policies like those in place at the University of Michigan have transformed the ranks of the Nation's professional, government and business leaders. WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: THE LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 158-64 (1998). Importantly, minority graduates of selective schools have very high rates of political participation and civic and community involvement. *Id.*

The significance of increased civic engagement from minority citizens should not be underestimated, especially in light of the country's ongoing struggle with segregation and discrimination. The presence of individuals in positions of government and corporate leadership who have significant ties to otherwise isolated minority communities has helped assure that our government responds to *all* its citizens, regardless of race.

Finally, the "soundness" of *Bakke* is all the more "apparent from consideration of the alternative." *Casey*, 505 U.S. at 859. Quite apart from the tens of thousands of individuals whose life experiences were radically changed by *Bakke's* approval of limited, race-sensitive admissions policies[6] – and the innumerable others (classmates, children,

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[6] T.L.C., *Thomas Carlyle and Affirmative Action*, 24 J. BLACKS HIGHER EDUC. 7 (Summer 1999) (documenting the numbers of black graduates from the Nation's highest-ranked universities, law schools, business schools and medical schools, who were admitted under affirmative action programs); *see also* Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 N.Y.U. L. REV. 1, 21-22 (1997). Bowen and Bok document a similar trend, pointing out that from 1960 to 1996, affirmative action programs led to the doubling of percentages of African-American male executives, managers and administrators, and to (continued . . .)

neighbors and institutions) who can be shown to have benefited – it is apparent that in the absence of such policies, the Nation will lose a critical tool in the struggle to overcome both racial separation and the mistrust it engenders.

Even with the success of affirmative action in integrating communities, our Nation remains highly segregated. *See Expert Report of Thomas J. Sugrue*, in *Gratz* v. *Bollinger*, No. 97-75321 (E.D. Mich.) and *Grutter* v. *Bollinger*, No. 97-75928 (E.D. Mich.) (hereinafter "*Sugrue Report*") at § 4 (reporting that "rates of residential segregation in Detroit were higher in 1990 than they were in 1960"); *see also* DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID (1993); Erica Frankenberg, et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* (Jan. 2003) (describing trend toward resegregation in primary and secondary education). As Sugrue documents: "The high degree of segregation by race reinforces and hardens perceptions of racial difference. It has profound effects on racial attitudes and opportunities and it creates a domino effect seriously limiting interracial contact in many other arenas of American life." *See Sugrue Report* at § 8.[7]

Abandoning efforts to address the ongoing effects of these pervasive patterns of segregation would be deleterious

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the tripling of African-American attorneys and engineers. *See* BOWEN & BOK, THE SHAPE OF THE RIVER at 10-13.

[7] *See* Donald R. Kinder & Tali Mendelberg, *Cracks in American Apartheid: The Political Impact of Prejudice Among Desegregated Whites*, 57 J. POL. 402, 418-22 & 418 tbl.6 (1995) (offering empirical evidence that level of whites' prejudice towards blacks increases with their isolation from them); *see also* Cathy J. Cohen & Michael C. Dawson, *Neighborhood Poverty and African American Politics*, 87 AM. POL. SCI. REV. 286, 293-95 (1993) (providing empirical evidence that blacks living in socially isolated high-poverty neighborhoods are more likely than other blacks to think that whites and middle class people have too much political influence).

for our Country. To ensure that all citizens participate fully in our democracy and work together to pursue common goals, it is imperative that we continue to take advantage of one of the most effective means of diminishing racial polarization.

II. BECAUSE OF THE COMPELLING NATIONAL INTERESTS SERVED, CONGRESS AND THE EXECUTIVE CONSISTENTLY HAVE ENDORSED THE *BAKKE* REGIME.

A. Congress and the Executive Have Treated Justice Powell's *Bakke* Opinion as the Controlling and Correct Interpretation of Title VI.

The question that divided the Court in *Bakke* was a statutory one. Four Justices maintained that Title VI foreclosed any consideration of race and that there was no reason to reach the constitutional Equal Protection issue. Five Justices concluded that an admissions policy, like the Harvard Plan, would be lawful under Title VI.

The political branches were free to disagree with the majority of the Justices' Title VI interpretation in *Bakke* and to "correct it" by amending the statute to expressly forbid race-based admissions policies. *See Neal* v. *United States*, 516 U.S. 284, 295 (1996). Indeed, in cases of disapproval of a decision interpreting federal civil rights statutes, Congress has never been reticent about amending the law. *See, e.g.*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (1982) (amending 42 U.S.C. § 1973b, in response to *Mobile* v. *Bolden*, 446 U.S. 55 (1980)); Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 42 U.S.C. § 2000d-4a *et seq.*) (amending Title VI and related statutes in response to *Grove City College* v. *Bell*, 465 U.S. 555 (1984)); *Landgraf* v. *U.S.I. Film Prods.*, 511 U.S. 244, 250-51 (1994) (noting that the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (1991), had responded to nine named Supreme Court decisions construing federal employment discrimination statutes).

The record reflects that for more than two decades, Congress and the Executive Branch have treated Justice Powell's opinion as the authoritative construction of Title VI. In 1979, immediately after the *Bakke* decision, the Department of Education undertook a review of existing Title VI regulations and ultimately announced that these regulations would be interpreted consistent with Justice Powell's opinion. This understanding was reiterated in 1991 when the Department explained that under its regulations, "[a] college should have substantial discretion to weigh many factors – including race – in its efforts to attract and retain a student population of many different experiences, opinions, backgrounds, and cultures." Notice of Proposed Policy Guidance, 56 Fed. Reg. 64,548, 64,549 (Dec. 10, 1991). The Department further advised institutions of higher education that they could continue to "consider race as one factor among several when awarding scholarships designed to help create the kind of campus educational environment that results from having a student population with a variety of experiences, opinions, backgrounds, and cultures." *Id.*; *see also* 59 Fed. Reg. 8,756, 8761-62 (Feb. 23, 1994) (noting that "[t]he Court in *Bakke* indicated that race or national origin could be used in making admissions decisions to further the compelling interest of a diverse student body even though the effect might be to deny admission to some students who did not receive a competitive 'plus' based on race or ethnicity" and that no intervening decision had "invalidated Justice Powell's opinion in *Bakke* that the promotion of diversity in the higher education setting is a compelling interest").[8]

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[8] There can be no doubt that this was the understanding of Title VI that governed when the University of Michigan accepted federal funds, and even the Briefs filed by the United States in these cases nowhere indicate that this longstanding construction of Title VI and agency regulations has been reconsidered or abandoned. *Compare* Brief of The United States as *Amicus Curiae* in *University of Georgia* v. *Johnson*, Nos. 00-14382-C, 00-

(continued . . .)

Congress's understanding that both the Judiciary and the Executive had endorsed *Bakke* is beyond dispute. Congress twice enacted significant amendments to Title VI – both signed into law by President Reagan – without seeking to overturn the "diversity" holding. In the Rehabilitation Act Amendments of 1986, for example, Congress abrogated the States' Eleventh Amendment immunity under Title VI (as well as section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975). *See* Pub. L. 99-506, Title X, § 1003, 100 Stat. 1807, 1845 (1986) (codified at 42 U.S.C. § 2000d-7). Congress also engaged in a comprehensive review of federal civil rights legislation before enacting the Civil Rights Restoration Act of 1987. *See* Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 20 U.S.C. § 1681 *et seq.*). When Congress amends a statute, it can be presumed to be familiar with this Court's relevant decisions on the topic and to consider those decisions in amending the statute. *See McCarthy* v. *Bronson*, 500 U.S. 136, 140 (1991); *Conroy* v. *Aniskoff*, 507 U.S. 511, 516 (1993).

Indeed, when the Executive indicated an intention to depart from the course charted by Justice Powell's *Bakke* opinion, the congressional response was emphatically negative. *See* H.R. Rep. No. 102-1086, at 211 (1992) (noting that the Department of Education "always recognized that diversity is a legally acceptable form of affirmative action"); H.R. Rep. No. 102-411, at 8 (1991) ("The Supreme Court [in *Bakke*] has . . . upheld Title VI's provisions that allow race to be considered in promoting student body diversity").

(. . . continued)
14382-CC (11th Cir. 2001) (arguing that "The Department of Education has also relied on Justice Powell's opinion in concluding that race-conscious decision-making for purposes of achieving diversity in higher education does not violate Title VI"), *and* Brief of The United States as *Amicus Curiae* in *Smith* v. *University of Wash. Law Sch.*, Nos. 99-35209, 99-35347, 99-35348 (9th Cir. 1999) (same), *with* Briefs of the United States as *Amicus Curiae* in these cases.

On several occasions, bills were introduced that sought to repeal the *Bakke* decision, and, in every case, these were defeated. For example, the proposed "Riggs Amendment" in 1998 sought to amend the Higher Education Act of 1965 so as "[t]o prohibit discrimination and preferential treatment on the basis of race, sex, color, national origin, or ethnicity in connection with admissions to institutions of higher education." H.R. 3330, 105th Cong. (1998). After Representatives J.C. Watts (R-OK) and John Lewis (D-GA) jointly authored a letter, dated May 5, 1998, to colleagues urging its rejection, that measure failed by a vote of 249 to 171.

Notably, even the *proponents* of these measures acknowledged *Bakke's* force. *See* 142 CONG. REC. H5282 (1996) (Rep. Canady) (noting that "the closely divided court in *Bakke* recognized that race could at least be a factor in determining eligibility for admission to an educational institution receiving Federal financial assistance").

B. Congress Has Enacted and the Executive Has Supported Legislation Recognizing the Educational Benefits of Racial Diversity.

Recognition of the importance of learning with students from diverse backgrounds and of the harms that occur when such opportunities are denied has been a keystone of broader federal education policy for more than a generation. In his 1970 message proposing the Emergency School Aid Act ("ESAA"), Pub. L. No. 92-318, Title VII, §§ 701-720, 86 Stat. 235, 354-371 (1972) (repealed 1978), President Nixon observed:

> This Act deals specifically with problems which arise from racial separation, whether deliberate or not, and whether past or present. It is clear that racial isolation ordinarily has an adverse effect on education. Conversely, we also know that desegregation is vital to quality education – not only from the standpoint of raising the achievement levels of the disadvantaged, but also from the

> standpoint of helping all children achieve the broad-based human understanding that increasingly is essential in today's world.

H.R. Rep. No. 92-576, at 3 (1971). In enacting the law in 1972, Congress concurred with the President, declaring that "racially integrated education improves the quality of education for all children." *Id.* at 10. Congress recognized both that "[e]ducation in an integrated environment, in which children are exposed to diverse backgrounds, is beneficial to both" minority and nonminority children, S. Rep. No. 92-61, at 7 (1971), and that "[w]hether or not it is deliberate, racial, ethnic, and socio-economic separation in our schools and school systems [has] serious and often irreparable adverse effects on the education of all children, be they from deprived or from advantaged backgrounds." *Id.* at 6.

After ESAA was eliminated, Congress enacted the Magnet Schools Assistance Program ("MSAP"), which continued provision of federal financial assistance to local educational agencies for the purpose of eliminating racial isolation. *See* Pub. L. No. 98-377, Title VII, 98 Stat. 1267, 1299-1302 (1984) (repealed 1988). Congress reauthorized MSAP in 1994 based on specific findings that "it is in the best interest of the Federal Government to . . . support . . . school districts seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stage of such students' education." Pub. L. 103-382, Title V, § 5101, 108 Stat. 3518, 3691 (1994) (amended 2002); *see also* S. Rep. No. 106-261, 2000 WL 1700122, at *21 (2000) (providing assistance for magnet school initiatives to improve diversity).

As recently as January 8, 2002, the President signed into law legislation on the finding that "[i]t is in the best interests of the United States . . . to continue the Federal Government's support of . . . local educational agencies that are voluntarily seeking to foster meaningful interaction among students of different racial and ethnic

backgrounds. . . ." Pub. L. No. 107-110, § 5301(a)(4)(A), 115 Stat. 1425, 1806 (codified at 20 U.S.C. § 7231). The new law provides that in furtherance of that interest schools may adopt plans for "the desegregation of minority group-segregated children" and may grant or deny admissions "to carry out the approved plan." 20 U.S.C. §§ 7231c, 7231d.[9]

Although these measures address conditions at the primary and secondary level, those schools are also subject to the strictures of Title VI. It is implausible that Congress would encourage and affirmatively fund such efforts, but consider higher education policies animated by the identical premises as unlawful "discrimination" under Title VI. There is also no logical reason why the benefits of diversity at those levels would be any less at the higher education level.

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[9] Notably, this statute requires recipients of federal funds to *classify* students by race and ethnic background for the wholly benign purpose of assuring that school districts' reported gains on assessment tests are not limited to a particular ethnic subpopulation.

The No Child Left Behind Act of 2001, Pub. L. 107-110, 115 Stat. 1425 (2002) (codified at 20 U.S.C. § 6301 *et seq.*), was enacted to "ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education" and, among other things, to "clos[e] the achievement gap . . . between minority and non-minority children." *Id.* at § 6301. It requires public schools to create performance based standards and implement testing to measure students' progress towards those goals at various grade levels. *Id.* at § 6311. Under the racial accountability standards of the Act, schools must break down test results by race and ethnicity. *Id.* at § 6311(b)(3)(C)(xiii). To avoid sanctions such as staff reorganization, reduced federal funding, or privatization, schools must demonstrate that each major racial and ethnic group is adequately progressing towards performance standards. *Id.* at § 6311(b)(2)(B), (C)(v)(II)(bb). Those schools in which any subgroup falls below the minimum testing level will be designated for improvement and subject to sanctions. *Id.* at § 6311(b)(2)(A)(iii), (B), (C)(v)(II)(bb).

C. The Federal Government Consistently Has Sought to Promote Diversity and Inclusion in Higher Education.

Any claim that the purposes pursued by the university policies at issue in these cases are illegitimate or impermissible as a matter of *federal law* is further controverted by numerous other measures – some dating back to *Bakke*, some enacted within the past year – that aim to promote diversity in higher education and beyond. *See Food & Drug Admin.* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2002) ("At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings. The classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute") (quoting *United States* v. *Fausto*, 484 U.S. 439, 453 (1988)).

In 1979, the year after *Bakke* was decided, Congress vested the National Science Foundation with responsibility for "efforts which provide support for . . . ethnic minorities." S. Rep. No. 96-49, at 52 (1979). More recently, in 1990, President Bush signed into law the Excellence in Mathematics, Science, and Engineering Education Act, Pub. L. 101-589, 104 Stat. 2881 (1990) (repealed 1994), whereby the federal government undertook to "increase the number and diversity of individuals entering and completing graduate and doctoral programs." S. Rep No. 101-412, at 4138 (1990). That Act also called upon the National Science Foundation, in awarding fellowships, to give "priority consideration to increasing the participation of women and minority students." *Id.*

In the past year, Congress has enacted statutes, signed by the President, directing that scholarship funds be awarded upon consideration of factors including individual applicants' race. *See, e.g.*, Pub. L. 107-368, § 10, 116 Stat. 3034, 3049 (2002) (codified at 41 U.S.C. § 1862n-1) (providing

that the Robert Noyce Scholarships for math, science and engineering be awarded, with consideration given to "promoting the participation" of disadvantaged individuals, including minorities); Pub. L. 107-110, Title I, § 1504, 115 Stat. 1425, 1598 (2002) (codified at 20 U.S.C. § 6494) (creating the Close Up Fellowship program for middle and secondary school students and directing that "*special consideration* shall be given to the participation of those students with special educational needs, including students with disabilities, ethnic minority students, and students with migrant parents") (emphasis added).

These measures are consistent with the determination that "declining participation rates for low-income students and minorities at institutions of higher education is of growing concern to the higher education community and Congress." Higher Education Amendments of 1992, Pub. L. 102-325, § 121, 106 Stat. 448, 461 (1992) (amended 1998). They are also in line with the finding that to "increase the number of underrepresented minority and disadvantaged students who enter and successfully complete higher education" is a "pressing national priorit[y]," as is "the lack of diversity at the graduate level." H.R. Rep. No. 106-370, at 344 (1999). They are additionally in keeping with the conclusion that "[p]ositive action is needed . . . to enhance the possibility for increased minority retention and graduation from America's colleges and universities." H.R. Rep. 102-447, 114 (1992). *Cf.* Pub. L. 105-244, Title V, §501(b)(1), 112 Stat. 1581, 1766 (1998) (codified at 20 U.S.C. § 1101(b)(1)) (describing government's purpose as "expand[ing] educational opportunities for, and improv[ing] the academic attainment of, Hispanic students").

Congress also has recognized that promoting opportunity at the undergraduate and graduate level is integral to achieving benefits of workforce diversity in critically important fields. *See, e.g.*, Pub. L. 105-244, Title VII, § 721(a), 112 Stat. 1581, 1794 (1998) (codified at 20 U.S.C. § 1136) (establishing the Thurgood Marshall Legal

Opportunity Program to assist "low-income, minority, or disadvantaged college students" with access to and completion of law studies); Pub. L. 102-325, Title VI, § 621, 106 Stat. 448, 734 (1992) (codified at 20 U.S.C. § 1131) (establishing the Minority Foreign Service Professional Development Program to "significantly increase the numbers of African American and other underrepresented minorities in the international service"); H.R. Rep. No. 106-645, at 164 (2000) (funding "minority science improvement" to "increase the number of minority students who pursue advanced degrees and careers" in those fields); H.R. Rep. No. 107-229, at 30 (2001) (advancing "nursing workforce diversity" through funding to "increase nursing education opportunities for individuals who are from disadvantaged backgrounds, including racial and ethnic minorities"); *see also* CHARLES C. MOSKOS & JOHN SIBLEY BUTLER, ALL THAT WE CAN BE: BLACK LEADERSHIP & RACIAL INTEGRATION THE ARMY WAY (1996) (addressing efforts to promote integration and minority group advancement in military).

This record of enactments represents Congress's agreement with Justice Powell's *reasoning* in *Bakke* that "diversity in higher education" is "of paramount importance." *Id.* at 313. It reflects agreement that "the Nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this nation of many peoples." *Id.* (quoting *Keyishian* v. *Board of Regents of the Univ. of the State of New York*, 385 U.S. 589, 603 (1967).)

III. THE COURT'S RESOLUTION OF THIS CASE MUST TAKE PROPER ACCOUNT OF THE LEGALLY RELEVANT ACTIONS AND JUDGMENTS OF THE OTHER TWO BRANCHES.

A. The Longstanding Judgments of the Legislature and the Executive Are Significant to the *Statutory* Question.

Congress's longstanding endorsement of *Bakke*'s Title VI construction, *i.e.*, that institutions of higher education can

consider race as a factor in admissions, is legally relevant to the statutory interpretation issues presented by these cases. Under this Court's precedents, it would be extraordinary to hold that Title VI could be construed as supporting a result different from that reached in *Bakke*. The fundamental rationale for *stare decisis* in statutory cases is that "unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter" the statute in a way that diverges from the Court's construction. *Patterson* v. *McClean Credit Union*, 491 U.S. 164, 172-73 (1989); *see also Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 736 (1977).

This is not a case of simple inaction. *Bakke* was, to say the least, an unusually well known judicial decision, and Justice Powell's opinion has been given controlling effect in agency regulations – of which Congress has also been keenly aware – for two decades. *See Bob Jones Univ.* v. *United States*, 461 U.S. 574, 600-01 (1983) ("It is hardly conceivable that Congress – and in this setting, any Member of Congress – was not abundantly aware of what was going on"); *Brown & Williamson*, 529 U.S. at 157 (2002) (consistent agency position "provides important context" for understanding congressional enactments).

As described above, Congress has considered and rejected measures proposed to overturn *Bakke* by statute, the *proponents of which* accepted that Justice Powell's opinion was authoritative. Congress has vigorously policed the Executive's adherence to *Bakke*, objecting loudly even to perceived departure from the standards articulated in Justice Powell's opinion, and it has twice amended Title VI, in full awareness of the *Bakke* decision. Finally, Congress has enacted decades worth of legislation in the civil rights and higher education areas on the understanding that Justice Powell's opinion was an accurate statement of the meaning of Title VI, and has appropriated millions of dollars in funds to institutions of higher education, with the understanding that admissions policies that consider race as one factor in order to achieve a diverse student body are entirely lawful.

B. The Longstanding Judgments of the Legislature and the Executive Are *Constitutionally* Significant.

The judgments and actions of the Legislative and Executive branches are relevant to the Court's resolution of the *constitutional* issue, *i.e.*, the meaning of the Equal Protection Clause, as well.

Importantly, the question whether an interest is "compelling" as opposed to merely "important" is not one that should be resolved in isolation from the considered judgments and enactments of other branches of government on the same subject. The term "compelling interest" does not itself appear in the Constitution. *See Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part and concurring in judgment) ("[A]s regards certain state interests commonly relied upon in formulating affirmative action programs, the distinction between a 'compelling' and an 'important' governmental purpose may be a negligible one."). *Cf. City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 451-52 (1985 (Stevens, J., concurring) (questioning "levels of scrutiny"); *id.* at 460 (Marshall, J., concurring in the judgment in part and dissenting in part); *United States* v. *Virginia*, 516 U.S. at 569 (Scalia, J., dissenting) (noting limitations of "abstract" Equal Protection standards).[10]

As has already been established, there can be no credible claim that either the constitutional text or the intentions of the Framers of the Fourteenth Amendment *specified* a different conclusion than that reached by Justice Powell in *Bakke*. *See Bakke*, 438 U.S. at 284 (observing that "the phrase 'Equal Protection of the Laws' is susceptible of varying

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[10] *See also* Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 920 (1988); Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381, 414-22 (1998).

interpretations"); *accord Virginia*, 518 U.S. at 568 (Scalia, J., dissenting) (describing "Equal Protection of the Laws" as "ambiguous constitutional text"). *Cf. Wittmer* v. *Peters*, 87 F.3d 916 (7th Cir. 1996), *cert. denied*, 519 U.S. 1111 (1997) (considering the permissibility of race-based decisionmaking under the Equal Protection Clause). Both this Court's precedents and the work of historians make clear that the Equal Protection Clause was *not* intended to foreclose government actors from taking any consideration of race. *See, e.g.*, KULL, THE COLOR-BLIND CONSTITUTION at 67-69 (demonstrating that the Framers of the Fourteenth Amendment considered, but rejected, a proposal to forbid all racial classifications).

In construing other provisions of the Constitution, this Court has looked to prevailing practice in determining whether a government interest is "compelling." *See, e.g., Republican Party of Minn.* v. *White*, 536 U.S. 765, 122 S. Ct. 2528, 2540-41 (2002) (First Amendment); *Burson* v. *Freeman*, 504 U.S. 191, 205-06 (1992) (Scalia, J., concurring in judgment) (First Amendment); *see also Washington* v. *Glucksberg*, 521 U.S. 702, 710 (1997) (Due Process Clause). Indeed, this Court has looked to prevailing legislative understanding in determining the meaning not only of doctrinal terms, but of constitutional *text*, such as "Due Process of Law," and "Cruel and Unusual Punishment." *See, e.g., Burnham* v. *Superior Court*, 495 U.S. 604, 619 (1990) (plurality opinion); *Coker* v. *Georgia*, 433 U.S. 684, 592-96 (1980). Although these cases have provoked sharp disagreement about how best to ascertain constitutionally relevant societal judgment, *see, e.g., Atkins* v. *Virginia*, 536 U.S. 304 (2002), it has been common ground that "statutes passed by society's elected representatives," *Stanford* v. *Kentucky*, 492 U.S. 361, 370 (1989), are the "clearest and most reliable objective evidence." *Penry* v. *Lynaugh*, 492 U.S. 302, 331 (1989).

These principles apply with special force here. First, as discussed above, Congress and the Executive have spoken to

the *very question* that the Court is asked to decide. Because *Bakke* held that the standards under Title VI and the Constitution are the same, *see Alexander* v. *Sandoval*, 532 U.S. 275, 281-82 (2002), the federal government's *substantive* agreement with the *Bakke* decision as evidenced in its actions in connection with Title VI must be understood as resolving this specific question: that the interest in diversity *is sufficiently compelling to support an admissions policy that considers race as one factor among many*.

Second, the question whether an interest is "compelling" and other aspects of the Equal Protection analysis are, in important respects, empirical matters. *See Board of Educ. Westside Cmty. Sch.* v. *Mergens*, 496 U.S. 226, 251 (1990) (plurality opinion of O'Connor, J.) (The Court does "not lightly second-guess . . . legislative judgments, particularly where the judgments are based in part on empirical observations"); *United States* v. *Gainey*, 380 U.S. 63, 67 (1965) ("[S]ignificant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it."); *Wittmer*, 87 F.3d at 916. As was true in *Bakke*, this Court will be presented with many *amicus* briefs seeking to demonstrate the scope and magnitude of benefits of diversity, as well as concerning the efficacy of "percentage plans" or other race-neutral alternatives.

Although a court can evaluate such matters - even when they are not the subject of testimony in trial court - assertions about the effectiveness or consequences of certain policies are hardly self-evident, and they are the sort for which considered judgments of educators and legislators should be given considerable weight.

This is particularly true here given the claims by Petitioners' *amici* regarding the availability and efficacy of "race-neutral" alternatives. *See* Briefs for The United States as *Amicus Curiae* Supporting Petitioners ("U.S. Br.") at 19-21. Whatever promise "percentage plans" may have, questions about their efficacy have already been raised, including that: (1) they fail to achieve sufficiently diverse student bodies, *see*

Carl Irving, *Texas's 'Top Ten-Percenters': In the Absence of Affirmative Action, the State Struggles to Increase Minority Enrollment*, 10 National Cross-Talk (Summer2002) (available at www.highereducation.org/crosstalk.pdf/ct_0302/front.html); (2) even if they do achieve some measure of racial diversity, they only work in already-segregated states and their success depends on continued segregation of our Nation's high schools; (3) they do not allow for thoughtful consideration of which students are actually the most well-prepared for college or graduate school given their exclusive reliance on grades; (4) they create perverse incentives, *see* Julie Berry Cullen, et al., *Jockeying for Position: High School Student Mobility and Texas' Top-Ten Percent Rule* (unpublished manuscript Nov. 2002) (reporting preliminary findings); and (5) they are not an option for graduate and professional schools. There are also legal arguments that such policies - which drastically alter admissions policies - are not a more "narrowly tailored" way of achieving the *same* goals that the universities seek to pursue, but rather simply require administrators to substitute one admissions model for an entirely different one. [11]

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[11] Ironically, given the vigor which they are being urged in this case, it is unlikely that such policies will give universities even a temporary reprieve from litigation: it has already been claimed that percentage plans "amount to a thinly veiled system of selecting students by race." Michael A. Fletcher, *Race-Neutral Plans Have Limits in Aiding Diversity, Experts Say*, WASH. POST, Jan. 17, 2003, at A12. Apparently this is because such plans have relied heavily on stepped-up recruiting efforts, including awarding significant scholarship awards to students from predominantly minority high schools. *See* U.S. Commission on Civil Rights, Office for Civil Rights Evaluation, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education*, at 28-29, 38-39, 65 n.140 (Nov. 2002). In fact, legal challenges to these measures are currently being prepared. *See* Ron Nissimov, *UT Tailors Scholarship to Minority High Schools*, HOUSTON CHRON., Feb. 12, 2002, at 21 (reporting that the Center for Individual Rights had "plans to legally challenge the new types of programs that offer advantages to students from selected schools").

There is another important point: *these* empirical questions are ones for which respect for the judgments of the political branches is both wise and constitutionally indicated. Questions concerning which policies will help achieve the "[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement," *see* Pet. Br. at 15 (quoting *Croson*, 488 U.S. at 505-06), are ones the Constitution explicitly entrusts to *Congress* in the first instance. *See* U.S. CONST. amend. XIV § 5.

The issues before the Court are ones in which the political branches have been actively involved. *See Murray* v. *Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in judgment) ("[J]udicial imposition of a categorical remedy . . . might pretermit other responsible solutions being considered in Congress and state legislatures."); *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 607 (1996) (Ginsburg, J., dissenting) (judicial intervention should take account of "reform measures recently adopted or currently under consideration in legislative arenas"). In the wake of *Adarand*, for example, the federal government undertook a comprehensive review of race-conscious policies in federal government contracting and other areas. *See* Resp. Br., *Adarand Constructors, Inc.* v. *Minetta*, No. 00-730 at 2-10 (describing response to Court's decision); *Adarand* v. *Constructors, Inc.* v. *Minetta*, 534 U.S. 103 (2001) (dismissing writ of certiorari as improvidently granted).

Petitioners and their *amici* argue that doing away with race-sensitive admissions policies will "hasten the day" when race ceases to play such a significant and divisive role. But it is our considered opinion that abandonment of policies like those under review in these cases will only lead to *more* social distance, greater mistrust and reliance on invalid stereotypes.

CONCLUSION

Petitioners ask this Court to impose a single, nationwide rule of higher education admissions, under which racial diversity may not be a component of the broader, educationally beneficial diversity that educators are plainly entitled to pursue. Petitioners' rule would bring an abrupt end to discussions and debates over these subjects among educators, the public, and elected representatives. It would also inhibit experimentation and innovation in policy areas where experimentation has been especially valued and where new solutions are most urgently needed.

Because we are convinced that the result reached by Justice Powell in *Bakke* was correct, because our conviction has been long and widely embraced throughout the federal government, and for the other reasons set out above, we ask that the Court reaffirm *Bakke* and affirm the judgments of the courts below.

Respectfully submitted,

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February 19, 2003

Nos. 02-241 & 02-516

IN THE

Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

—v.—

LEE BOLLINGER, *et al.*,

Respondents.

JENNIFER GRATZ and PATRICK HAMACHER,

Petitioners,

—v.—

LEE BOLLINGER, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF NOW LEGAL DEFENSE AND EDUCATION FUND, FEMINIST MAJORITY FOUNDATION, INTERNATIONAL HUMAN RIGHTS LAW GROUP, AND THE ALLARD K. LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC, YALE LAW SCHOOL, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Atkins v. Virginia, 536 U.S. 340 (2002) 4, 9

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Enmund v. Florida, 458 U.S. 782 (1982) 5

Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000) 4

Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002) 4

Knight v. Florida, 528 U.S. 990 (1999) 9

Miranda v. Arizona, 384 U.S. 436 (1966) 5

Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) 4

New York v. Quarles, 467 U.S. 649 (1984) 5

New York v. United States, 326 U.S. 572 (1946) 5

Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000) 9

Omaya v. California,
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Patterson v. Texas, 123 S. Ct. 24 (2002).....9

Printz v. United States,
521 U.S. 898 (1997).....6, 9

Regents of the University of California v. Bakke, 438 U.S. 265 (1978).....11, 12

Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801)....4

Thompson v. Oklahoma,
487 U.S. 815 (1988).....5, 9

United States v. Then, 56 F.3d 464 (2d Cir. 1995).....6

Washington v. Glucksberg, 521 U.S. 702 (1997).....4, 5

INTERNATIONAL CASES

Canadian Nat'l Ry. Co. v. Canada, [1987] 1 S.C.R. 1114, 1987 S.C.R. LEXIS 1136 (Can.)..... 12-13

Case C-158/97, *Badeck & Others*, 2000 E.C.R. I-1875, [2001] 2 C.M.L.R. 6, 2000 All ER (EC) 289 (E.C.J. 2000).....10

Case C-409/95, *Marschall v. Land Nordhein-Westfalen*, 1997 E.C.R. I-6363, 1997 All ER (EC) 865 (E.C.J. 1997).....10

Lovelace v. Ontario, [2000] 1 S.C.R. 950, 2000 Can. Sup. Ct. LEXIS 33 (Can.).....12

Motala & Another v. Univ. of Natal, 1995 (3) BCLR 374 (Durban Sup. Ct.), 1995 SACLR LEXIS 256 (S. Afr.).....13

CONSTITUTIONS, TREATIES, AND TREATY MATERIALS

Can. Const. (Constitution Act, 1982) Schedule B, Pt. I (Canadian Charter of Rights and Freedoms), § 15(2).....12

Committee on the Elimination of Racial Discrimination: Addendum by Israel, U.N. Doc. CERD/C/294 Add. 1 (1997).....13

Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195.....14, 17, 18

International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171.....14, 15

S. Afr. Const. Preamble; ch. 2, § 9(2).....13

United Nations, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, General Comment 18 (1994) 16, 17

U.S. Const. art. VI, cl. 2 14

U.S. Reservations, Understanding, Declarations, and Proviso, CERD, 140 Cong. Rec. S7634-02 (daily ed. June 24, 1994) 15

U.S. Reservations, Understandings, Declarations, and Proviso, ICCPR, 138 Cong. Rec. S4781-01 (daily ed. April 2, 1992) 15

United States: Senate Committee On Foreign Relations Report On The International Covenant On Civil And Political Rights, 31 I.L.M. 645 (May 1992) 16, 17

BOOKS AND ARTICLES

Martha F. Davis, *International Human Rights and United States Law: Predictions of a Courtwatcher*, 64 Alb. L. Rev. 417 (2000) 7

Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. Cin. L. Rev. 423 (1997) 14, 19

Joan Fitzpatrick, *The Preemptive and Interpretive Force of International Human Rights Law in State Courts*, 90 Proc. Am. Soc. Int'l L. 259 (1996) 19

Ruth Bader Ginsburg & Deborah Jones Merritt, *Fifty-First Cardozo Memorial Lecture—Affirmative Action: An International Human Rights Dialogue*, 21 Cardozo L. Rev. 253 (1999) 8, 11, 13

Louis Henkin *et al.*, *Human Rights* (1999) 19

Oliver Wendell Holmes, Jr., *The Common Law* (1881) 5

Herbert M. Jauch, *Affirmative Action in Namibia* (1998) 13

Claire L'Heureux-Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 Tulsa L.J. 15 (1998) 7

Marian Nash, *U.S. Practice: Contemporary Practice of the United States Relating to International Law*, 88 Am. J. Int'l L. 719 (1994) 18

Sandra Day O'Connor, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, 45 Fed. Lawyer 20 (1998) 5, 7

Sandra Day O'Connor, *Federalism of Free Nations, reprinted in International Law Decisions in National Courts* (Thomas M. Franck & Gregory H. Fox eds., 1996).....4

Sandra Day O'Connor, *Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law*, 96 Am. Soc'y Int'l L. Proc. 348 (2002).....6

Jordan J. Paust, *International Law as Law of the United States* (1996).....19

Jordan J. Paust, *Race-Based Affirmative Action and International Law*, 18 Mich. J. Int'l L. 659 (1997).....14, 17, 18, 19

William Rehnquist, *Constitutional Courts—Comparative Remarks* (1989), *reprinted in Germany and Its Basic Law: Past, Present and Future—A German-American Symposium* (Paul Kirchhof & Donald P. Kommers eds., 1993).....8

OTHER AUTHORITIES

Press Release, New York University, European Court Members and Four U.S. Supreme Court Justices to Discuss Current European and U.S. Constitutional Issues (Mar. 27, 2000), *available at* www.nyu.edu/publicaffairs/newsreleases/b_EUROP.shtml.....9

STATEMENTS OF INTEREST OF *AMICI CURIAE*[1]

Amicus curiae NOW Legal Defense and Education Fund ("NOW Legal Defense") is a leading national non-profit civil rights organization that has used the power of the law to define and defend women's rights for thirty years. It has participated as counsel and as *amicus curiae* in numerous cases in support of affirmative action. NOW Legal Defense is interested in these cases because of the positive impact affirmative action programs have in promoting equality and eliminating barriers for women, particularly for women of color, and for racial minorities.

Amicus curiae the Feminist Majority Foundation ("FMF") is a non-profit organization that promotes women's economic, social and political equality. FMF is dedicated to achieving civil rights for all people, including affirmative action programs for women and people of color. FMF strongly supports the affirmative action programs challenged in these cases and the need for diversity in higher education.

Amicus curiae the International Human Rights Law Group (the "Law Group") is a non-profit organization of human rights and legal professionals engaged in human rights advocacy, litigation, and training around the world. Founded in the District of Columbia in 1978, the Law Group works to empower advocates to expand the scope of human rights protection for men and women and to promote broad participation in creating more effective human rights standards and procedures at the national, regional, and international level. The Law Group has represented individuals and organizations before U.S. and international

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[1] The parties' letters consenting to the filing of *amicus curiae* briefs have been filed with the Clerk of the Court. Counsel for the *amici curiae* authored this brief in its entirety. No person or entity other than *amici* and their counsel made a monetary contribution to the preparation of this brief.

tribunals and has appeared as *amicus curiae* in a number of U.S. cases. The Law Group also maintains consultative status with the Economic and Social Council of the United Nations. Beginning in the 1990s, a central focus of the Law Group's work has been to promote the use of international human rights law and standards in efforts to combat racial discrimination. The Law Group joins this brief to emphasize the obligation of the United States to provide remedies for racial discrimination consistent with its obligations under international treaty law, particularly the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination, as well as international customary law.

Amicus curiae the Allard K. Lowenstein International Human Rights Clinic (the "Clinic") is a Yale Law School program that gives students first-hand experience in human rights advocacy. The Clinic undertakes numerous litigation and research projects on behalf of human rights organizations and individual victims of human rights abuses. The Clinic's work is based on the human rights standards contained in international customary and conventional law, at the core of which is the prohibition against discrimination. Since the Clinic began more than ten years ago, its students have worked on a number of lawsuits and other projects designed to combat racial, gender, ethnic and other kinds of discrimination. In recent years, the Clinic has focused increasing attention on efforts to ensure respect for international human rights standards in the United States.

SUMMARY OF ARGUMENT

Comparative and international law support the lower courts' decisions upholding the University of Michigan's affirmative action programs, and are relevant for at least two reasons to this Court's consideration of the constitutionality of affirmative action programs. First, our legal tradition has long embraced looking to foreign and international precedent

and practice to help solve our legal questions. There is practical value in examining how other constitutional courts have analyzed similar issues. Second, in an era of globalization, this Court maintains its intellectual leadership in the human rights field by acknowledging the international context in which its decisions resonate.

The constitutional courts of states as diverse as Canada, India and South Africa, as well as the European Union, have all confronted challenges to affirmative action policies in recent years. These courts have uniformly upheld such policies, including policies similar to those at issue here, as consistent with their constitutional guarantees of equal protection. As members of this Court have previously recognized, wisdom gleaned from the opinions of colleagues in foreign jurisdictions—particularly those with legal traditions and political cultures similar to ours—can assist this Court in reaching sound conclusions under domestic law.

Furthermore, the United States is party to international treaties that not only permit race-based affirmative action programs, but that also may require the implementation of such programs when failure to do so would perpetuate wrongful discrimination. These treaties are valuable sources of interpretive guidance to this Court when considering the validity of the affirmative action programs at issue here.

ARGUMENT

I. COMPARATIVE AND INTERNATIONAL LAW ARE RELEVANT TO THE ISSUES BEFORE THE COURT

It is undisputed that the University of Michigan and its law school (together, "the University") use race as one of many factors in their admissions decisions, and that this use must be narrowly tailored to serve a compelling governmental interest. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Here, Respondents argue that the University

justifiably uses race as an admissions factor to ensure diversity in higher education, and Intervenors argue that the University's policies are justified as a measure to remedy past discrimination. *See Grutter v. Bollinger*, 288 F.3d 732, 735 (6th Cir. 2002); *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 816 (E.D. Mich. 2000). The record amply supports the force of these arguments. In addition, *amici curiae* urge this Court to follow the trend of American jurists, including members of this Court, to look to international and foreign law to inform their decisions regarding domestic legal issues.

From its earliest days, this Court has recognized that the laws of the United States should be construed to be consistent with international law whenever possible. *See, e.g., Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); *Talbot v. Seeman,* 5 U.S. (1 Cranch) 1, 43 (1801) ("the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations"); *see generally* Sandra Day O'Connor, *Federalism of Free Nations, reprinted in International Law Decisions in National Courts* 13, 15-16 (Thomas M. Franck & Gregory H. Fox eds., 1996).

In recent years, the Court has continued to recognize the importance of looking to international and comparative law for interpretive guidance in areas of constitutional law. For example, last year in *Atkins v. Virginia*, 536 U.S. 340 (2002) (Stevens, J., joined by O'Connor, Kennedy, Souter, Ginsburg, and Breyer, JJ.), this Court examined the opinions of "the world community" to support its conclusion that execution of persons with mental retardation would offend the standards of decency required by the Eighth Amendment. *Id.* at 347 n.21. Similarly, in *Washington v. Glucksberg*, 521 U.S. 702 (1997) (Rehnquist, C.J., joined by O'Connor, Scalia, Kennedy, and Thomas, JJ.), in ruling that the State of Washington's statute prohibiting assisted suicide was not

invalid on its face under the Due Process Clause of the Fourteenth Amendment, the Court noted that Canada, Great Britain, New Zealand, and Australia, like the State of Washington, have rejected efforts to establish a fundamental right to assisted suicide, while Colombia has legalized voluntary euthanasia for terminally ill people. *Id.* at 718 n.16.[2]

Two broad rationales justify the use of international and comparative law perspectives to help resolve domestic legal issues. First, there is a practical value to drawing upon international law and the experiences of other nations as aids to interpretation. As Justice Holmes wrote, "the life of the law has not been logic, it has been experience." Oliver Wendell Holmes, Jr., *The Common Law* 1 (1881). "Other legal systems," Justice O'Connor has recognized, "continue to innovate, to experiment, and to find new solutions to the new legal problems that arise each day, from which we can learn and benefit." Sandra Day O'Connor, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, 45 Fed. Lawyer 20 (1998). The possibilities for such learning are particularly great when those other legal systems "have struggled with the same basic constitutional questions as we have: equal protection, due process, the rule of law in constitutional democracies." *Id.; see also New York v. Quarles*, 467 U.S. 649, 672-74 (1984) (O'Connor, J.,

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[2] *See also Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (looking to international standards regarding execution of persons under sixteen years old); *Enmund v. Florida*, 458 U.S. 782, 796-97 n.22 (1982) (noting relevance of "the climate of international opinion concerning the acceptability of a particular punishment" to Eighth Amendment determination and looking to felony murder laws in England, India, Canada, and other Commonwealth countries) (citation omitted); *Miranda v. Arizona*, 384 U.S. 436, 488-90, 521-22 (1966) (considering law enforcement "experience in . . . other countries," including England, Scotland, and India, in interpreting Fifth Amendment); *New York v. United States*, 326 U.S. 572, 584 n.5 (1946) (looking to constitutional experiences of Canada, Australia, and Brazil relating to intergovernmental taxation to help decide scope of federal taxation power).

concurring) (supporting application of experience of other countries that addressed similar issues to determine scope of Fifth Amendment exclusionary rule); *United States v. Then*, 56 F.3d 464, 468-69 (2d Cir. 1995) (Calabresi, J., concurring) (noting that German and Italian constitutions "unmistakably draw their origin and inspiration from American constitutional theory and practice" and that, as a result, "how [those countries] have dealt with problems analogous to ours can be very useful to us when we face difficult constitutional issues").

International and foreign law rulings on constitutional issues facing the Court "cast an empirical light on the consequences of different solutions to a common legal problem." *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting). In this regard, the use of international and comparative law is similar to the use of state law by federal courts for interpretive guidance when giving content to federal law. In such circumstances, state law does not apply of its own force, but instead supplies a useful source of persuasive authority. *See generally D'Oench, Duhme & Co., Inc. v. FDIC*, 315 U.S. 447, 465-75 (1942) (Jackson, J., concurring) (describing federal courts' practice of looking to state common law to interpret federal law). Similarly,

> conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts. . . . While ultimately we must bear responsibility for interpreting our own laws, there is much to learn from other distinguished jurists who have given thought to the same difficult issues we face here.

Sandra Day O'Connor, *Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law*, 96 Am. Soc'y Int'l L. Proc. 348, 350 (2002).

Second, acknowledging the international context of this Court's decisions helps to ensure the continued intellectual leadership of the United States in human rights issues and to maintain international respect for our courts in an era of globalization. *See* Martha F. Davis, *International Human Rights and United States Law: Predictions of a Courtwatcher*, 64 Alb. L. Rev. 417, 421-28 (2000) (arguing that in the twenty-first century, judicial legitimacy requires that courts acknowledge international context of decisions). Throughout its history, decisions rendered by this Court have served as a model for countries around the world. As Justice L'Heureux-Dube of the Supreme Court of Canada has explained, high courts in other countries have historically looked to the jurisprudence of this Court for guidance, and the United States government has been an international leader in proclaiming the importance of international law and the promotion of human rights. *See* Claire L'Heureux-Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 Tulsa L.J. 15, 16-17 (1998) (acknowledging United States' past judicial influence "[i]n the fields of human rights and constitutional principles"). As Justice O'Connor has argued, we fail to "broaden[ ] our horizons" at our peril:

> The vibrancy of our common law legal culture has stemmed, in large part, from its dynamism, from its ability to adapt over time. Our flexibility, our ability to borrow ideas from other legal systems, is what will enable us to remain progressive with systems that are able to cope with a rapidly shrinking world.

O'Connor, *Broadening Our Horizons*, *supra*, at 21. Increased engagement with the constitutional courts of other countries can help to ensure the continued leadership role of American courts and the United States more generally.

Both of these rationales for considering international and comparative perspectives are relevant to the

constitutionality of the programs at issue in these cases. The United States is not alone among nations in using affirmative action to promote diversity and to remedy the current practices and lingering effects of discrimination against particular social groups; nor has the United States been alone in requiring that such programs be reconciled with formal guarantees of equality before the law. Moreover, this Court's pronouncements on equality traditionally have carried tremendous weight in international human rights law and the constitutional law of other countries, and that prestige can only be enhanced by considering how other nations have interpreted the equality norms they share with the United States.

Justice Ginsburg has directly addressed the relevance of international and comparative law to affirmative action:

> [C]omparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups.

Ruth Bader Ginsburg & Deborah Jones Merritt, *Fifty-First Cardozo Memorial Lecture—Affirmative Action: An International Human Rights Dialogue*, 21 Cardozo L. Rev. 253, 282 (1999).

Indeed, a majority of the Justices of this Court has supported consideration by United States courts of international legal materials when expounding federal law. Chief Justice Rehnquist has called on courts to examine international precedents, noting, "it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process." William Rehnquist, *Constitutional Courts—Comparative Remarks* (1989), *reprinted in Germany and its Basic Law: Past, Present and Future—A German-American Symposium*

411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993). Similarly, Justice O'Connor, a proponent of an international perspective, commented in 1998, after an initial meeting with members of the European Court of Justice, that "[i]n the next century, we are going to want to draw upon judgments from other jurisdictions," including the decisions of the European Court. Press Release, New York University, European Court Members and Four U.S. Supreme Court Justices to Discuss Current European and U.S. Constitutional Issues, at 2 (Mar. 27, 2000), *available at* www.nyu.edu/publicaffairs/newsreleases/b_EUROP.shtml.

Justices Breyer and Stevens also have demonstrated interest in both comparative and international law materials as aids to constitutional interpretation. *See, e.g.*, *Atkins*, 536 U.S. at 347 n.21 (Stevens, J.); *Patterson v. Texas*, 123 S. Ct. 24 (2002) (Stevens, J., dissenting from denial of *certiorari*) (citing apparent international consensus against the execution of a capital sentence imposed upon a juvenile to urge Court to revisit issue of its constitutionality); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 403 (2000) (Breyer, J., concurring) (noting that other nations' approaches to campaign finance are consistent with Supreme Court majority's approach); *Knight v. Florida*, 528 U.S. 990, 995-96 (1999) (Breyer, J., dissenting from denial of *certiorari*) (citing Universal Declaration of Human Rights and case law of Canada, India, Great Britain and Zimbabwe to support view that lengthy delay in administering lawful death penalty may be unusually and impermissibly cruel); *Printz v. United States*, 521 U.S. 898, 976-77 (1997) (Breyer, J., dissenting) (discussing experiences of federal systems in Switzerland, Germany, and European Union as aids to deciding question of U.S. federalism); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (Stevens, J.) (looking to opinions of "other nations that share our Anglo-American heritage" and "leading members of the Western European community" as aids to deciding Eighth Amendment question).

As elaborated below, courts and jurists around the world have grappled with issues of affirmative action, often in contexts analogous to those presented by the record in these cases. Wisdom gleaned from the opinions of colleagues in foreign jurisdictions can assist this Court in reaching sound conclusions under domestic law.

II. HIGH COURTS OF OTHER NATIONS HAVE UPHELD AFFIRMATIVE ACTION MEASURES UNDER COMPARABLE CIRCUMSTANCES

Numerous countries have examined the issue of affirmative action under their own laws and have upheld programs benefiting minority populations who suffered discrimination. Most notably, the Court of Justice of the European Communities has endorsed affirmative action programs that use gender as a factor in employment decisions in order to remedy gender discrimination in employment. In two recent cases, the Court of Justice upheld national measures giving priority to women for promotion to public service positions in which women were underrepresented. *See* Case C-158/97, *Badeck & Others*, 2000 E.C.R. I-1875, [2001] 2 C.M.L.R. 6, 2000 All ER (EC) 289 (E.C.J. 2000) (*available on* Westlaw); Case C-409/95, *Marschall v. Land Nordhein-Westfalen*, 1997 E.C.R. I-6363, 1997 All ER (EC) 865 (E.C.J. 1997) (*available on* Westlaw). Critical to the opinions in both cases was the fact that—as with the admissions processes at issue here—women were not given automatic and unconditional priority in obtaining promotions when there were equally qualified male candidates available; rather, all of the candidates—male and female—were assessed individually according to objective criteria. *Badeck*, 2000 E.C.R. at 1918-19, 1923; *Marschall*, 1997 E.C.R. at 6393.

In *Marschall*, a German national rule permitted giving qualified women priority for promotions to positions where women were underrepresented, unless there was a specific

reason to favor a male candidate. *Marschall*, 1997 E.C.R. at 6366. The rule was promulgated to promote equality of opportunity between men and women and to counteract the discrimination that had in the past led to a disproportionate number of higher positions being awarded to male applicants. *Id.* The court held that the affirmative action policy was acceptable because the candidates were objectively assessed; indeed, the rule's "saving clause" specifically allowed the selection of a male candidate over a female where nondiscriminatory criteria tilted the balance in his favor. *Id.* at 6392-93.

Correspondingly, in *Badeck*, the Court of Justice was asked to decide whether the "positive action" program to promote equality between men and women mandated by the Hesse Equal Rights Law complied with European Community law. *Badeck*, 2000 E.C.R. at 1877, 1878. Building upon its earlier judgment in *Marschall*, the court again concluded it was lawful for women to be given priority over equally qualified males for promotion in public and private sector jobs, provided that the employer retained the flexibility to select the most suitable candidate, with gender as simply one criterion in the overall evaluation of the candidates. *Id.* at 1891-92. Because the program did not foreclose selection of a qualified male, the court determined that the national rule for affirmative action targeting women for advancement in the areas of public employment, academic service, and training programs comported with Community law. *Id.* at 1923, 1926-27.

Significantly, in both *Badeck* and *Marschall*, gender was used as a plus factor for promotion. *Cf. Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 318 (1978); *see also* Ginsburg & Merritt, *supra*, at 279 (acknowledging that race and gender may be plus factors in employment, promotion, or educational admissions). The discretion accorded by the German legislation is comparable to that permitted by the University's admissions programs where race and ethnicity

are included as additional considerations to promote the goal of diversity. Though the European Court did not explicitly adopt the concept of "narrow tailoring" from United States jurisprudence, it engaged in an analysis similar to that invoked by American courts reviewing government action under the strict scrutiny standard. Thus, the European Court investigated whether the priority given to females in appointments and promotions pursued a legitimate social objective and used means that were proportionate "in relation to the real needs of the disadvantaged group." *Badeck*, 2000 E.C.R. at 1889. Applying this standard, the court concluded that a program including such discretion was sufficiently customized to pass muster under Community law. *Id.* at 1919. This analysis comports with the rationale of *Bakke* and is applicable to the cases at bar.

Other countries also permit affirmative action programs that correct systemic discrimination using targeted measures to ameliorate the hardships suffered by certain minority populations. For example, the Canadian Charter of Rights and Freedoms states that its equal protection provision "does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race." Can. Const. (Constitution Act, 1982) Schedule B, Pt. I (Canadian Charter of Rights and Freedoms), § 15(2); *see generally Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 Can. Sup. Ct. LEXIS 33, at *87-*100 (Can.) (discussing relationship between § 15(2) and Charter's equal protection provision). In interpreting the Canadian Human Rights Act, the Supreme Court of Canada upheld an affirmative action measure imposed on the Canadian National Railway to combat systemic discrimination in the hiring and promotion of women. *Canadian Nat'l Ry. Co. v. Canada*, [1987] 1 S.C.R. 1114, 1143-45, 1987 S.C.R. LEXIS 1136, at *48-*52 (Can.). The special, temporary measure—which went farther than the programs at issue here or in the

European cases—required hiring at least one woman for every four nontraditional positions until women had achieved greater representation in positions traditionally filled by men. *Id.* at 1125-27, 1141, 1987 S.C.R. LEXIS at *17-*21, *44-*45.

Similarly, the South African Constitution adopted in 1996 specifically acknowledges the injustices of the past and promotes affirmative action policies to assist groups that have been disadvantaged under prior laws. S. Afr. Const. pmbl.; ch. 2, § 9(2). Indeed, the lack of quality education available to African students in South Africa led the dean of a medical school to create an affirmative action program targeted to benefit African students. *Motala & Another v. Univ. of Natal*, 1995 (3) BCLR 374 (Durban Sup. Ct.), 1995 SACLR LEXIS 256 at *16-*17 (S. Afr.). An Indian woman who was denied admission challenged the school's program. *Id.* at *13-*14. In rejecting her claim, the court observed that, although Indians also suffered discrimination under apartheid, the experience for Africans was significantly worse, and compensating for this long-standing mistreatment of African applicants to the medical school did not represent unfair discrimination against Indian students under the constitution. *Id.* at *28.

In addition to the countries discussed above, many other nations also take into account the need to redress the effects of past discriminatory laws and practices. *See Committee on the Elimination of Racial Discrimination: Addendum by Israel*, at ¶ 48, U.N. Doc. CERD/C/294/Add. 1 (1997) (describing Israel's program of tutorial and financial assistance provided to Ethiopian immigrants in higher education to promote mobility and leadership); Herbert M. Jauch, *Affirmative Action in Namibia* 53-148 (1998) (detailing history of affirmative action in Namibia); Ginsburg & Merritt, *supra*, at 273-81 (discussing successful affirmative action policies in India and European Union). The legal analyses applied by other countries to uphold successful affirmative

action policies for groups that, like racial minorities in the United States, have suffered past discrimination should inform United States courts as they address similar issues.

III. UNITED STATES TREATY LAW PERMITS AFFIRMATIVE ACTION AND, UNDER CERTAIN CIRCUMSTANCES, IMPOSES AFFIRMATIVE DUTIES TO ASSURE EQUALITY

The United States's duty to comply with its international treaty obligations further supports a finding that the University's interest in considering race when selecting its students is, indeed, "compelling," as the Constitution mandates. *See* Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. Cin. L. Rev. 423, 468 (1997); Jordan J. Paust, *Race-Based Affirmative Action and International Law*, 18 Mich. J. Int'l L. 659, 675-76 (1997). Two treaties ratified by the United States specifically permit race-based distinctions in order to redress past discrimination and promote the values of diversity: the International Covenant on Civil and Political Rights, *opened for signature* December 19, 1966, art. 2(2), 999 U.N.T.S. 171, 173 (hereinafter "ICCPR"); and the Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* March 7, 1966, art. 2(2), 660 U.N.T.S. 195, 218 (hereinafter "CERD"). The United States has committed itself, by becoming a party to the treaties, to take the affirmative steps necessary to ensure that the equal enjoyment of rights is guaranteed to all racial groups and their individual members. Indeed, those treaties are now part of the "supreme Law of the Land." U.S. Const. art. VI, cl. 2. What is more, the Senate's ratifications of these treaties acknowledged that, in our federal system, implementation of their principles is a responsibility of state and local government, as well.[3]

[3] The United States Senate ratified the ICCPR with the express understanding that it "shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters contained therein, and otherwise by the state and local governments," and that "the Federal Government shall take measures appropriate to the Federal system to the end that competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant." U.S. Reservations, Understandings, Declarations, and Proviso, ICCPR, 138 Cong. Rec. S4781-01 (daily ed. April 2, 1992); *see also* U.S. Reservations, Understanding, Declarations, and Proviso, CERD, 140 Cong. Rec. S7634-02 (daily ed. June 24, 1994).

Accordingly, the ICCPR and CERD offer relevant, legitimate guidance to this Court in evaluating whether the University's affirmative action programs further compelling interests in promoting a diverse intellectual community and remedying past discrimination in admissions. *Cf. Omaya v. California*, 332 U.S. 633, 649-50 (1948) (Black, J., concurring) (U.S. pledge in U.N. Charter to "promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" is additional reason that California law impermissibly interferes with federal policy) (citation omitted); *id.* at 673 (Murphy, J., concurring) ("Its inconsistency with the Charter . . . is but one more reason why the statute should be condemned.").

A. The ICCPR Supports Affirmative Action Programs Such As The Admissions Policies At Issue Here

States Parties to the ICCPR are bound to take "necessary steps" to effectuate rights guaranteed by the treaty. ICCPR, art. 2(2), 999 U.N.T.S. at 173. Article 26 of the ICCPR provides that "[a]ll persons are equal before the law" and that States Parties "shall . . . guarantee to all persons equal and effective protection against discrimination on any ground such as race." *Id.* at 179. Moreover, the Human Rights Committee created by the treaty has provided authoritative recognition that "not every differentiation of treatment will constitute discrimination, if the criteria for such

differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant." United Nations, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, General Comment 18, para. 13, at 28 (1994) (hereinafter "General Comment 18"). According to the Committee:

> [T]he principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. . . . Such action may involve granting for a time . . . certain preferential treatment in specific matters . . . .

Id. para. 10.

The United States affirmed the Human Rights Committee's construction when it ratified the ICCPR. The formal "understanding" adopted at that time states in pertinent part:

> The United States understands distinctions based upon race . . .—as those terms are used in Article 2, paragraph 1 and Article 26—to be permitted when such distinctions are, at a minimum, rationally related to a legitimate governmental objective.

United States: Senate Committee On Foreign Relations Report On The International Covenant On Civil And Political Rights, 31 I.L.M. 645, 655 (May 1992) (earlier draft, adopted later by the Senate and President).

The Report of the Senate Committee on Foreign Relations, addressing the ICCPR, also noted that the Human Rights Committee created by the Covenant had interpreted the treaty to allow certain forms of "differentiation":

> In interpreting the relevant Covenant provisions, the Human Rights Committee has observed that not all differentiation in treatment constitutes discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

Id.; *see also* Paust, *Race-Based Affirmative Action*, *supra*, at 662-63 n.12.

In sum, the ICCPR has been construed—by the United Nations Human Rights Committee and the United States Senate—squarely to permit the purpose here, *i.e.*, affirmative action. Indeed, the Human Rights Committee has indicated that affirmative action may be "require[d]" when States Parties' failure to take such affirmative steps would perpetuate discrimination. General Comment 18, *supra*, at para. 10.

B. CERD Endorses Affirmative Action Programs

CERD by its terms also authorizes affirmative action programs to redress past wrongs. While the treaty's general provisions outlaw all forms of racial discrimination, *see* CERD, arts. 2-5, 660 U.N.T.S. at 216-22, certain "special measures" are expressly excluded from the definition of proscribed racial discrimination. As the Convention states in Article 1, paragraph 4:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that

> such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

CERD, art. 1(4), 660 U.N.T.S. at 216.

Again, when it ratified CERD, the United States expressly recognized that it permits race to be taken into account when necessary to secure equality. In his formal statement to Chairman Claiborne Pell of the Senate Foreign Relations Committee concerning ratification of the treaty, Conrad Harper, the Legal Adviser to the Secretary of State, noted: "Article 1(4) explicitly exempts 'special measures' taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection." Marian Nash, *U.S. Practice: Contemporary Practice of the United States Relating to International Law*, 88 Am. J. Int'l L. 719, 722 (1994). Significantly, Article 2 of CERD also imposes on States Parties the *duty* to take special and concrete measures of affirmative action "when the circumstances so warrant." CERD, art. 2(2), 660 U.N.T.S. at 218; *see also* Paust, *Race-Based Affirmative Action*, *supra*, at 666-67. In ratifying CERD on November 20, 1994, the United States consented to all of its provisions.

Thus, carefully crafted race-based affirmative action programs to ensure equal enjoyment of rights by all racial groups are plainly permissible, and in some circumstances may be required, under both the ICCPR and CERD.

C. Self-Execution Is Not An Issue Where, As Here, The Treaty Provisions Are Cited As Aids To Interpretation

The United States's instruments of ratification for both the ICCPR and CERD contain declarations that many (but not all) of the articles are "non-self-executing." Louis

Henkin *et al., Human Rights* 784-86, 1043-44 (1999). The propriety of such declarations need not be resolved here, because the *amici* do not directly draw upon the treaty provisions as the foundation for their legal claims. Rather, the ICCPR and CERD are cited here as additional interpretive support for concluding that the University's admissions policies do not offend the United States Constitution. Such an informative and illustrative role for international law has been widely accepted by members of this Court. *See* Point I, *supra*. Even generally non-self-executing treaties can be used indirectly as aids for interpretation of other laws, defensively in civil or criminal contexts, or—as here—to support a claim that the state interest in race-based affirmative action is, indeed, "compelling." *See, e.g.*, Jordan J. Paust, *International Law as Law of the United States* 62-64, 68, 97-98, 134-35, 370, 377-78 n.4, 384 (1996); de la Vega, *supra*, at 457 n.206, 460, 467-68, 470; Joan Fitzpatrick, *The Preemptive and Interpretive Force of International Human Rights Law in State Courts*, 90 Proc. Am. Soc. Int'l L. 259, 262, 264 (1996); Paust, *Race-Based Affirmative Action*, *supra*, at 671 n.45. Thus, the Court may appropriately consider these treaties here.

CONCLUSION

For the foregoing reasons, as well as those stated in the briefs for Respondents, the decisions of the courts below should be affirmed.

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IN THE

Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

-and-

JENNIFER GRATZ and PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE STATES OF MARYLAND, NEW YORK, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, ILLINOIS, IOWA, MAINE, MASSACHUSETTS, MINNESOTA, MONTANA, NEW MEXICO, NORTH CAROLINA, OKLAHOMA, OREGON, RHODE ISLAND, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND THE TERRITORY OF THE U.S. VIRGIN ISLANDS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Johnson v. Transp. Agency, 480 U.S. 616 (1987)	5, 28
Keyishian v. Bd. of Regents, 385 U.S. 589 (1967)	*passim*

Cited Authorities

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Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd mem.*, 402 U.S. 935 (1971)	18
McLaurin v. Okla. State Regents, 339 U.S. 637 (1950)	16
Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990)	17
Miller v. Johnson, 515 U.S. 900 (1995)	*passim*
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San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973)	9
Shaw v. Reno, 509 U.S. 630 (1993)	10, 11
Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971)	17
Sweatt v. Painter, 339 U.S. 629 (1950)	16

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Sweezy v. New Hampshire, 354 U.S. 234 (1957)	*passim*
United States v. Lopez, 514 U.S. 549 (1995)	8, 9
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William G. Bowen and Derek Bok, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998)	6, 29

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Chilling Admissions: The Affirmative Action Crisis and the Search for Alternatives (Gary Orfield & Edward Miller, eds., 1998) 23

Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 Baylor L. Rev. 289 (2001) 26

Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. Rev. 521 (2002) 25

Catherine L. Horn and Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences*, Feb. 5, 2003 (available at http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf) 24, 25

Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 Mich. L. Rev. 1045 (2002) 29

Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484 (1987) 9

Patricia Marin and Edgar K. Lee, *Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida*, Feb. 5, 2003 (available at http://www.civilrightsproject.harvard.edu/research/affirmativeaction/florida.pdf) 24, 25

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Jon Mills, *Diversity in Law Schools: Where Are We Headed in the Twenty-First Century?*, 33 U. Tol. L. Rev. 119 (2001) 23-24

Jeffrey Selingo, *What States Aren't Saying About the "X-Percent Solution,"* Chron. of Higher Educ., June 2, 2000 26

Marta Tienda, *et al.*, *Closing the Gap?: Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action*, Jan. 21, 2003 (available at <http://www.texastop10.princeton.edu/publications/tienda012103.pdf) 24, 25

U.S. Civil Rights Commission, Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education, Nov. 2002 (available at <http://www.usccr.gov/pubs/percent2/main.htm) 23

U.S. Department of Education, National Center for Education Statistics, *Digest of Education Statistics, 2001* (available at http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2002130) 1, 7

Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. Rev. 1 (1997) 22

INTEREST OF *AMICI CURIAE*

The *Amici States* respectfully submit this brief in support of Respondents University of Michigan, *et al.* At issue is the States' discretion to determine how best to provide high-quality public education — "perhaps the most important function of state and local governments." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

Every State in the nation operates a system of higher education — from California and Texas, with 143 and 109 public institutions of higher learning, respectively, to Alaska and Delaware, which each have five.[1] States provide a complete array of post-secondary schools, including two-year community colleges, four-year colleges and universities, research and doctoral institutions, and professional, vocational, and technical schools. The missions of these schools vary tremendously, as do their resources and governing structures, but most, if not all, States share the goal of educating their citizens, in all their diversity, to assume productive roles in business, government, and society generally.

Public universities and colleges enroll the vast majority of students pursuing post-secondary education. Indeed, in 2000, they enrolled approximately 75% of post-secondary school students nationally, expending over 170 billion dollars.[2] For students of moderate means, public schools play a particularly significant role, as the average expense of attending a private undergraduate college is almost three times that of the public equivalent.[3]

To successfully fulfill their traditional role in providing higher education, States must have the freedom and flexibility to create strong institutions tailored to the needs of each particular

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1. U.S. Department of Education, National Center for Education Statistics, *Digest of Education Statistics, 2001*, Chapter 3, Table 245 at 291 (available at http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2002130).

2. *Supra* note 1, Figure 13 at 200.

3. *Supra* note 1, at 199.

State and its citizens. In striving to meet these objectives, *Amici* States have learned, through decades of experience, that a diverse student population enriches the learning environment for all students and better prepares them to excel in a heterogenous world. The States also recognize that because of our nation's tragic history of slavery and, until just a generation ago, legal segregation, the law limits how racial classification may be used, even where intended to broaden the intellectual discourse and further the goals of equality and democracy. State colleges and universities across the nation have therefore relied for more than two decades on *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), to understand how the Fourteenth Amendment should guide their efforts to formulate admissions policies that strengthen diversity. Many of these policies are similar to those of the University of Michigan's School of Literature, Science and the Arts and its Law School, and all reflect the type of educational judgment and expertise Respondents exercised in their admissions decisions.

The need to take race or ethnicity into account in college admissions, like the mission, goals, and student body of each institution, varies over time and requires periodic re-evaluation. Some public colleges and universities that do not currently consider race may choose to in the future, while others that consider race now may not tomorrow. The Court's decision in these cases will therefore affect the ability of *all* public higher education institutions to decide how best to achieve the educational benefits of diversity for their students and their citizens.

SUMMARY OF ARGUMENT

The court of appeals and district court decisions upholding the University of Michigan's admissions programs should be affirmed because they properly harmonize constitutional principles of equal protection, academic freedom, and traditional state sovereignty — the same balance originally struck by Justice Powell in *Bakke*, and one upon which the States have relied for almost twenty-five years.

At the outset, proper application of the Equal Protection Clause in these cases requires an understanding of its context. In exercising their freedom to determine how best to educate their citizens, many States have decided that a diverse student body, including racial and ethnic diversity, is of the utmost importance, at times requiring the consideration of race as one factor among many in a competitive admissions process. Such admissions policies must, of course, comport with the Equal Protection Clause, and a program that relies on a racial classification is thus subject to strict judicial scrutiny. But just as equal protection doctrine is sensitive to the complex interplay of forces that enter a legislature's redistricting calculus, its application in the higher education context is no less strict for taking account of complex academic judgments in an area that is, like redistricting, primarily the responsibility of the States. To accommodate these highly valued constitutional principles of academic freedom and state sovereignty, a degree of deference to the University of Michigan's determination that diversity yields educational benefits important to its educational mission, as well as to its method for attaining this diversity, is appropriate.

Second, the University of Michigan has plainly identified a compelling interest in achieving the educational benefits of a diverse student body. Its assessment that diversity will, in fact, yield educational benefits that are essential to its academic mission is one to which this Court should defer. Even under strict scrutiny, a court's role is not to require proof of a State's educational judgments, but to determine whether such a judgment is a genuinely academic one that lies within a public university's professional expertise. In any event, Petitioners have not seriously disputed that significant educational benefits are conferred by a diverse assembly of students, including students of different racial and ethnic backgrounds, and as the record establishes, these benefits are recognized by a growing consensus among leading educators, researchers and scholars.

While deferring to a public university's judgments in this way, the Court must closely scrutinize the university's goals to

determine whether they are compelling. It does so by examining whether those goals are consistent with the values of equality and free speech at the core of our Constitution and embraced within the Court's own jurisprudence — as indeed they are. As the Court has long recognized, education in an integrated setting can play a foundational role in awakening students to the cultural and democratic values of our pluralistic society, including the values of equality. Moreover, it can stimulate the "robust exchange of ideas" central to the First Amendment. Conversely, the harm that can flow from education in isolation from the individuals, institutions, and ideas that make up our heterogeneous society has long been recognized as anathema to the very notion of equality.

Third, equal protection doctrine also requires a close fit between goals and policies. But "fit" in the context of higher education is a function of many variables, including mission, selectivity, traditions, and characteristics of the applicant pool. Public universities and colleges differ widely along these lines, and "narrow tailoring" does not require a one-size-fits-all admissions system. Thus, the theoretical existence of a race-neutral alternative cannot be dispositive, especially because such alternatives are ineffectual in many settings. Rather, public universities require flexibility, within clearly-defined constitutional limits, to decide how best to achieve their diversity goals in light of the many factors that impact such complex educational policy decisions. By clarifying the limits first set forth in *Bakke*, this Court can provide "breathing space" within which universities can exercise their judgment as to how best to fulfill their academic missions.

As explained in *Bakke*, the hallmark of a constitutional plan is individualized inquiry, in which race is one of many factors, placed on the same footing for consideration as other types of diversity. Because the University of Michigan's plans comport with these parameters, they are narrowly-tailored and should be upheld.

ARGUMENT

I. EQUAL PROTECTION REVIEW OF A PUBLIC UNIVERSITY'S ADMISSIONS DECISIONS REQUIRES ACCOMMODATION OF FIRST AMENDMENT INTERESTS AND RESPECT FOR THE STATES' TRADITIONAL ROLE IN EDUCATION.

In determining whether an admissions plan comports with both the "compelling interest" and "narrow tailoring" prongs of equal protection doctrine, the Court should keep in mind that unlike in the employment and contracting settings, equal protection review in the context of public higher education implicates important principles of academic freedom in an area traditionally committed to the discretion of the States. It is well-settled that the Equal Protection Clause subjects a State's use of a racial classification to "searching judicial inquiry" to "'smoke out' illegitimate uses of race." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 226 (1995) (internal quotations omitted). But strict scrutiny does not require that a court blind itself to other, equally important, constitutional values. *See, e.g., Miller v. Johnson*, 515 U.S. 900, 915-916 (1995). On the contrary, the "fundamental purpose" of strict scrutiny is to "take 'relevant differences' into account." *Adarand*, 515 U.S. at 228. *Bakke* itself — which has become integrated into "the fabric of our law," *Johnson v. Transp. Agency*, 480 U.S. 616, 644 (1987) (Stevens, J., concurring), as well as the fabric of our university communities, *see* Brief of the State of New Jersey as *Amicus Curiae* in support of Respondents (discussing *stare decisis* effect of *Bakke*) — harmonizes principles of equal protection, academic freedom, and federalism. It does so by giving a degree of deference to a public university's academic decisions, within constitutionally prescribed limits. In order to adequately accommodate the university's academic freedom, as well as the States' traditional role in higher education, this Court should do the same.

A. University Admissions Decisions Are a Special Concern of the First Amendment and Require Judicial Deference.

The Court has long viewed the academic freedom of our universities as a "transcendent value," the safeguarding of which is "a special concern of the First Amendment" to which "[o]ur Nation is deeply committed." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *see also Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("The essentiality of freedom in the community of American universities is almost self-evident."). Protecting a university's freedom to determine for itself "what is or is not germane to the ideas to be pursued," *Board of Regents v. Southworth*, 529 U.S. 217, 232 (2000), is of vital importance if our universities are to continue "'to provide that atmosphere which is most conducive to speculation, experiment and creation.'" *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring). This "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also * * * on autonomous decisionmaking by the academy itself." *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (citing *Bakke*, 438 U.S. at 312 (opinion of Powell, J.)) (internal citations omitted). Indeed, the success of our nation's academic institutions is often attributed to the value we place on academic freedom: "An important reason why American higher education has become pre-eminent in the world is the greater willingness of the government to respect the autonomy of colleges and universities." William G. Bowen and Derek Bok, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS [hereinafter THE SHAPE OF THE RIVER] 287 (1998).

Included within "'the freedom of a university to make its own judgments as to education'" is "the selection of its student body." *Bakke*, 438 U.S. at 312. Restricting the States' ability to select a diverse student body runs counter to this principle by denying "one of 'the four essential freedoms' of a university," that is, "[d]iscretion to determine, on academic grounds, who

may be admitted to study." *Ewing*, 474 U.S. at 226 n.12 (quoting *Bakke*, 438 U.S. at 312). It is for this reason that judicial review of university admissions decisions "is rarely appropriate." *Ewing*, 474 U.S. at 230 (Powell, J., concurring).

Judicial restraint with respect to admissions decisions is further grounded in the Court's recognition that a university's judgment regarding admissions relies on a specialized area of knowledge. Federal courts are simply not well-suited to "evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions — decisions that require 'an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.'" *Ewing*, 474 U.S. at 226 (quoting *Board of Curators v. Horowitz*, 435 U.S. 78, 91 (1978)).

It is in consideration of our nation's "deep commitment" to academic freedom that a state college or university is entitled to deference in its determination that a diverse student body will lead to educational benefits essential to its mission, and in its selection of the admissions program that it believes will best serve this goal.

B. Public Education Is a Traditional State Concern.

Deference to academic judgments regarding admissions decisions is particularly appropriate for the nation's *public* colleges and universities because higher education is primarily a state concern. *See Horowitz*, 435 U.S. at 91 ("By and large, public education in our Nation is committed to the control of state and local authorities."). The States have committed substantial resources to establish institutions of higher education that both are affordable and rival this nation's private universities. Nearly twelve million students enrolled in public institutions of higher education in 2000 alone, representing 75% of post-secondary school students nationally.[4] The States thus play a vital role in the sphere of higher education, similar to their role in public education at the primary and secondary level.

4. *Supra* note 1, Figure 13 at 200.

See Brown, 347 U.S. at 493. Neither our federal system — nor academic freedom — can thrive when a public university is not accorded deference in the selection of a student body that, in its view, will best serve its mission. While the Fourteenth Amendment contemplates interference with state authority, "this Court has never held that the Amendment may be applied in complete disregard for a State's constitutional powers" but rather has recognized that the "Fourteenth Amendment does not override all principles of federalism." *Gregory v. Ashcroft*, 501 U.S. 452, 468, 469 (1991).

One of the many functions of public education at all levels is to nurture values necessary for good citizenship and the maintenance of a flourishing democracy — a quintessentially state role. "'No one should underestimate the vital role in a democracy that is played by those who guide and train our youth,'" *Keyishian*, 385 U.S. at 603 (quoting *Sweezy*, 354 U.S. at 250), as education is essential to the political health of our communities, *see Mueller v. Allen*, 463 U.S. 388, 395 (1983). Indeed, public education serves as "the very foundation of good citizenship," *Brown*, 347 U.S. at 493, and is vital to "the preservation of values on which our society rests." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979).

For these reasons, decisions regarding public education are an exercise of state sovereignty that go "'to the heart of representative government,'" fulfilling "'a most fundamental obligation of government to its constituency.'" *Ambach*, 441 U.S. at 76; *see also Gregory*, 501 U.S. at 462-463 (citing *Ambach* for the proposition that public education is "'intimately related to the process of democratic self-government'"). It is thus well-established that education is a traditional state concern, *United States v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, O'Connor, JJ., concurring), that rest[s] "firmly within a State's constitutional prerogatives" reserved by the Tenth Amendment. *Gregory*, 501 U.S. at 462-463. Just as the Court has stated that "our scrutiny will not be so demanding" when reviewing political functions such as the establishment of citizenship qualifications

for public school teachers, *id.*, it has expressed its "reluctance to trench on the prerogatives of state and local educational institutions," noting its "responsibility to safeguard their academic freedom." *Ewing*, 474 U.S. at 226; *see also Horowitz*, 435 U.S. at 91.

The admissions policies devised by the University of Michigan and the alternative approaches advocated by several *Amici* for Petitioners demonstrate how, with respect to education policy, States perform their role as "laboratories for experimentation to devise various solutions where the best solution is far from clear." *Lopez*, 514 U.S. at 581; *see San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42-43 (1973) (noting the judiciary's "lack of specialized knowledge and expertise" in educational policy, and observing that "the judiciary is well-advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe continued * * * experimentation so vital to finding even partial solutions to educational problems"); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1498, 1507 (1987) (States have "greater opportunity and incentive to pioneer useful changes," and should retain "a high degree of decision making autonomy * * * on the humble assumption that most governmental decisions are fairly debatable–that is, there is no single compelling just answer to many questions of government."). Federal intervention that prevents States from "experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise" constitutes a significant intrusion on state sovereignty, *Lopez*, 514 U.S. at 583 — even more so when a public university is seeking to nurture an intellectual atmosphere of "'speculation, experiment and creation'" protected by the First Amendment, *Bakke*, 438 U.S. at 312 (quoting *Sweezy*, 354 U.S. at 263).

C. Harmonizing These Constitutional Principles Requires Judicial Deference to a Public University's Judgment as to How Best to Fulfill its Mission.

The arena of public education does not permit easy crossover of equal protection principles established in other contexts because public higher education implicates the important principles of academic freedom and federalism, discussed *supra*. This Court should review a public university's academic decisions with a degree of deference, while ensuring they are within constitutionally-prescribed limits. This deference is similar to that accorded electoral redistricting. Equal protection review of redistricting legislation "represents a serious intrusion on the most vital of local functions." *Miller*, 515 U.S. at 915. For this reason, and because redistricting is "a most difficult subject for legislatures," the Court has held that "the States must have the discretion to exercise the political judgment necessary to balance competing interests." *Id*; accord *Easley v. Cromartie*, 532 U.S. 234, 242 (2001). To allow States to exercise this judgment, the Court does not interfere in the redistricting process on a claim of racial gerrymandering unless race predominates, subordinating traditional districting principles; if race is considered as *a* factor, but not the *predominant* factor, the Court will not strictly scrutinize the legislation. *Miller*, 515 U.S. at 916; *Cromartie*, 532 U.S. at 214.

Public institutions of higher education, while subject to strict scrutiny when they rely on a racial classification, similarly must be afforded "breathing space" to make academic judgments and complex policy choices. *See Keyishian*, 385 U.S. at 604. Indeed, the scheme established in *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny to protect state political prerogatives is comparable to that set forth by Justice Powell in *Bakke* to accommodate First Amendment considerations, and appropriately so. Both involve the need to balance multiple constitutional considerations in reviewing complex decisions regarding difficult matters of traditional state concern. Both therefore provide a measure of deference in reviewing such state

decisions. In *Bakke*, as in the *Shaw* line of cases, race may constitutionally be considered as one of many factors — "on the same footing" as, or not "subordinat[ing]," the others — without thereby depriving the States of the judicial deference that they are otherwise afforded in such matters. *Bakke*, 438 U.S. at 317; *Miller*, 515 U.S. at 779; *id.* at 928 (O'Connor, J., concurring).

Bakke stresses this point. As Justice Powell explained, "[u]niversities * * * may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose. So long as the university proceeds on an individualized, case-by-case basis, there is no warrant for judicial interference in the academic process." 438 U.S. at 319 n.53. If a university's admissions plan involved a competitive consideration of race as one of many factors, with individualized review as the hallmark, "good faith would be presumed in the absence of a showing to the contrary." *Bakke*, 438 U.S. at 318-319.

As discussed in Points II and III, *infra*, the Court should harmonize the various constitutional interests at play in the same manner Justice Powell did — by providing clear parameters for a constitutionally permissible plan and then giving serious weight to a public university's determination of its academic mission and how that mission is best fulfilled. This deference does not dilute the strict scrutiny analysis; it sets up certain legal boundaries within which a court may presume that consideration of race in admissions is constitutional.

II. PUBLIC UNIVERSITIES HAVE A COMPELLING INTEREST IN THE EDUCATIONAL BENEFITS OF A DIVERSE STUDENT BODY.

To satisfy strict scrutiny, the University of Michigan must show that its interest in attaining the educational benefits of a diverse student body is compelling. The University of Michigan, like many state universities, has determined that diversity confers educational benefits that are essential to its mission. While the Court must determine whether those benefits constitute a "compelling interest," the judgment that diversity yields them,

and that they are central to a school's mission, should not be second-guessed. These decisions merit deference in light of the freedom accorded the University in defining its own academic mission and its expertise in doing so, as well as the need to give the States a measure of discretion in fulfilling their traditional function of providing public education.

The goal of attaining the educational benefits of diversity is sufficiently compelling to allow consideration of race as a factor in admissions decisions. This Court has stressed the importance of a diverse educational environment. And as explained below, Petitioners' other objections — that an interest in attaining diversity is amorphous and ill-defined, and that the consideration of race as one of many factors relevant to diversity relies on impermissible stereotypes — are unavailing and misapprehend the role that race plays in the University of Michigan's admissions plans.

A. Public Universities Have Determined That Diversity Is Essential to Their Educational Missions.

The University of Michigan asserts a compelling interest in achieving the educational benefits that flow from a diverse student body — including diversity by race. While the record firmly establishes these benefits, such proof is not constitutionally required in assessing whether this asserted interest is compelling. The University of Michigan's judgment that diversity does confer critical advantages, and that they are essential to its academic mission, is the type of judgment to which a court should defer, for the reasons discussed in Point I, *supra*. Academic freedom requires that a university be given discretion in selecting its students and the values its admissions policies will promote. *See Ewing*, 474 U.S. at 225 (When asked "to review the substance of genuinely academic decisions," judges "should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.") (footnote omitted).

Additionally, where the university is a public school, federalism demands some degree of deference to the State's decisions about the values to be instilled by its educational institutions.

This approach diverges from a court's role in assessing a remedial interest, which requires "a strong basis in evidence of the harm being remedied" to assess the veracity of a state actor's assertion that remedial efforts are in fact the reason for the classification. *Miller*, 515 U.S. at 922. The different evidentiary standards stem from the divergent nature of the respective interests. The validity of a remedial interest is by its nature a question of historical fact, and thus is susceptible to evidentiary verification in a way that an educational interest grounded in the fulfillment of a public university's mission simply is not. Moreover, state institutions generally can make no claim of specialized expertise in identifying past discrimination, as they can with respect to the definition and fulfillment of their educational missions. The public university's educational interest must be articulated to permit an assessment of its compelling nature and a means-end analysis, but to require evidentiary verification of the educational benefit sought, especially where that benefit may yet be aspirational, would do serious damage to the principles of academic freedom and federalism essential to our Constitution.

In any event, the benefits of diversity in institutions of higher education are plain and well-established. The University of Michigan, like the vast majority of public colleges and universities, has determined that exposure to a diverse student body is a powerful tool by which students come to understand and appreciate similarities and differences in life experience, as well as how those similarities and differences inform beliefs and attitudes. Such exposure spurs students to tolerate and respect differences in appearance and experience, to question previously unexamined assumptions and stereotypes, and, at the same time, to truly appreciate the common ground that they share. With this teaching tool, public universities play an indispensable role in preparing students to succeed in our

heterogenous workplaces and markets and to participate fully in our pluralistic social and political institutions.

Because race remains a salient feature in American life, public universities have found that racial and ethnic diversity is a crucial component of the diversity from which these educational benefits may be derived. The record in these cases documents what is otherwise obvious — by and large, Americans of different races live in different communities, attend separate elementary and secondary schools, and rarely have sustained, meaningful contact with one another. *See* Expert Report of Thomas J. Sugrue.

Justice Powell's opinion in *Bakke* affirms the importance of a diverse student body. His concurrence recognized that a university's academic freedom includes the freedom to select its student body in such a way as to create an atmosphere of "'speculation, experiment, and creation — so essential to the quality of higher education.'" 438 U.S. at 312. More importantly, it observed that such an environment is "widely believed to be promoted by a diverse student body":

> [A] great deal of learning occurs informally * * * through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. * * * People do not learn very much when they are surrounded only by the likes of themselves.

Id. at 312-313 n.48 (quoting Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WEEKLY 7, 9 (Sept. 26, 1977)). Justice Powell also acknowledged the significant social benefits of permitting universities to use their admissions process

to obtain a diverse student body: "[T]he 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Id.* at 313. Even at the level of graduate education, Justice Powell added, "our tradition and experience lend support to the view that the contribution of diversity is substantial." *Id.* at 313.

Many public universities, including the University of Michigan, agree with these views and believe that consideration of race as a "plus" factor in their admissions process, in the manner approved in *Bakke*, is essential to obtain these important educational benefits.[5]

B. The Goal of Achieving the Educational Benefits of a Diverse Student Body Is Compelling.

The Court has long recognized the foundational role of education in awakening students to the cultural and democratic values of a pluralistic society, the importance of exposure to a "robust exchange of ideas" "out of a multitude of tongues," and the harm of education that takes place in isolation from the individuals, institutions, and ideas that make up our heterogenous community. Relying on this "tradition and experience," as well as fundamental principles of equal protection and academic freedom, the Court should conclude that a university's interest in diversity is compelling and therefore justifies a narrowly-tailored consideration of race. *See Bakke*, 438 U.S. at 311-312 ("[T]he attainment of a diverse student body * * * is clearly a constitutionally permissible goal for an institution of higher education."); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) ("[A]lthough its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least

5. For example, institutions of the University System of Maryland consider race as one factor among many in deciding whom to admit, and the System's administration regards it as essential that this practice continue.

in the context of higher education, to support the use of racial considerations in furthering that interest.") (citing *Bakke*, 438 U.S. at 311-315).[6]

1. In the context of racially-segregated professional schools, this Court has highlighted the importance of education in a racially heterogenous environment. *See Sweatt v. Painter*, 339 U.S. 629, 634 (1950) (Legal education "cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned."); *McLaurin v. Okla. State Regents*, 339 U.S. 637, 641 (1950). The Court's First Amendment jurisprudence has similarly recognized the significance of interaction among a wide range of persons and ideas: "The Nation's future depends on leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Keyishian*, 385 U.S. at 603.

And though a state university system differs in certain respects from primary and secondary schools, this Court has also acknowledged, in the context of public school desegregation, the important educational benefits of interaction among students of different races: "Attending an ethnically diverse school may help * * * prepar[e] minority children 'for citizenship in our pluralistic society,' while, we may hope, teaching members of the racial majority 'to live in harmony and mutual respect' with children of minority heritage." *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472-473 (1982) (internal citations omitted); *see also id.* at 472 ("[W]hite as well as Negro children benefit from exposure to 'ethnic and

6. The United States, as well, through its Title VI guidance, has long recognized and advised the States that a university's interest in educational diversity is compelling. *See* 59 Fed. Reg. 8756, 8760-8761 (Feb. 23, 1994) (supplementing 44 Fed. Reg. 58509 (Oct. 10, 1979)).

racial diversity in the classroom.'"); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (school authorities have the discretion to determine that a racially diverse student body is necessary "to prepare students to live in a pluralistic society"); *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971) (same); *see also Ambach*, 441 U.S. at 77 (public schools bring together "diverse and conflicting elements in our society" "on a broad but common ground").

2. While Petitioners claim otherwise (Briefs for the Petitioners in No. 02-241, at 22, 31-33; No. 02-516, at 39-41), an interest in attaining a diverse student body is sufficiently "specific" and "verifiable" to permit consideration of race. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 613 (1990) (O'Connor, J., dissenting). The interest in educational diversity "is not an interest in simple ethnic diversity." *Bakke*, 438 U.S. at 315. "The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.* The race of an applicant may be considered, but it is not decisive when compared to the contribution to educational pluralism that may be made by another candidate. When racial diversity is considered on the same footing as the other pertinent elements of diversity in this way, a university does not rely on race in substantial disregard of the school's other admissions criteria. Those other elements of diversity thus provide "a crucial frame of reference" against which any consideration of race to achieve educational diversity can be compared, and therefore "constitute a significant governing principle." *Miller*, 515 U.S. at 928 (O'Connor, J., concurring).

By the same token, while the Equal Protection Clause requires close judicial scrutiny when a state actor uses a racial classification, it does not demand that racial diversity be treated as *less important* than other constituent elements of a diverse student body. Race is an important component of a diverse student body, and to consider factors such as age, geographic

origin, and socioeconomic status, while barring consideration of race, would treat a State's efforts to achieve racial diversity *less* favorably than similar efforts to achieve other forms of diversity. *Cf. Seattle Sch. Dist.*, 458 U.S. 457 (state-wide initiative permitting busing for nonracial reasons but forbidding it for racial reasons violates equal protection); *Lee v. Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970) (statute treating educational matters involving racial criteria differently from other educational matters and making it more difficult to deal with racial imbalance in the public schools violates equal protection), *aff'd mem.*, 402 U.S. 935 (1971); *Hunter v. Erickson*, 393 U.S. 385 (1969) (city charter treating racial housing matters differently from other housing matters violates equal protection).

3. Moreover, contrary to Petitioners' claim (Briefs for the Petitioners in No. 02-241, at 43-44; No. 02-516, at 17-18, 29-30), considering race as permitted in *Bakke* does not rely on stereotypes, as it does not assume that persons of a certain race or ethnicity will share particular views or beliefs. The educational value of diversity does not depend on the false assumption that all members of one race think alike or share the same views. Rather, education in a diverse environment enables students to discover the falsity of such stereotypes.

Just as geographic diversity exposes students to the range of experiences associated with growing up in different places, ethnic and racial diversity exposes students to the range of experiences attendant to living as a racial or ethnic minority. In treating race and rural upbringing, for example, as relevant in the competitive admissions process, the university admissions officer cannot know precisely how living in a rural area has shaped one student's beliefs or how the fact that a student self-identifies and is perceived as African-American has shaped another's. And indeed, the admissions officer need not know, because the pursuit of racial and ethnic diversity relies not on the belief that members of the same race share the same beliefs or behavior, but on the indisputable social fact that race and ethnicity can significantly affect life experience — just as socio-

economic status and geographic origin can significantly affect life experience. This Court has reached a similar insight in discussing the requirement that juries be drawn from a fair cross section of society. *See Peters v. Kiff*, 407 U.S. 493, 503-504 (1972) (plurality opinion) (The exclusion from jury service of any "large and identifiable segment of the community" removes "varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude * * * that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance."); *Ballard v. United States*, 329 U.S. 187, 193-194 (1946) (A community made up exclusively of one sex "is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.") (footnote omitted).

III. AN ADMISSIONS PROGRAM THAT PROVIDES FOR INDIVIDUALIZED, WEIGHTED CONSIDERATION OF RACE IS NARROWLY TAILORED.

Having established that the goal of diversity is compelling, the University of Michigan must also demonstrate — as it has — that its means are narrowly tailored to accomplish this objective. Petitioners ask this Court to hold otherwise, contending that the challenged programs fail the narrow-tailoring test set forth in *Bakke* and subsequent decisions, in particular *United States v. Paradise*.[7] While an admissions program such as the University's, modeled after the "Harvard plan" referenced in *Bakke*, satisfies the principles animating *Paradise*, Petitioners'

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7. In *Paradise*, the Court relied upon several factors to assess the constitutionality of a remedial race-conscious employee promotion plan, including: the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief; the appropriateness of the numerical goals; and the impact on the rights of third parties. 480 U.S. 149, 171 (1987).

reflexive application of *Paradise* ignores significant differences between the context of that case — involving employment — and this one. Where the provision of public education is at stake, courts should accord universities a degree of deference about the manner in which they consider race, as discussed in Point I, *supra*. In any event, the University of Michigan's plans are narrowly tailored under either formulation.

In attempting to refute this conclusion, several *Amici* for Petitioners claim that any consideration of race is impermissible given the existence of alternative diversity plans at several undergraduate institutions. That argument, however, unduly restricts the States' discretion in providing public education and also ignores the limited efficacy of such plans. Most universities share a goal of diversity. But due to differences in their educational missions, histories, geographic locations, and the characteristics of their applicant pools, they rely upon a wide variety of factors, at times including race, to attain that goal. The choice of which factors to consider and how much weight should be accorded to them is quintessentially an academic judgment, tailored to each university's unique needs. An admissions system that produces diversity at a flagship state university located in a metropolitan area in Florida may fail to produce diversity at a liberal arts college in a small town in Iowa or an upstate New York community college located in a rural county. Simply put, there is not and cannot be a single "right" way to achieve diversity in university student populations nationwide. If diversity is viewed as a compelling interest, universities must have the flexibility to choose the means best suited to their goals. Narrow tailoring does not demand a universal admissions system.

The University of Michigan's admissions programs fit comfortably within the parameters set forth in *Bakke* and thus should be upheld. These plans consider race as a factor, but not the predominant factor, and individually assess each applicant. They do not set quotas or unduly burden non-minority students. Permitting the States to employ such plans would assure a close fit between ends and means, while creating a sphere within which States

are free to select the admissions systems that best serve their mission. This result would ensure that equal protection is accorded all of the University's students, without nullifying the additional constitutional interests in academic freedom and federalism.

A. The Mere Existence of Alternatives for Achieving Diversity Does Not Preclude a University from Establishing That a Race-conscious Admissions Program Is Narrowly Tailored to Achieve its Diversity Goals.

Perhaps the most significant of the *Paradise* factors is the efficacy of alternative approaches. Indeed, Justice Powell characterized this as the "secondary meaning" of the term "narrowly tailored," *Wygant*, 476 U.S. at 280 n.6 (plurality opinion), and it has proven dispositive in several cases, including *Bakke*. Several *Amici* supporting Petitioners assert that the admissions programs at the University of Michigan cannot survive strict scrutiny because other assertedly race-neutral alternatives exist for achieving diversity in university student populations. These include the "percentage" plans instituted in Texas, Florida and California, which guarantee admission to a state university to graduates of secondary schools who finish in the top "x" percent of their class.

However, the theoretical availability of such alternatives does not preclude a university from establishing that its admissions program is narrowly tailored. The crucial determination is whether those alternatives are effective and would provide a more precise "fit" to a particular university's goals than an admissions program that considers an applicant's race as one of many factors. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion). "Fit" is a function of many variables, including the selectivity of the university, its traditions, mission and priorities, and the characteristics of its applicant pool. No two universities have all of these variables exactly in common, and no single type of admissions program will therefore produce satisfactory results for every institution of higher education. Thus, the existence of these programs

cannot be grounds for holding the University of Michigan's programs unconstitutional.

1. The record here contains ample evidence that the University of Michigan considered alternatives to the admissions programs it ultimately adopted and assessed whether, in light of its applicant pool and academic standards, those alternatives would effectively produce a diverse student body. *See* Briefs of Respondents in Nos. 02-244; 02-516. A state official's good faith selection of an admissions program that considers race as one factor among many, in the manner endorsed by *Bakke*, should be upheld. *See Bakke*, 438 U.S. at 318-319. Courts should not require universities to experiment with an alternative approach just because it has been newly implemented in another State. As the court below noted in *Grutter v. Bollinger*, courts are "ill-equipped to ascertain which race-neutral alternatives merit which degree of consideration or which alternatives will allow an institution such as the Law School to assemble both a highly qualified and richly diverse academic class." 288 F.3d 732, 751 (6th Cir. 2002) (citing *Ewing*, 474 U.S. at 226).

2. In any event, the percentage plans touted by *Amici* in support of Petitioners are not the panacea the *Amici* make them out to be. As a preliminary matter, the percentage plans — instituted in California, Texas, and Florida — do not apply to those States' graduate and professional schools, and thus have no relevance whatsoever to the law school case currently before the Court. In fact, in those States, where consideration of race in admissions has been banned by voter initiative (California), executive order (Florida), and court ruling (Texas), graduate and professional schools have witnessed a significant drop in minority enrollments. The studies suggest that race-neutral alternative policies may be particularly ineffective in producing diversity at the graduate and professional school level. *See* Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. Rev. 1, 39-50 (1997).

At the University of California's law schools, for example, the number of applicants, admissions and new registrants from the underrepresented minority groups decreased after affirmative action was banned, as did the representation of those groups as a percentage of the entire student body. The effect on African Americans was most severe. In 1995-96, before the ban, 7.2% of admittees to UC law schools were African American. By 1997-98, after the ban, that figure had dropped to 2.2%, and by the Fall of 2001, it had reached only 4%.[8]

In Texas, enrollment of African Americans and Hispanics at the University of Texas Law School, the premier public law school in the State, has significantly declined since the ban was imposed. In 1996-97, before the ban, African Americans were 6.4% of total enrolled students. In the following years, that figure dropped to 4.7%, 2.9%, and 1.2%, and stood at 2.3% in 2000-2001. Hispanics were 11.8% of total enrolled students in 1996-97, but only 10.2%, 8.9%, 8.3% and 9.0% in each subsequent year. During this time period, total minority enrollment dropped from 24.7% to 17.2%.[9]

In Florida, after race-conscious admissions to graduate and professional schools were prohibited effective for Fall 2001 admissions, enrollment of minorities at certain schools dropped dramatically. For example, at the University of Florida Levin College of Law, minority enrollment dropped from 33.8% in 1999-2000 to 22.9% in 2001-2002,[10] and the Dean of the Law School has admitted that even that lower figure could not have been attained without crucial reliance on minority scholarships, *see* Jon Mills, *Diversity in Law Schools*:

8. U.S. Civil Rights Commission, Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education [hereinafter U.S. Civil Rights Commission], Nov. 2002, Chapter 2, Table 2.6 and Figure 2.3 (available at <http://www.usccr.gov/pubs/percent2/main.htm); *Chilling Admissions: The Affirmative Action Crisis and the Search for Alternatives* (Gary Orfield & Edward Miller, eds., 1998), at 43-45.

9. U.S. Civil Rights Commission, *supra* note 8, at Table 2.10.

10. U.S. Civil Rights Commission, *supra* note 8, at Table 2.16.

Where Are We Headed in the Twenty-First Century?, 33 U. TOL. L. REV. 119, 129 (2001).

3. Even at the undergraduate level, percentage plans are not a viable alternative for most States. They fundamentally alter the standards of academic achievement relied upon by many selective universities by requiring universities to prioritize class rank over all else. Doing so can force schools to admit students from weaker schools over better-prepared students from stronger schools.

Moreover, percentage plans have not been effective in maintaining diversity at the most selective flagship schools, especially in light of the rising percentage of underrepresented minorities in the population.[11] The selective citation of statistics by *Amici* supporting Petitioners masks this fact. For example, the statistic cited by the United States with respect to California focuses on the state-wide university system and ignores the effect California's percentage plan has had on individual campuses. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners in No. 02-241, at 17. At one of the California system's more selective universities, UC-Berkeley, the African American and Hispanic admissions figure stood at 24.1% in 1997, when race was considered. In 1998, after Proposition 209, the figure dropped precipitously to 11.7%, and has risen only slightly in subsequent years (13.9% in 1999; 16.0% in 2000; and 16.6%

11. *See* Catherine L. Horn and Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* [hereinafter Horn and Flores], Feb. 5, 2003 (available at http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf); Patricia Marin and Edgar K. Lee, *Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida* [hereinafter Marin and Lee], Feb. 5, 2003 (available at http://www.civilrightsproject.harvard.edu/research/affirmativeaction/florida.pdf); Marta Tienda, *et al.*, *Closing the Gap?: Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action* [hereinafter Tienda], Jan. 21, 2003, at 1 (available at <http://www.texastop10.princeton.edu/publications/tienda012103.pdf).

in 2001, since the percentage plan was put into effect).[12] Enrollment statistics show the same pattern. Enrollment of Hispanics and African Americans at UC-Berkeley dropped from 22.4% in 1997 to 11.7% in 1998, and remains low (13.8% in 1999; 13.9% in 2000; and 14.7% in 2001).[13] Notably, in California in 2000, African Americans and Hispanics constituted 46% of the population aged 15-19, and 40% of the high school graduating classes that year.[14]

In addition, percentage plans by themselves apparently have only a minimal effect on diversity; any positive results appear attributable to minority-targeted financial aid, support services, and recruitment to sustain minority enrollment.[15] In relying on race, particularly race-targeted financial aid, such plans cannot fairly be considered a "race-neutral" alternative.

Moreover, percentage plans can succeed only in the presence of a very particular combination of demographic factors and segregation indices. The minority population in a State must be sufficiently large, as it is in Texas, California and Florida, and clustered in large areas rather than dispersed throughout the State. If it is, and a significant number of racially-segregated high schools result, admitting the top percentage of high school graduates could, in theory, lead to the enrollment of a number of minority students. However, where high schools are integrated, a percentage plan would very likely pass over well-qualified minority students. *See* Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 546 (2002). Many States believe a college admissions program that depends on a high degree of segregation for its success is in tension with efforts to

12. Horn and Flores, *supra* note 11, Table 18 at 40.

13. Horn and Flores, *supra* note 11, Table 29 at 49.

14. Horn and Flores, *supra* note 11, Table 2 at 26; Table 5 at 28.

15. *See* Marin and Lee, *supra* note 11, at v, 37; Horn and Flores, *supra* note 11, at vii-viii, 51-59; Tienda, *supra* note 11, at Abstract, 37.

desegregate their elementary and secondary schools, a view that should not be lightly disregarded.

4. Finally, although percentage and other plans that use a proxy for race can be race-neutral on their face, if the primary motivation behind their implementation is the desire to maintain or increase minority enrollment relative to non-minorities and if that goal is achieved, States implementing such plans may still be subject to constitutional attack. *See* Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289 (2001); *cf.* Jeffrey Selingo, *What States Aren't Saying About the "X-Percent Solution,"* CHRON. OF HIGHER EDUC., June 2, 2000, at A31 (reporting that "[a]ides to Gov. Jeb Bush of Florida admit they settled on a 20-percent standard after computer models of 10-percent and 15-percent policies failed to produce enough black and Hispanic students").

B. An Admissions Plan That Considers Race as a Factor and Does Not Set Quotas or Insulate Any Student from Competition Is Constitutional.

If a university considers alternatives and concludes that an admissions program that considers race as one factor among many will most effectively achieve diversity, the pertinent inquiry becomes the constitutionally permissible contours of that program. In this respect, *Bakke* provides useful guidance. In *Bakke*, Justice Powell pointed with approval to the admissions programs at Harvard College and Princeton, which provided for individualized, weighted consideration of each applicant's qualifications, including race and ethnic background. *See* 438 U.S. at 318 (an individual whose qualifications were weighed fairly and competitively under such a program "would have no basis to complain of unequal treatment under the Fourteenth Amendment"); *id* at 320 (Brennan, White, Marshall, and Blackmun, J.J., concurring in part) (agreeing that "a properly devised admissions program involving the competitive consideration of race and ethnic origin" would be constitutional); *see also* 44 Fed. Reg. at 58510. Many universities, including

the University of Michigan, modeled their admissions programs after these plans. The *Amici* States contend that such admissions programs, which require individualized review and consider race as one of many factors, satisfy *Bakke* and *Paradise*.

1. Perhaps most importantly, the Michigan and Harvard plans are flexible and have a logical stopping point. The admissions process begins anew each school term, at which point a school can re-evaluate the need to consider race. And while the interest in diversity, unlike a remedial interest, is itself timeless, the need to consider race to achieve that goal is not. As the court below found in *Grutter*, "[t]he record indicates that the Law School intends to consider race and ethnicity to achieve a diverse and robust student body only until it becomes possible to enroll a 'critical mass' of under-represented minority students through race-neutral means." 288 F.3d at 752.

Moreover, the Michigan admissions plans utilize a single admissions system with a single review committee and a consistent set of admission criteria. Applicants are neither excluded from consideration on a systemic basis nor grouped together for consideration. Admissions personnel individually review each file, and consider a wide variety of diversity-enhancing characteristics, such as socioeconomic status, athletic talent, geographic factors, alumni relationships, personal achievement, age, leadership and service skills, and writing skills. Race does not predominate over the other factors, as academic criteria and an applicant's other contributions to diversity will frequently eclipse race. Such a system ensures that applicants have an opportunity to compete for all available seats and are not insulated or protected from competition.

2. The Michigan admissions plans do not use quotas or reserve a pre-determined number of seats for applicants of any particular race. This is not to say, however, that it is impermissible to pay any attention to the number of minority applicants who are ultimately offered admission. Genuine diversity cannot be achieved by the admission of token numbers

of minority groups. As the Harvard Plan endorsed in *Bakke* explains:

> [T]he Committee is aware that if Harvard College is to provide a truly heterog[e]neous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers. It would not make sense, for example, to have 10 or 20 students out of 1,100 whose homes are west of the Mississippi. Comparably, 10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States. Their small numbers might also create a sense of isolation among the black students themselves and thus make it more difficult for them to develop and achieve their potential. Consequently, when making its decisions, the Committee on Admissions is aware that there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted.

438 U.S. at 323.

Contrary to the arguments made by Petitioners and several of their *Amici*, the endeavor to enroll a "critical mass" of underrepresented minorities does not transform Michigan's admissions policies into quota systems. This Court has recognized a clear distinction between lawful goals and prohibited quotas. *See Johnson*, 480 U.S. at 641 (holding that affirmative hiring plan that considers sex as one of many factors is not a quota where its numerical goals are adjusted annually and it does not earmark positions for anyone).

Nor is it inappropriate for university officials to assign a fixed weight to each diversity factor, including race, or to assign more weight to race than to some other factors. *See* 44 Fed. Reg. at 58510. Justice Powell acknowledged as much in stating,

"the weight attributed to a particular quality may vary from year to year depending upon the 'mix' both of the student body and the applicants for the incoming class." *Bakke*, 438 U.S. at 317-318. The informality of a plan like Harvard's, which does not assign numerical weights to each factor, is simply not feasible in a large public institution, operating on a limited budget, where the need for fairness and consistency in individually reviewing a large number of applications requires a degree of standardization. A rigid rule forbidding the assignment of particular weights to diversity factors would deny large public universities the flexibility to adopt a Harvard-like plan, and deny its students the benefits of a diverse education. *Cf. Wygant*, 476 U.S. at 280 n.6 (narrow tailoring does not require prohibitive administrative expense).

3. Finally, a race-conscious admissions system like the Harvard and Michigan plans does not unduly burden non-minority students. The effect of such plans is "diffused to a considerable extent among society generally." *Wygant*, 476 U.S. at 282. Indeed, several empirical studies have shown that an admissions program that uses race as a "plus" factor has only a slight impact on a particular non-minority applicant's odds of admission to a selective university, in the range of 1-2%. *See* Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1072-1078 (2002); THE SHAPE OF THE RIVER, *supra*, 36-37.

In sum, the *Amici* States contend that there can be no one right way to achieve genuine diversity in university student populations. Universities' educational missions, applicant pools, and diversity goals differ, and the law must be sufficiently flexible to allow for the implementation of different types of admissions programs. We urge the Court to hold that an admissions program like the Harvard and Michigan programs — one that provides for competitive, individualized consideration of applicants' qualifications and characteristics, including race to some degree but not predominantly — is constitutionally permissible.

CONCLUSION

For the reasons stated, the judgments of the United States Court of Appeals for the Sixth Circuit and the United States District Court for the Eastern District of Michigan upholding the constitutionality of the University of Michigan's admissions programs should be affirmed.

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Nos. 02-241 and 02-516

In The
Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Respondents.

JENNIFER GRATZ AND PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF EXXON MOBIL CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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MOTION FOR LEAVE TO FILE OUT OF TIME *AMICUS CURIAE* BRIEF

Exxon Mobil Corporation, by counsel and pursuant to Rule 37, moves for leave to file out of time *amicus curiae* brief in these cases.

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INTEREST OF THE *AMICUS CURIAE*[1]

Exxon Mobil Corporation (ExxonMobil) is the world's leading energy, petrochemical, and technology company. Headquartered in Irving, Texas, it does business in 200 countries and territories and employs nearly 95,000 people, one-third of whom work in the United States.

Attracting and retaining a talented and diverse workforce is critical to ExxonMobil's continued success, both at home and abroad. ExxonMobil's recruitment process is global and competitive. Each year, ExxonMobil recruits thousands of employees from hundreds of universities around the globe – each represents a unique culture, nationality, and background. By recruiting worldwide, ExxonMobil gains essential local knowledge and a range of perspectives to help achieve today's business goals and find tomorrow's leaders of its global operations. ExxonMobil has thus included workforce diversity among its key, long-term business objectives, and it has implemented strategies to achieve diversity in cultural experience, race, ethnicity, gender, and other characteristics. These strategies are many and varied. They include educational, community outreach, and mentoring programs; scholarships and other financial support; and internal equal employment opportunity policies, to name just a few. These efforts have done much to create a workplace that is inclusive, comfortable, and reflective of the multicultural communities in which ExxonMobil does business.

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[1] All parties have consented to the filing of this *amicus curiae* brief. No portion of the brief was authored by counsel for a party. No person or entity other than the *amicus* signing this brief or their counsel made a monetary contribution to the preparation or submission of the brief.

ExxonMobil is proud of its achievements with respect to workforce diversity, but it also recognizes the need to improve, not simply maintain, what it has done. Accordingly, one key component of ExxonMobil's ongoing strategy involves recruiting employees from premier colleges and universities, on a global basis, that offer a broad, well-educated, and heterogeneous talent pool. The University of Michigan is one such school. ExxonMobil uses neither a point system nor set-asides in employment decisions. While the University of Michigan's admissions practices may not be lawful, we believe that this Court should not issue a broad decision barring consideration of race entirely in college admission decisions.

SUMMARY OF THE ARGUMENT

A diverse workforce is essential to the success of global companies like ExxonMobil, and student body diversity at colleges and universities, like the University of Michigan, is critical to ensuring that companies can meet their needs for workforce diversity. Although ExxonMobil takes no position on the particular admissions practices at issue in these cases, it believes that colleges and universities should be able to assemble their student bodies with an eye toward diversity so as not to hinder ExxonMobil's efforts – or the efforts of other American companies – to build the most competitive workforce. Moreover, regardless of the outcome of these cases, ExxonMobil urges the Court to structure its decision so that legitimate diversity initiatives and programs in place at ExxonMobil and other global companies are left undisturbed.

ARGUMENT

I. A diverse workforce is essential to ExxonMobil and other global businesses.

ExxonMobil, like many American companies today, is a truly global business with a highly diverse workforce. Two-thirds of ExxonMobil's operations and employees are located outside of the United States. Within the United States, 30% of ExxonMobil's employees are minorities.

In ExxonMobil's experience, employing a diverse workforce is essential to a company's success in the global marketplace. ExxonMobil understands diversity to mean a commitment to equal opportunity for everyone and a workplace free from any form of harassment or discrimination. Operating effectively in the global marketplace requires an understanding of the many different environments in which a company conducts business, and a diverse workforce that has experience with other cultures facilitates such an understanding. As CEO and Chairman Lee Raymond has stated in a letter to employees,

> Having a workforce that is as diverse as your business is a key competitive advantage. Our success is a direct reflection of the quality of our employees. We strive to attract the best people and to provide them the best career opportunities in our industry. In doing so, we've built a diverse global workforce that is focused on producing superior business results.[3]

[3] Letter from Lee Raymond to all ExxonMobil employees, *available at* http://www.prod.exxonmobil.com/careers/whatcan05_main.html.

Additionally, a diverse workforce creates a competitive advantage by allowing a business to leverage the diverse perspectives of its employees to improve decision-making and increase productivity. As one commentator has observed, "[T]here has come a uniform recognition by top management that diversity adds a significantly valuable dimension to problem-solving and decision-making, and therefore that diverse groups possess important advantages over homogeneous groups as units of creative and competitive productivity." Robert L. Lattimer, *The Case for Diversity in Global Business, and the Impact of Diversity on Team Performance*, COMPETITIVENESS REVIEW, Jan. 1, 1998, at 317.

Student body diversity at the University of Michigan and other institutions of higher education is critical to ensuring that global businesses like ExxonMobil are able to meet their needs for workforce diversity.[3] Not only does an institution with a culturally diverse student body produce graduates possessing the variety of perspectives that ExxonMobil views as paramount to its success as a global business, but all individuals educated at such an institution benefit from exposure to students of widely diverse backgrounds – and this exposure, in turn, benefits their employers. As Justice Powell aptly recognized, "[I]t is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S.

[3] In assembling its workforce, ExxonMobil recruits at the University of Michigan and other universities, and it currently employs about 150 Michigan graduates in the United States.

265, 313 (1978) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).[4]

Indeed, for these very reasons, ExxonMobil is committed to ensuring that its workforce is currently, and continues to be, diverse. ExxonMobil commits substantial resources to supporting various organizations working to diversify the overall student bodies of higher-education institutions. For example, in the United States, ExxonMobil was one of the first contributors to the United Negro College Fund when it was founded in 1944, and it has contributed significantly to the fund every year since. It also helped organize, and is the largest contributor to, the National Action Council for Minorities in Engineering. In fact, between these two organizations, ExxonMobil has contributed almost $20 million. Today, it gives over $5 million annually to minority projects, a portion of which goes to education programs aimed at increasing the number of minorities graduating with technical degrees.

Additionally, ExxonMobil focuses much of its recruitment efforts on top universities with large minority populations. According to the rankings compiled by the Engineering Workforce Commission of the American Association of Engineering Societies, ExxonMobil actively

[4] Patricia Gurin, University of Michigan professor of psychology and women's studies, also has determined from her empirical research that "[s]tudents educated in diverse settings are more motivated and better able to participate in an increasingly heterogeneous and complex democracy." Patricia Gurin, *Reports Submitted on Behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education*, 5 MICH. J. RACE & LAW 363, 365 (1999) (cited with approval in *Grutter v. Bollinger*, 288 F.3d 732, 760 (6th Cir. 2002) (Clay, J., concurring), *cert. granted*, 123 S. Ct. 617 (2002)).

recruits from 64% of the recognized top 55 schools for all women and minorities. And the fact that the number of minority and women employees in ExxonMobil's key professional and managerial positions is increasing *despite* a decline in its overall employment levels speaks volumes about the success of these efforts towards ExxonMobil's long-term business strategy of building and maintaining a diverse, talented workforce.

Although ExxonMobil takes no position on the constitutionality of the particular admissions policies of the University of Michigan and its law school, ExxonMobil believes that a ruling that institutions of higher education cannot consider race or ethnicity as a factor in assembling their student bodies at all would hamper ExxonMobil's efforts – and the efforts of other American companies – to assemble the most productive and competitive workforce. In fact, such a ruling would present a particular challenge to ExxonMobil and other companies that draw their human resources largely from scientific, engineering, and technical fields. Minorities and women have historically been underrepresented in those areas, and invalidating all efforts directed toward increasing enrollment by minorities would exacerbate that concern.[5]

[5] Recognizing minority underrepresentation in these areas, Congress in 1998 created the Commission on the Advancement of Women and Minorities in Science, Engineering, and Technology Development (CAWMSET). The Commission's mandate was to "research and recommend ways to improve the recruitment, retention, and representation" of these groups. CAWMSET Home Page, *at* http://www.nsf.gov/od/cawmset/start.htm. "Commission exploration of the status of these underrepresented populations in SET has reaffirmed the nation's absolute economic and social imperative to ensure that all

(Continued on following page)

II. This Court's decision should not disrupt legitimate diversity programs.

Many American corporations, like ExxonMobil, have devoted considerable financial and other resources to create and sustain a diverse workforce, the type of workforce that is essential to successful participation in the global marketplace. These extensive efforts are ingrained in the corporate culture of ExxonMobil, as well as other American companies that have operations and customers around the world.

As part of its long-term business strategy, ExxonMobil continually has striven to attract employees from the broadest possible and most diverse talent pool in order to develop and retain a premier workforce. As a leading technology company that draws resources primarily from science, engineering, and technical disciplines, ExxonMobil contributes to scholarship funds at various colleges and universities across the country to expand the pool of minorities pursuing science, engineering, and technical degrees. The company also is actively engaged in partnerships with minority organizations and groups, such as the National Black MBA Association, the Society of Hispanic Professional Engineers, the National Society of Black Engineers, the American Indian Science and Engineering Society, and the Consortium for Graduate Study in Management, to support the recruitment and retention of minorities.

U.S. citizens enjoy full participation at all levels of SET education and the SET workforce." *Id.*

Regardless of the outcome of these cases, ExxonMobil urges the Court not to disturb legitimate programs and diversity initiatives in which ExxonMobil and other American businesses engage. In ExxonMobil's experience, these programs and initiatives necessarily promote the acquisition and retention of a diverse workforce whose members have the cross-cultural competence necessary for effective performance in the global marketplace.

One of ExxonMobil's efforts involves a continuing review of, and sensitivity to, the career progress and opportunities for high-performing minority employees. This initiative requires tautologically that race be considered, yet it does not confer an advantage on an employee because of her race; rather, that employee must still compete head to head with her colleagues. ExxonMobil respectfully submits that a focus on the development of high-performing minority employees – without discriminating in their favor once they have been identified – is a sound and important policy that must not be threatened by a decision cast in broad strokes by the Court.

Well-educated employees with diverse backgrounds, who are emerging as the business leaders of the twenty-first century, are essential to maintain America's competitiveness in an increasingly diverse global economy. A diverse workforce not only generates varied perspectives, which improve decision-making, increase productivity, and help companies understand the different environments in which business is conducted today, but also contributes to a positive work environment and

decreasing incidents of discrimination.[6] It is therefore critical for American businesses to be able to continue to foster a climate that encourages and facilitates further development of diversity in their workforces and throughout the country.

CONCLUSION

ExxonMobil must have a qualified, well-educated, diverse workforce to succeed in the global marketplace. Through various legitimate activities, programs, and diversity initiatives, ExxonMobil and other global companies have made great strides in recruiting and retaining employees with varied cultural backgrounds, many of whom have come from colleges and universities that have diverse student bodies. Much has been done; much remains to be done. ExxonMobil thus urges the Court not to disturb legitimate programs and diversity initiatives that help promote essential needs of American businesses in

[6] *See generally* THE CONFERENCE BOARD, DIVERSITY: AN IMPERATIVE FOR BUSINESS SUCCESS (1999).

the ever growing multi-cultural marketplace of the twenty-first century.

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IN THE
SUPREME COURT OF THE UNITED STATES

JENNIFER GRATZ AND PATRICK HAMACHER, *Petitioners*
v.
LEE BOLLINGER, ET AL., *Respondents*

On Writ of Certiorari to the
United States Court of Appeal for the Sixth Circuit

BRIEF OF *AMICI CURIAE* THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND, INC., NATIONAL WOMEN'S LAW CENTER, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, COALITION OF BAR ASSOCIATIONS OF COLOR, AND SIGMA PI PHI FRATERNITY IN SUPPORT OF RESPONDENTS

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Balsbaugh v. Rowland, 290 A.2d 85, (Pa. 1972) 20

Berry v. School Dist. of Benton Harbor, 505 F.2d 238 (6th Cir. 1974).....26

Board of Directors of Rotary Int'l. v. Rotary Club of Duarte, 481 U.S. 537, (1987) 20

Bradley v. Milliken, 433 F.2d 897 (6th Cir. 1970) 26

Brown v. Board of Education, 347 U.S. 483 (1954).....8, 23, 25

Bush v. Vera, 517 U.S. 952 (1996).....10, 27, 28

City of Memphis v. Greene, 451 U.S. 100 (1981) 22

City of Richmond v. Croson, 488 U.S. 469 (1989) ..... *passim*

Civil Rights Cases, 109 U.S. 3 (1883).....18, 20, 22

Crandall v. Connecticut, 10 Conn. 339 (1834).....24

Dred Scott v. Sandford, 60 U.S. 393 24

Easley v. Cromartie, 532 U.S. 234 (2001) 11

Erlenbaugh v. United States, 409 U.S. 239 (1972).....13

Fullilove v. Klutznick, 448 U.S. 448 (1980).....21, 22

Hurd v. Hodge, 334 U.S. 24 (1948) 12

J. E. B. v. Alabama, 511 U.S. 127 (1994) 28, 29

Johnson v. Transportation Agency, 480 U.S. 616 (1987).....10, 11, 19

Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)..... *passim*

McDaniel v. Barresi, 402 U.S. 39 (1971) 27

McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976).....19

Miller v. Johnson, 515 U.S. 900 (1995) 11

NAACP v. Lansing Bd. of Educ., 559 F.2d 1042 (6th Cir. 1977).....26

Oliver v. Michigan State Bd. of Educ., 508 F.2d 178 (6th Cir. 1974).....26

Palmer v. Thompson, 403 U.S. 217 (1971).....22

Patton v. United States, 281 U.S. 276 (1930) 13

Plessy v. Ferguson, 163 U.S. 537 (1896).....7, 8

Regents of University of California v. Bakke, 438 U.S. 265 (1978)..... *passim*

Runyon v. McCrary, 427 U.S. 160 (1976)..... *passim*

United Steelworkers v. Weber, 443 U.S. 193 (1979).....10

United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977).....27

United States v. Paradise, 480 U.S. 149 (1987).....9

United States v. School Dist. of Ferndale, 616 F.2d 895 (6th Cir. 1980) 26

Williams v. City of New Orleans, 729 F.2d 1554 (5th Cir. 1984).....22

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).....10, 20, 27

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42 U.S.C. § 1981(1994) ..... *passim*

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Other Authorities

A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS--THE COLONIAL PERIOD (1978) 23

Cong. Globe, 38th Cong., 1st Sess. (1864) 24, 25

David R. Harris & Justin L. Thomas, THE EDUCATIONAL COST OF BEING MULTIRACIAL: EVIDENCE FROM A NATIONAL SURVEY OF ADOLESCENTS (Univ. of Mich. Population Studies Center, 2002), available at http://www.psc.isr.umich.edu/pubs/papers/rr02-521.pdf 27

Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, (1990) 12

Ed Watch Online: State Summary of Michigan (2001), *available at* http://www.edtrust.org 27

ERIC FONER, RECONSTRUCTION, AMERICA'S UNFINISHED REVOLUTION 1863-1877 (1988).....15

Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985) 12, 17, 18

GEORGE M. STROUD, A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA (2d ed. 1856) 23

Gratz v. Bollinger, No. 97-75321 (E.D. Mich.) 27

H.R. Exec. Doc. No. 11, 39th Cong., 1st Sess. (1865).....18

JACQUELINE JONES, SOLDIERS OF LIGHT AND LOVE: NORTHERN TEACHERS AND GEORGIA BLACKS, 1865-1873 (1980) 24

Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427 (1997).....17

JEFFERY R. HENIG, et al., THE COLOR OF SCHOOL REFORM: RACE, POLITICS, AND THE CHALLENGE OF URBAN EDUCATION (Princeton University Press, 1999) 27

JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICAN SCHOOLS (1992) 26

Mary Anne Case, *Lessons for the Future of Affirmative Action from the Past of the Religion Clauses*?, 2000 Sup. Ct. Rev. 325, (2001).....14

THE BLACK-WHITE TEST SCORE GAP (Christopher Jencks & Meredith Phillips, eds., Brookings Institute Press 1998).....27

INTEREST OF *AMICI CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law is a tax exempt, nonprofit civil rights legal organization founded in 1963 by the leaders of the American bar at the request of President Kennedy, to provide legal representation to the victims of civil rights violations. Its members include former Attorneys General, former Presidents of the American Bar Association, law school deans and professors, and many of the nation's leading lawyers. Over the last forty years, the Lawyers' Committee and its independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington, D.C. have represented members of minority groups and women in hundreds of civil rights cases. Among the essential interests of the Lawyers' Committee is the proper construction and implementation of programs to remedy racial discrimination and its effects and to ensure that all members of our society share in its institutions, opportunities, and benefits.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. It has state and local affiliates throughout the nation. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social and economic status of minority groups and the elimination of racial prejudice.

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[1] Pursuant to Rule 37.6, the *Amici* state that no counsel for any party in this case authored any portion of this brief, and no person other than the *Amici* and their counsel have made any monetary contribution to its preparation or submission. Concurrent with this brief, letters of consent to its filing have been lodged with the Clerk of the Court under Rule 37.3.

The Minority Business Enterprise Legal Defense and Education Fund, Inc. ("MBELDEF") is a nonprofit corporation founded in 1980 by former Maryland Congressman Parren J. Mitchell. The primary purpose of MBELDEF is to promote legally defensible minority business opportunity programs that ensure the fair and equitable participation of minority businesses in the marketplace. As part of its mission, MBELDEF encourages affirmative action initiatives designed to assist minority entrepreneurs in the marketplace.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated since 1972 to the advancement and protection of women's legal rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in education for girls and women through full enforcement of the Constitution and laws prohibiting discrimination. It has a deep and abiding interest in assuring the continued vitality of affirmation action programs and policies that open the doors of opportunity for minorities and women.

The National Partnership for Women & Families, a non-profit, national advocacy organization founded in 1971 as the Women's Legal Defense Fund, promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex and race discrimination in education and employment, and advancing women's opportunities in education, employment, and other aspects of American life.

The Coalition of Bar Associations of Color ("CBAC") consists of the National Bar Association, the Hispanic National Bar Association, the National Asian Pacific American Bar Association, and the Native American

Bar Association. CBAC advances the common interests of these bar associations through joint resolutions, actions, and meetings. Through these actions, CBAC reflects the unity of these bar associations in responding to issues concerning lawyers of color.

Sigma Pi Phi Fraternity is a non-profit organization of college- and university-educated professional men dedicated to the uplift of the African American community through local and national social action programs, concentrated heavily in the area of education, and focusing on mentoring and providing scholarships for economically disadvantaged minority youth. Founded in 1904, Sigma Pi Phi is the oldest predominantly African American Greek-letter fraternity, with 110 member boulés (local chapters) nationwide. Its mission is to gather together men of good training, intelligence and culture for the good of themselves and the community and "by concerted action bring about those things that seem best for all that cannot be accomplished by individual efforts." Sigma Pi Phi has adopted a policy position in support of preserving affirmation action in order to assure equal opportunity in American society.

SUMMARY OF ARGUMENT

The question presented in the Petition asks whether the University of Michigan's undergraduate admissions program is unlawful under 42 U.S.C. § 1981. This statute codifies a provision of the 1866 Civil Rights Act enacted pursuant to the Thirteenth Amendment. Section 1981 does not foreclose the University's remedial consideration of race but indeed supports it.

Amici submit that the inclusion of race, as one factor among a number of factors, in determining admissions from among qualified applicants to the University's undergraduate

programs is constitutionally justified by two distinct compelling interests. The first is the remedial interest of eliminating the "badges and incidents of slavery," particularly with respect to educational opportunity. The second compelling interest is in achieving diversity in institutions of higher education. The first of these interests is firmly grounded in the Thirteenth Amendment and the articulation of its purpose and intent in contemporary provisions of the 1866 Civil Rights Act. The second interest is informed by this Amendment and statute. In addition, the Thirteenth Amendment and the contemporaneous legislation implementing its commands not only complement, but modify, precedent developed under the Fourteenth Amendment. The Thirteenth Amendment provides a related, but different, remedial justification for the permissible consideration of race. It reinforces the historical moorings and purposes of the Fourteenth Amendment, requiring greater elasticity in its appropriate application.[2]

Slavery and subsequent, state-imposed segregation were part of a system depriving African Americans of educational opportunities. The University should be allowed to address voluntarily the continuing effects of that deprivation, through remedial measures and a pursuit of diversity informed by history.

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[2] Although the University has not advanced a remedial justification for its program, instead confining itself to the interest in diversity articulated by Justice Powell in *Bakke*, the Intervenors have asserted a remedial basis. And the evidence demonstrating racial disparities in the application of the University's criteria for admissions, and in the education offered to young African Americans and other racial minorities in Michigan and the nation, supports the remedial interest addressed in this brief.

ARGUMENT

THE THIRTEENTH AMENDMENT AND THE 1866 CIVIL RIGHTS ACT PROVIDE A COMPELLING REMEDIAL INTEREST AND INFORM A DIVERSITY INTEREST.[3]

A. This Court's Compelling Remedial Interest Has Largely Been Shaped By Consideration of The Fourteenth Amendment.

This Court's decision in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), contained two distinct perspectives on the constitutionally permissible use of race in university admissions.[4] On the one hand, Justice Powell found "the attainment of a diverse student body" to be "clearly [ ] a constitutionally permissible goal for an institution of higher education," *id.* at 311-12, and, that "[i]n enjoining petitioner from ever considering the race of any applicant ... the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Id.* at 320. On the other hand, Justices, Brennan, White, Marshall, and Blackmun joined Justice Powell in approving

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[3] The Thirteenth Amendment provides, in pertinent part: Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction. U.S. Const. amend. XIII, § 1.

[4] Only five Justices participated in the discussion of the Fourteenth Amendment, because four Justices confined their views solely to the interpretation of Title VI of the Civil Rights Act of 1964. *Id.* at 408 (Stevens, J., concurring in the judgment in part and dissenting in part).

the competitive consideration of race to achieve diversity, "at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination." *Id.* at 326 n.1.

All of these Justices agreed that it was constitutionally permissible to consider race to remedy discrimination. They differed with respect to whether the plan at issue satisfied scrutiny under the Fourteenth Amendment on the basis of its remedial purpose. Justice Powell distinguished the permissible use of race, where judicial, legislative or administrative findings of discrimination have been made, from impermissible use for the purpose of "remedying [ ]the effects of 'societal discrimination.'" *Id.* at 307. He viewed societal discrimination as "an amorphous concept of injury that may be ageless in its reach into the past." *Id.* The remaining Justices concluded that

> [The] articulated purpose of remedying the effects of past societal discrimination is, under our cases, sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the [s]chool.

Id. at 362.

The difference in views, between the justices reaching the constitutional issue, is largely traceable to differing constructions of the Equal Protection Clause of the Fourteenth Amendment. Justice Powell recognized that "[t]he Court's initial view of the Fourteenth Amendment was that its 'one pervading purpose' was 'the freedom of the slave race, the security and firm establishment of that

freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised dominion over him.'" *Id.* at 291. He also recognized that "[t]he Equal Protection Clause . . . was '[virtually] strangled in infancy by post-civil-war judicial reactionism,'" and "relegated to decades of relative desuetude," during which its "'one pervading purpose' was displaced," referring to *Plessy v. Ferguson, 163 U.S. 537 (1896).* *Id.* (citations and footnotes omitted). However, when "the Equal Protection Clause [again] began to attain a genuine measure of vitality," Justice Powell opined that "it was no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority." *Id.* at 292. Thus, Justice Powell concluded that "[t]he guarantees of equal protection 'are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.'" *Id.* at 292-93 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)). Justice Powell's views did not include consideration of legislative authority under either the Thirteenth or Fourteenth Amendments. *Id.* at 302 n.41.

In his powerful but angry, concurring opinion in *Bakke*, Justice Marshall disagreed with broader or "universal" construction of the Equal Protection Clause, to the extent that the construction might be interpreted to prohibit considering race to remedy the effects of discrimination. Justice Marshall's opinion began by looking back at slavery.

> Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights. It was unlawful

> to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing him or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave.

Id. at 387-88 (Marshall, J.) The opinion then traced the continuing legally established and enforced deprivations of African Americans, and the Court's complicity in that enterprise through interpretations of the Fourteenth Amendment, *see id.* at 390-94. He concluded, "The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro." *Id.* at 395. After reviewing existing precedent, he concluded that there was "ample support for the conclusion that a university can employ race-conscious measures to remedy past societal discrimination." *Id.* at 400.

Similarly, the joint opinion authored by Justice Brennan traced the tragic history of Fourteenth Amendment interpretation, including the fact that it was "early turned against those whom it was intended to set free." *Id.* at 326-27.

In Justice Powell's view, although the original purpose of the Equal Protection Clause had been strangled by "judicial reactionism" and that original purpose was then "displaced" by *Plessy*, when it was later resuscitated it could no longer serve as a basis for remedying the particular injuries to African Americans caused by centuries of subjugation. In contrast, the four concurring Justices felt that this construction failed to take into account the "moorings" of the Fourteenth Amendment as reflected in *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny. *Id.* at 405. As Justice Blackmun put it:

> This enlargement [of the Fourteenth Amendment] does not mean for me, however, that the Fourteenth Amendment has broken away from its moorings and its original intended purposes. Those original aims persist. And that, in a distinct sense, is what "affirmative action," in the face of proper facts, is all about. If this conflicts with idealistic equality, that tension is original Fourteenth Amendment tension, constitutionally conceived and constitutionally imposed, and it is part of the Amendment's very nature until complete equality is achieved in the area. In this sense, constitutional equal protection is a shield.

Id. at 405 (Blackmun, J.).

In cases since *Bakke*, the Court repeatedly has held that the Fourteenth Amendment permits the consideration of race under strict scrutiny. Use of race must be supported by a compelling interest and narrowly tailored[5] to achieve that interest. *City of Richmond v. Croson*, 488 U.S. 469, 491-92 (1989); *id.* at 518 (Kennedy, J., concurring). *See also Adarand Constructors Inc. v. Pena*, 515 U.S. 200, 227 (1995). The Court has emphasized that strict scrutiny is not a veiled prohibition, and has pointed to instances in which that scrutiny has been satisfied. *Adarand*, 515 U.S. at 237 (citing *United States v. Paradise*, 480 U.S. 149, 167 (1987)). Among the interests recognized as compelling is the objective, and at times, the obligation, to remedy discrimination. *See, e.g., Croson*, 488 U.S. at 518 (Kennedy,

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[5] Although *Amici* do not explore the narrow tailoring aspect of the University's admissions program in these pages, we adopt by reference all arguments advanced in the Brief of *Amici Curiae* Lawyers' Committee, et al., in *Grutter v. Bollinger*.

J., concurring) ("the State has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself."). *See also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) ("remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program."); *Adarand*, 515 U.S. at 237; *cf. Johnson v. Transp. Agency*, 480 U.S. 616, 634 (1987).

The Court also has held that local, state and federal authorities may remedy past and present, public and private discrimination without an established constitutional or statutory violation, when acting on a firm basis in evidence that a remedy is needed. *Croson*, 488 U.S. at 491-92, 499-501. *See also Wygant*, 476 U.S. at 277; *id.* at 292-93 (O'Connor, J., concurring). That firm basis is supplied by evidence of a manifest imbalance or an under-representation of members of a particular race, compared to an appropriately qualified population, participating in or benefiting from an activity. *Johnson*, 480 U.S. at 631-32 (citing, among other cases, *United Steelworkers v. Weber*, 443 U.S. 193 (1979)). *See also Croson*, 488 U.S. at 501-02. When these requisites are met and the use of race is narrowly tailored to achieve the remedial end, consideration of race is constitutionally permissible under the Fourteenth Amendment.[6]

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[6] In other circumstances, consideration of race as one factor in the decision-making has been held to be constitutionally permissible, in the absence of strict scrutiny, when other traditionally relevant factors are also considered and followed. Race, in certain circumstances, simply cannot be the predominant factor in decision-making. *See e.g., Bush v. Vera*, 517 U.S. 952, 958 (1996) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race."). *See*

(Footnote continued)

Although general "societal discrimination" and other proffered justifications have been held not compelling, *see, e.g., id.* at 276 (rejecting a "role model" theory), the Court has never attempted exhaustively to define or catalogue all of the interests and purposes that might be found compelling. *Id.* at 286 (O'Connor, J., concurring) ("certainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests... sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies.").

The precise contours of "strict scrutiny" review remain open, and the Court has emphasized that this scrutiny is strict but not necessarily fatal:

> Indeed, the Court's very recognition today that strict scrutiny can be compatible with the survival of a classification so reviewed demonstrates that our concepts of equal protection enjoy a greater elasticity than the standard categories might suggest. See *ante*, at 237 ("We wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' *Fullilove*, *supra*, at 519 (Marshall, J., concurring in judgment)"); see also *Missouri v. Jenkins*, *ante*, at 112 (O'Connor, J., concurring) ("But it is not true that strict scrutiny is 'strict in theory, but fatal in fact.'").

Adarand, 515 U.S. at 268 (Souter, J., dissenting).

The Court's post-*Bakke* exploration of the permissible extent of the constitutional consideration of race, *Amici* suggest, lacks a complete exposition of the historical

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also, Easley v. Cromartie, 532 U.S. 234, 242 (2001); *Miller v. Johnson*, 515 U.S. 900, 917 (1995); *cf. Johnson*, 480 U.S. at 638 (gender).

moorings of the Thirteenth and Fourteenth Amendments. A university's voluntary adoption of a plan that not only seeks to obtain critical diversity, but also serves to remedy the *present effects of racial discrimination fairly characterized as "badges and incidents of slavery"* is compelling. Any scrutiny of voluntary practices that serve to remedy the historical effects of invidious racial classifications that does not read the Equal Protection Clause in its historical context, denies the original intent of the first two Reconstruction Amendments. Such uninformed reading, then, would strip this nation of its constitutional history regarding race.

B. <u>The Fourteenth Amendment Must Be Read *In Pari Materia* With The Thirteenth Amendment and the Civil Rights Act of 1866.</u>

The Civil Rights Act of 1866 inextricably intertwines, the Thirteenth Amendment and the Fourteenth Amendment.[7] Going to first principles of statutory construction, the Thirteenth Amendment, and the Civil

[7] The Congressional record establishes that the Thirteenth Amendment provided the foundation for Section 1 of the Fourteenth Amendment, the section containing the Equal Protection Clause. *See* Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 48 n.227 (1990). Soon after the Civil Rights Act of 1866 (now 42 U.S.C. § 1981) was passed, its proponents felt the need to protect it with a new constitutional amendment. *Id.* at 47-48; Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 771 (1985). Language for what became Section 1 of the Fourteenth Amendment was introduced only three weeks after Congress had overridden President Johnson's veto of that Act. Colbert, 76 *supra* at 48 n.227; *see also Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968) ("It is quite true that some members of Congress supported the Fourteenth Amendment 'in order to eliminate doubt as to the constitutional validity of the Civil Rights Act as applied to the States.'" (quoting *Hurd v. Hodge*, 334 U.S. 24, 32-33 (1948)).

Rights Act of 1866 must be read *in pari materia* with the Equal Protection Clause.[8] Reading them together guards against the concern that the Fourteenth Amendment might again be "broken away from its moorings and its original intended purposes." *Bakke*, 438 U.S. at 404-05 (Blackmun, J.). The Thirteenth Amendment and its implementing legislation remains vital and, tragically, necessary. Both the purposes and force of these measures distinguish discrimination and its effects traceable as badges and incidents of slavery from a "claim to a history of prior discrimination" asserted by "various minority groups" within "the white 'majority.'" *See id.* at 295 (Powell, J.); *Croson*, 488 U.S. at 505-06.

To the extent that the Thirteenth Amendment's purpose to eliminate the badges and incidents of slavery increases the tension between the Fourteenth Amendment's remedial purpose that can require consideration of race, and the so-called "broader" purpose of achieving equality without reference to race, Justice Blackmun identified this as "original Fourteenth Amendment tension, constitutionally conceived and constitutionally imposed, and it is part of the Amendment's very nature until complete equality is achieved in this area." *Bakke*, 438 U.S. at 405 (Blackmun, J.). The increased weight of the commands of the Thirteenth Amendment to remedy the continuing effects of slavery suggests a principled constitutional basis for greater "elasticity" in the application of strict scrutiny review.[9]

[8] *See, e.g., Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972); *cf. Patton v. United States*, 281 U.S. 276, 298 (1930) ("The first ten amendments and the original Constitution were substantially contemporaneous and should be construed *in pari materia*. So construed, the latter provision fairly may be regarded as reflecting the meaning of the former.").

[9] In many respects, the tensions of which Justice Blackmun wrote are analogous and require treatment similar to tensions inherent in

(Footnote continued)

Reference to the Thirteenth Amendment and the Civil Rights Act of 1866 also clearly establishes a "principled distinction" between historically-linked incidents and consequences of race-based discrimination traceable to slavery that "merit 'heightened judicial solicitude'" from other claims of "prejudice and consequent harm," and the concept of general "societal discrimination." *See Bakke*, 438 U.S. at 296-97 (Powell, J.).

The Equal Protection Clause should inform, but not limit, analysis of the permissible consideration of race pursuant to the Thirteenth Amendment. Because the Fourteenth was promulgated, in large part, to give effect to the Thirteenth, the Fourteenth Amendment must be interpreted and applied to accommodate -- and not obstruct -- the purposes of the Thirteenth Amendment.[10]

other words of the Constitution. *See, e.g.*, Mary Anne Case, *Lessons for the Future of Affirmative Action from the Past of the Religion Clauses*?, 2000 Sup. Ct. Rev. 325, 329 (2001) ("the Equal Protection Clause itself may demand [race-conscious state action] in part because the Thirteenth and Fifteenth Amendments are like the Free Exercise Clause--counterweights to the presumption against state use of race or religion.").

[10] The Thirteenth and Fourteenth Amendments, of course, were intended to overcome the paradox between the "self-evident" truth of the Declaration of Independence and the "three fifths" clause of Article I, Section 2 of the Constitution.

C. The Elimination Of Disparities Associated With "Badges and Incidents of Slavery" Is a Compelling Interest Under The Thirteenth Amendment.

1. The remedial purposes and authority of the Thirteenth Amendment and the 1866 Civil Rights Acts.

The Civil Rights Act of 1866 is expressly race-conscious. It was enacted under the authority, and gave expression to the purpose and aims, of the Thirteenth Amendment. *See, e.g.*, ERIC FONER, RECONSTRUCTION, AMERICA'S UNFINISHED REVOLUTION 1863-1877 244 (1988) ("In consitutional terms, the Civil Rights bill represented the first attempt to give meaning to the Thirteenth Amendment, to define in legislative terms the essence of freedom."). In fact, it was enacted over the veto of President Johnson. *Id.* at 251. Its clear language demonstrates its focus on race. The Act establishes, as the benchmark of equality, the classification of rights enjoyed by "white citizens."[11] Thus, the statute explicitly contemplates race-conscious comparisons and remedies aimed at bringing former slaves to the advantaged position enjoyed by "white citizens," not only in law, but in fact.

In holding the Civil Rights Act of 1866 constitutional under the Thirteenth Amendment, the Court in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438 (1968), noted that "the revolutionary implications of so literal a reading of

[11] The applicable provision of the Act states: "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . *as is enjoyed by white citizens* . . ." 42 U.S.C. § 1981(a) (1994) (emphasis added); *see also* 42 U.S.C. § 1982 (1994) (providing that all citizens have the same right "as is enjoyed by white citizens" to purchase and sell property).

§ 1982," as to reach private conduct, were exactly what Congress had intended. *Id.* at 422. In exploring the congressional debates, the Court found that "[i]n the House, as in the Senate, much was said about eliminating the infamous Black Codes. But, like the Senate, the House was moved by a larger objective -- that of giving real content to the freedom guaranteed by the Thirteenth Amendment." *Id.* at 433.

In *Jones*, this Court held that § 1982 bars all racial discrimination, private or public, in the sale or rental of property, as a measure to enforce the Thirteenth Amendment. *Id.* at 413. In reaching this holding, the Court looked to the "crucial language" of § 1981, guaranteeing to all citizens: "the same right, in every State and Territory in the United States, . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . . *as is enjoyed by white citizens* . . . ." *Id.* at 423 (emphasis added). After expressly considering and rejecting the question whether a subsequent act narrowed the original intent of the Civil Rights Act of 1866, *see id.* at 416 n.20, the Court examined the statute's language, concluding that it "meant exactly what it said." *Id.* at 421-22. Thus, the Court expressly rejected any prior restrictive reading of the Act. *See id.* at 441 n.78. As Justice Powell would later suggest, the Court did not merely drift, almost accidentally, into this broad interpretation, but rather arrived at its conclusion deliberately. *Runyon v. McCrary*, 427 U.S. 160, 186 n.* (1976) (Powell, J., concurring).[12]

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[12] As Senator Trumbull explained: "This measure is intended to give effect to [the Thirteenth Amendment] and secure ... practical freedom. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of their benefits." *Jones*, 392 U.S. at 431-32.

Moreover, the Court also held, that the subsequent adoption of the Fourteenth Amendment did not limit its scope:

> [I]t certainly does not follow that the adoption of the Fourteenth Amendment or the subsequent readoption of the Civil Rights Act were [sic] meant somehow to *limit* its application to state action. The legislative history furnishes not the slightest factual basis for any such speculation, and the conditions prevailing in 1870 make it highly implausible.

Jones, 392 U.S. at 436.

Contemporaneous with this Civil Rights Act, the Reconstruction Congress enacted several race-conscious initiatives, for example, the Freedmen's Bureau Acts of 1865 and 1866. These acts permitted the Bureau to focus its efforts almost exclusively on *freedmen*. *See generally* Eric Schnapper, *supra* note 7, at 760-75; *see also id.* at 754 ("From the closing days of the Civil War until the end of civilian Reconstruction some five years later, Congress adopted a series of social welfare programs whose benefits were expressly limited to blacks."); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 430-31 (1997) (describing various statutes passed in the same era that were aimed at benefiting solely African Americans).[13] Among these efforts, education was recognized as fundamental. As observed by the first commissioner of the Freedmen's Bureau, General Oliver O. Howard: "Education is absolutely essential to the freedmen to fit them for their new duties and

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[13] Congress adopted such race-conscious measures over the same objections that opponents raise today--that such measures provided "special treatment" for African Americans. *See Bakke*, 438 U.S. at 397-98; Schnapper, *supra* note 7, at 773-74.

responsibilities . . . . Yet I believe the majority of the white people to be utterly opposed to educating the negroes." Schnapper, *supra* note 7, at 761 n.47 (citing H.R. Exec. Doc. No. 11, 39th Cong., 1st Sess. 33 (1865)).

2. The Thirteenth Amendment applies with full force to support Michigan's admissions program.

In defining its substantive scope, this Court long ago held that the Thirteenth Amendment permits Congress to "enact all necessary and proper laws for the obliteration and prevention of slavery, with all its badges and incidents." *Civil Rights Cases*, 109 U.S. 3, 21 (1883). The Court listed some of these badges and incidents, noting that "[c]ompulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and *such like burdens and incapacities* were the inseparable incidents of the institution." *Id.* at 22. More recently, in *Jones*, the Court made clear that this list was neither static nor exclusive, and that Congress may identify remaining relics of slavery and enact appropriate laws to remove them: "Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation." 392 U.S. at 440.

Citing *Jones*, the Court has since upheld the use of 42 U.S.C. § 1981, which provides a civil remedy for racial discrimination in the making and enforcement of private contacts, in cases involving private discrimination in providing education. *See Runyon v. McCrary*, 427 U.S. 160, 169 (1976). In *Runyon*, this Court expressly held that 42 U.S.C. § 1981 properly prohibits racial discrimination in public and private schooling, *id.* at 172, in furtherance of the interests of the Thirteenth Amendment, even over claims that

the prohibition infringed on other constitutionally protected rights. *Id.* at 175-79. Such rulings make clear that certain forms of discrimination can constitute badges and incidents of slavery.

The same day the Court decided *Runyon*, it also decided *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), in which the Court construed § 1981 to provide a cause of action to whites for claims of racial discrimination. After reviewing the legislative history, Justice Marshall, writing for the Court, concluded that Section 1981 should be read to include a "broader principle," i.e., to protect *all* races from racial discrimination. *Id.* at 295-96. Of course, the existence of such a broader principle does not obscure or remove the affirmatively remedial purpose and capacity of the Act, as the Court expressly noted that "the immediate impetus for the bill was the necessity for further relief of the constitutionally emancipated former Negro slaves." *Id.* at 289.[14]

While *Jones* dealt with Congress' authority to eradicate the badges and incidents of slavery on a national scope, the opinion anticipates approval of state actions furthering that goal.[15] Indeed, it is not subject to serious

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[14] Thus, Petitioners are mistaken in arguing that *McDonald* forecloses the remedial consideration of race. *See* Petitioners' Brief at 49. First, the Court in *McDonald* expressly does not consider the statute's effect on affirmative action programs. *McDonald*, 427 U.S. at 289 n.8. Second, the "broader principle" for which *McDonald* has been cited, has since given way to strict scrutiny approval of narrowly tailored, raced-based remedies. *See Bakke*, 438 U.S. at 405 (Blackmun, J., concurring). As Justice Stevens noted, "Neither the 'same standards' language used in *McDonald*, nor the 'color blind' rhetoric used by the Senators and Congressmen who enacted [Title VII], is now controlling." *Johnson*, 480 U.S. at 644 (Stevens, J., concurring).

[15] *Compare Jones*, 392 U.S. at 430 n.48 (quoting Senator Trumbull as stating that it was "for Congress to determine, and nobody

(Footnote continued)

debate that states can advance these compelling interests by acting to eradicate or remedy the badges of inferiority. *See, e.g.*, *Croson*, 488 U.S. at 518 (Kennedy, J., concurring); *see also Wygant*, 476 U.S. at 286 (O'Connor, J., concurring); *Adarand*, 515 U.S. at 237.[16]

In light of its express language, its revolutionary purpose, its broad remedial interpretation, and contemporaneous race-conscious legislative measures, the Civil Rights Acts of 1866 supports reasonably tailored affirmative action programs designed to remedy race-based educational deprivation of African Americans that can be historically linked to badges of servitude and inferiority.

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else," what legislation was appropriate) with *Jones*, *id.* at 432 n.54 (stating that "Senator Trumbull later observed that his bill would add nothing to federal authority if the States would fully 'perform their constitutional obligations.'"). *See also id.* at 422 n.29 (reading the legislative history to clarify that the 1866 statute had supremacy "over *inconsistent* state or local laws").

[16] Likewise in *Roberts v. United States Jaycees*, the Court upheld against a First Amendment challenge a state's "compelling interest in eradicating discrimination against its female citizens . . . ." 468 U.S. 609, 623 (1984). *See also Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (holding state civil rights act advanced compelling interest in eliminating discrimination against women). The state statute in *Roberts*, the Court recognized, was an example of laws adopted by states "beginning a decade before enactment of their federal counterpart, the Civil Rights Act of 1875." 468 U.S. at 624. The Court recognized that while the federal statute had been struck down in the *Civil Rights Cases*, the Court there had emphasized the states' ability to enact such laws. *Id.* Furthermore, "[a] state enjoys broad authority to create rights of public access on behalf of its citizens." *Id.* at 625 (citation omitted). *See also Balsbaugh v. Rowland*, 290 A.2d 85, 92 n.9 (Pa. 1972) (citing both the Thirteenth and Fourteenth Amendments in upholding a school board plan correcting racial imbalances in the district, even where there was no history of *de jure* segregation).

3. Ameliorating badges and incidents of slavery is a distinct compelling interest under the Thirteenth Amendment.

A reading of the Thirteenth Amendment and the Civil Rights Act of 1866 to establish a compelling interest for race-conscious action is consistent with Justice Powell's concurrence in *Fullilove v. Klutznick*, 448 U.S. 448, 509-10 (1980), where he expressly addressed the first two Civil War Amendments in the context of strict scrutiny. There, he approved race-conscious contracting goals under "the analysis set forth [in his] opinion in" *Bakke*, finding that the congressionally-chosen remedy "serve[d] the compelling governmental interest in eradicating the continuing effects of past discrimination identified by Congress." *Id.* at 496. He observed "that a Court must accept as established the conclusion that purposeful discrimination contributed significantly to the small percentage of federal contracting funds that minority business enterprises have received." *Id.* at 506. Thus, Justice Powell concluded that the program challenged in *Fullilove* was "designed to serve the compelling governmental interest in redressing racial discrimination" and that "this Court has not required remedial plans to be limited to the least restrictive means of implementation." *Id.* at 508. Relying on both the Thirteenth and Fourteenth Amendments (*in pari materia*), he found:

> [T]he Enforcement Clauses of the Thirteenth and Fourteenth Amendments confer upon Congress the authority to select reasonable remedies to advance the compelling state interest in repairing the effects of discrimination. But that authority must be exercised in a manner that does not erode the guarantees of *these Amendments*.

Id. at 510 (emphasis added).

Similarly, following this Court's lead in *Jones*, Judge John Minor Wisdom, writing for five other judges, also concluded that the Thirteenth Amendment's compelling interest in eradicating the badges and incidents of slavery justified "affirmative race-conscious relief." *Williams v. City of New Orleans*, 729 F.2d 1554, 1580 (5th Cir. 1984) (Wisdom, J., concurring in part and dissenting in part). After a thorough discussion of the history of the Thirteenth Amendment, Judge Wisdom stated that "[t]he first Justice Harlan, in his famous dissent [in *The Civil Rights Cases*], rejected the restrictive interpretation adopted by the majority. He reasoned that badges of slavery encompassed all practices that continued to label blacks as inferior because of their race." *Id.* at 1578. Judge Wisdom then noted that "[u]nder the *Jones v. Mayer* rationale, current forms of racial discrimination are badges of slavery that may be proscribed under the thirteenth amendment *if they are historically linked with slavery or involuntary servitude*." *Id.* at 1579 (emphasis added).

Judge Wisdom, thereby, effectively defined the compelling interest prong of the strict scrutiny review in Thirteenth Amendment terms, so long as a link could be made historically with Thirteenth Amendment badges and incidents of slavery.[17] Where the State acts to remedy what are fairly identified as the invidious consequences of Thirteenth Amendment badges and incidents, such a purpose properly is recognized as compelling. *See Fullilove*, 448 U.S. at 508; *Runyon*, 427 U.S. at 169.

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[17] This Court's cases interpreting the Thirteenth Amendment and the 1866 Civil Rights Act provide such limiting principles. *See Palmer v. Thompson*, 403 U.S. 217 (1971); *City of Memphis v. Greene*, 451 U.S. 100 (1981).

Voluntary race-conscious admission programs designed to increase diversity in higher education and with the effect of ameliorating the continuing deprivations of the legacy of slavery clearly comport with the history and purposes embedded in the Thirteenth Amendment and its legislative progeny. Furthermore, such programs are in harmony with the constitutional history of this Court since *Brown*. *See Bakke*, 438 U.S. at 407-08 (Blackmun, J.). Given the particular moorings of the Thirteenth Amendment and the Civil Rights Act of 1866, the Fourteenth Amendment must accommodate such voluntary affirmative programs. Where qualified minority students have historically and manifestly been kept out of the classroom, a race-conscious response is constitutionally permissible.

4. Race-based educational deprivations suggesting intellectual inferiority are "badges and incidents" of slavery the University permissibly addresses.

Educational deprivation and forced intellectual suppression were, and continue to be, a direct and significant badge and incident of American slavery. For example, under the 1755 slave code in Georgia, the penalty for teaching a slave to read or write was fifteen pounds sterling. A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS--THE COLONIAL PERIOD 258 (1978). Many slave-holding states' laws against education covered not only enslaved African Americans, but free "persons of colour" as well. For example, an Alabama law required that "[a]ny person who shall attempt to teach any free person of colour or slave to spell, read or write, shall upon conviction, . . . be fined in a sum not less than $250 nor more than $500," GEORGE M. STROUD, A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA 142 (2d ed. 1856). As one Reconstruction scholar has observed, to many whites,

educating African Americans "symbolized the breakdown of a social system that had formed the cornerstone of the southern 'way of life.'" JACQUELINE JONES, SOLDIERS OF LIGHT AND LOVE: NORTHERN TEACHERS AND GEORGIA BLACKS, 1865-1873 50 (1980).

Nor were prohibitions on the education of African Americans confined to the South. This Court's decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1856), cites to examples of state laws that reinforced "the same opinions and principles" of African American inferiority, including state criminal prosecutions for teaching African American children to read and write. *Id.* at 413-15 (citing *Crandall v. Connecticut*, 10 Conn. 339 (1834) (upholding the criminal conviction of Prudence Crandall under a Connecticut law that prohibited teaching nonresident African American children)).

Congressional supporters of the Thirteenth Amendment -- the overwhelming majority of whom also passed the Fourteenth Amendment – were fully cognizant of these laws and viewed the educational deprivation of African Americans as a badge or incident of slavery. As Congressman Morris of New York observed, "[a]n entire race has been deprived of all social rank, barred our schools, shut out from the gospel, and then held to be inferior for not rising in spite of their henderances [sic]." Cong. Globe, 38th Cong., 1st Sess. 2615 (1864). Similarly, Senator Wilson of Massachusetts stated, in arguing for passage of the Amendment:

> Then, sir, when this amendment to the Constitution shall be consummated the shackle will fall from the limbs of the hapless bondman, and the lash drop from the weary hand of the taskmaster. . and the school-house will rise to enlighten the darkened intellect of a race imbruted by long years of enforced ignorance.

Cong. Globe, 38th Cong., 1st Sess. 1324 (1864).

The Amendment's supporters understood that slavery was institutionally supported, deeply rooted, and systemic -- that it was enforced by a system of laws that denied African Americans the privileges and immunities of citizenship that "belonged to every free citizen, high or low, rich or poor." Cong. Globe, 38th Cong., 1st Sess. 1319 (statement of Sen. Wilson). Iowa Senator James Harlan defined "some of the necessary incidents of slavery which it was the specific object of the amendment to abolish," as including "the perpetuity of the ignorance of its victims." *Id.* at 1439. Concurring in *Jones*, Justice Douglas described the pernicious effects of slavery on white persons, as well as its continuing effects:

> The true curse of slavery is not what it did to the black man, but what it has done to the white man. For the existence of the institution produced the notion that the white man was of superior character, intelligence, and morality. The blacks were little more than livestock—to be fed and fattened for the economic benefits they could bestow through their labors, and to be subjected to authority, often with cruelty, to make clear who was master and who slave.
>
> *Some badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men.*

392 U.S. at 445 (emphasis added). In words that continue to resonate today, Justice Douglas lamented that "the black[s] [are] protected by a host of civil rights laws. But the forces of discrimination are still strong." *Id.* at 447.

Brown and its continuing progeny make clear that the Civil War Amendments have not yet achieved their goal, and

the subjugation of African Americans through educational deprivation is not an unpleasant relic of the 1800's, but rather an unremitting and contemporary badge and incident of that past.[18] In words that ring as true today as they did in 1978, one Michigan federal district judge wrote, "we observe a generation of children being injured by an admittedly segregated school situation, another generation receiving inferior educations and being deprived of the technical and intellectual skills that will enable them upon graduation to perform in significant positions competently and confidently." *Berry v. School Dist. of Benton Harbor*, 467 F. Supp. 721, 732-33 (W.D. Mich. 1978). An all too evident truth about this nation's educational systems is that the Civil War Amendments' promise of equal educational opportunity has yet to be realized for most students of color.[19] This includes African American students in Michigan who, by the

[18] *See, e.g., Bradley v. Milliken*, 433 F.2d 897 (6th Cir. 1970); *Berry v. School Dist. of Benton Harbor*, 505 F.2d 238 (6th Cir. 1974); *Oliver v. Michigan State Bd. of Educ.*, 508 F.2d 178 (6th Cir. 1974); *NAACP v. Lansing Bd. of Educ.*, 559 F.2d 1042 (6th Cir. 1977); *United States v. School Dist. of Ferndale*, 616 F.2d 895 (6th Cir. 1980).

[19] For example, half the University's students derive from Detroit metropolitan schools, yet 92% of city students are African American, where schools have been so poorly funded classes must share books, and in the late 1980s "[o]f an entering ninth grade class of 20,000 ..., only 7,000 graduate from high school, and, of these, only 500 ha[d] preparation to go to college." JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICAN SCHOOLS 198 (1992). Such disparities are traceable to race-based considerations in school funding. For example, as the former Speaker of the Michigan House of Representatives, made clear, "[p]eople in affluent [predominantly white,] Farmington ... 'are not going to vote for more taxes so the poor black kids in Ypsilanti can get ... better reading programs.'" *Id.* at 199.

time they enter eighth grade, are nearly four years behind their white peers in math and science.[20]

The simple and ineluctable fact is that an objective review of factors considered by the University in making its admission decisions reveals stark racial disparities.[21] Ultimately, public universities ought not to be barred from voluntarily adjusting their admissions policies to account for these contemporary badges and incidents of slavery. *See Wygant*, 476 U.S. at 290-91 (O'Connor, J., concurring) (citing *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 165-66 (1977), and *McDaniel v. Barresi*, 402 U.S. 39 (1971)); *see also Bush v. Vera*, 517 U.S. 952, 977 (1996); *id.* at 990, 992, 994 (O'Connor, J.,

[20] The Education Trust, *Ed Watch Online: State Summary of Michigan* (2001), *available at* http://www.edtrust.org.

[21] Present racial disparities exist in each of the factors the University considers in admissions: standardized exams, Expert Report of Claude Steele in *Gratz v. Bollinger*, No. 97-75321 (E.D. Mich.) (citing THE BLACK-WHITE TEST SCORE GAP (Christopher Jencks & Meredith Phillips, eds., Brookings Institute Press 1998) (racial gap in SAT scores), David R. Harris & Justin L. Thomas, THE EDUCATIONAL COST OF BEING MULTIRACIAL: EVIDENCE FROM A NATIONAL SURVEY OF ADOLESCENTS (Univ. of Mich. Population Studies Center, 2002), available at http://www.psc.isr.umich.edu/pubs/papers/rr02-521.pdf (racial differences in GPA and difficulty of curriculum) (African Americans are 18.8% of public school enrollment in Michigan, but only 4.5%, 3.7%, and 2.6% of students taking the State's Advanced Placement English Composition, Calculus, and Biology exams); JEFFERY R. HENIG, et al., THE COLOR OF SCHOOL REFORM: RACE, POLITICS, AND THE CHALLENGE OF URBAN EDUCATION 43 (Princeton University Press, 1999) (high school quality) ("the schools [black] children attended [in Detroit] were often in terrible physical condition, and their supplies and equipment fell far below standard."); Joint Summary of Undisputed Facts (App.106a-118a) at 3482 (geography) (the forty-five northern counties that receive preferences are overwhelmingly white); Interveners' Petition for Writ of Certiorari at 10 (alumni relationships) (African Americans in Michigan are "less likely to have alumni parents or relatives").

concurring); *id.* at 1033-35, 1014 n.9 (Stevens, J., dissenting).

D. <u>The Thirteenth Amendment And The 1866 Civil Rights Act Both Inform the University's Compelling Interest in Identifying And Admitting A Racially Diverse Student Body.</u>

The Respondents and *amici* associated with higher education will fully apprise the Court of the academic interests, benefits, and meaning of diversity in higher education. We write here only to suggest that the Thirteenth Amendment and its implementing legislation inform the compelling interest in obtaining a diverse student body. Stated simply, given not only the complex and torturous history of race in this nation, but the contemporary social, political, cultural, and economic realities it has shaped, race is not simply a matter of skin color or features. Race is not simply a characteristic irrelevant to an individual. It is one of a number of dimensions of an individual, and many of the events and factors that shape it, like the institution of slavery itself, are based on group interaction. Recognition that race has an influence on the individual, does not suggest an assumption that individuals of a particular race will be affected in the same way, or will espouse the same views. Such stereotypical treatment gives rise to impermissible classifications.

It is also true, however, that there are circumstances in which a person's race, like one's gender, and consequent life experiences can affect his or her perspective. In *J. E. B. v. Alabama*, the Court struck down the use of peremptory challenges to female jurors in a paternity and child support case, holding it a violation of the Equal Protection Clause because the use of gender served to ratify and perpetuate invidious stereotypes about the relative abilities of men and women. 511 U.S. 127, 140 (1994). But in her concurrence, Justice O'Connor noted that, in some instances, "We know

that, like race, gender matters" – pointing to studies showing that in rape cases, female jurors are somewhat more likely to vote to convict than male jurors, and positing that in sexual harassment, child custody, or spousal or child abuse cases, "a person's gender and resulting life experiences will be relevant to his or her view of the case." *Id.* at 148-49. Just as gender and resulting life experiences may affect a juror's perspective in some cases, educators understand that race and gender can affect a student's perspective and contributions in the classroom, and race and gender diversity can affect the educational experience for all students.

<u>CONCLUSION</u>

For the foregoing reasons, *Amici Curiae* respectfully submit that the judgment of the United States District Court for the Eastern District of Michigan, Southern Division, should be affirmed, as that judgment relates to the University's admissions program for 1999 and 2000.

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Nos. 02-241 and 02-516

IN THE

Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Respondents.

JENNIFER GRATZ AND PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OUT OF TIME AND BRIEF OF BP AMERICA INCORPORATED AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OUT OF TIME

BP America Inc., by counsel and pursuant to Rule 37, moves for leave to file out of time amicus curiae brief in these cases.

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BRIEF OF BP AMERICA INCORPORATED AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

INTEREST OF THE *AMICUS CURIAE* [1]

BP America Inc. is the United States subsidiary of BP p.l.c., a corporation organized under the laws of England and Wales (hereinafter collectively referred to as "BP"). As a result of recent mergers between BP p.l.c. and other energy companies from around the world, including Amoco Corp., Atlantic Richfield Co., Vastar Resources, Inc., Veba Oel AG/Aral AG, and Burmah Castrol p.l.c., BP is one of the world's largest publicly held, fully integrated energy, petroleum and petrochemical companies. BP does business in almost all parts of the world. As the U.S. subsidiary of BP p.l.c., BP is the single largest producer of natural gas in North America and holds a significant position in all aspects of the U.S. energy markets ranging from natural gas to oil to refined petroleum and petrochemical products to electric, solar and wind power. BP draws a significant amount of its capital and human resources from the U.S. Significantly, approximately forty-five percent of BP's assets are in the United States, and of BP's 110,000 employees around the globe, over forty percent were recruited or hired from the U.S. As a global leader in this highly competitive industry, BP's university hires are deployed to work in all of our locations around the world.

BP emerged from consolidation among global energy companies as a strong, performance-oriented company com-

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[1] Consents to file amicus briefs have been filed in this court by all parties. This brief was not authored by counsel for any party, in whole or in part, and not person or entity other than amicus curiae and its counsel have made a monetary contribution to the preparation or submission of this brief.

prised of several distinct business cultures. BP has long recognized that the underpinnings of performance lie in the strength, quality and depth of its people while acknowledging the variety of geographies, businesses, locations and cultures that exist within BP today. BP believes that diversity and inclusion is a powerful source of commercial advantage and critical to BP's continued success, both in the United States and abroad. As a result, BP's recruitment process is global and extremely competitive. BP is keenly aware that through its multinational recruiting, it gains knowledge, skills and perspectives essential to success in the global marketplace.

Because BP strongly believes that innovation, one of its core brand values, can only come from encouraging true diversity of styles and ideas while leveraging multiple talents, BP has made diversity and inclusion a strategic focus of its business in the US and around the world. Accordingly, BP's commitment to diversity does not end with its recruitment strategy, but rather transcends all of its business activities. Indeed, active engagement at the top of the company has provided visible leadership for the diversity and inclusion strategy. Educational and mentoring programs; training and awareness activities; cross-cultural competency skill building programs; and gender issues in communication training, in addition to participation in innovative events, such as the first ever global women's conference, has helped to bring BP's strategy to the forefront of its operations.

SUMMARY OF THE ARGUMENT

To be successful in the global marketplace multinational companies like BP must cultivate and maintain a diverse workforce comprised of the most talented and skilled people in the industry. Essential to realizing this goal is the availability of a diverse student body population at U.S. universities and colleges, like the University of Michigan, from which global companies like BP recruit. While BP takes no position

on the constitutionality of the admission practices of the University of Michigan, it believes the University of Michigan and other institutions of higher education should have the discretion to shape admission policies which promote the achievement of diversity so that global companies can continue their efforts to compete and thrive in the marketplace by assembling a diverse and highly skilled workforce there from. BP also urges the Court to consider the importance of diversity initiatives implemented by BP and other global companies when structuring its opinion so that these legitimate business programs may continue.

ARGUMENT

I. WORKFORCE DIVERSITY IS ESSENTIAL TO THE SUCCESS OF MULTINATIONAL COMPANIES

BP is committed to the ideal of meritocracy—employing the best people on the sole criteria of merit. The importance of this goal as part of BP's overall business strategy has increased as competition in the energy industry has both globalized and intensified due to consolidation among large multi-national corporations. As Group CEO John Browne has stated in a June 2002 keynote speech to the Women in Leadership: A European Imperative Conference, held in Berlin,

> People with ideas, with passion, with the ability to deliver, and with the ethical standards which match our aspirations to be a company, which plays a constructive and progressive part in the development of society . . . The people we have form our human capital. To me that is a more important corporate asset than all the plant and equipment, all the oil fields and pipelines. If we can get a disproportionate share of the most talented people in the world, we have a chance of holding a competitive edge. That is the simple strategic logic behind our commitment to diversity and to the inclusion of

individuals—men and women regardless of background, religion, ethnic origin, nationality or sexual orientation.

However, the legacy and changing nature of the energy business affects the ability of BP to attain that goal. This is now a truly global industry and human capital is assessed on a global basis. BP's U.S. operations are but a part of the larger worldwide BP organization, contributing talent in a global talent pool. Further, as an industry based on science and technology that requires professionals from around the world with high levels of education, it is difficult to ignore that historically fewer women and persons of color have pursued careers in the technical sciences and many people, from many different countries and socio-economic backgrounds, have had limited access to technical and scientific educational opportunities. Accordingly, in an effort to meet the goal of meritocracy in a global business context, BP broadens the diversity of its workforce through continuous examination of its internal selection and development processes and adjustment of work practices and company culture, targeting historically under-represented groups such as women, minorities and persons from what BP refers to as "most of the world" outside the U.S. and the United Kingdom.

One of the areas that has been reexamined as part of BP's focus on diversity in the global marketplace for human capital is recruiting. To a large extent, BP and other multinational energy companies rely on the preeminent colleges and universities from around the world to provide them with potential leaders. BP recruits in practically every area of the world for people with the ability to both work and to lead its operations in any country. The University of Michigan is one example of the preeminent institutions of higher education from which BP and other global companies recruit. The U.S. has long recognized that colleges and universities are the training ground for tomorrow's technical professionals and

leaders, and that the "'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples". *Regents of the University of California v. Bakke*, 438 U.S. 265, 313 (1978) (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)). Similarly, the creativity and innovation necessary for global energy companies like BP to succeed and thrive in an increasingly competitive global marketplace is fostered and developed through these same diverse student bodies in institutions of higher education. Recognizing the need to encourage diversity in these institutions, BP endeavors to support organizations within colleges and universities that promote diversity. For example, BP supports organizations such as the National Action Council for Minorities in Engineering, the National Consortium for Graduate Degrees for Minorities in Engineering Science, the National Society for Black Engineers, the Society for Women Engineers and the Mexican American Engineering Society. Fundamentally, however, BP believes it is essential that U.S. universities and colleges have the discretion to create admission policies that encourage and deliver diverse student body populations. While BP takes no position on the issue of whether or not the University of Michigan's admission practices are constitutional, BP believes this Court should not prevent the University of Michigan from considering race, gender or ethnicity in its admission decision, if necessary to foster diversity in its student body population. The global market-place in which BP recruits today demands diversity. Like BP, U.S. colleges and universities must be able to utilize the tools that best prepare its graduates to compete in this global and diverse marketplace for human capital.

II. GLOBAL COMPANIES SHOULD NOT BE HINDERED IN THE PROMOTION OF LEGITIMATE DIVERSITY PROGRAMS

BP is committed to achieving meritocracy so that talented people, regardless of race, gender, or ethnic background, will always have the opportunity to contribute to maximum potential. BP acknowledges the continual need to improve on the progress it has made toward workforce diversity and to ensure that it reaches beyond recruitment into all aspects of corporate culture and policies. To that end BP has created a corporate strategy for fostering diversity and inclusion in the workplace. BP has devoted substantial financial and human resources to achieving the delivery of this strategy. For example, BP invests in people through formal training, development experience and coaching; mutual mentoring; and training in which managers are taught to be open to others and to create environments in which outcomes are more important than styles. Specifically, BP incorporates diversity and inclusion training modules in its First Level Leaders Program, Mid Level Leaders Program, Leadership Enrollment & Alignment Program and self-assessment tools utilized by managers and team leaders. BP respectfully submits that the Court in its decision in this case should not restrict the continuation of legitimate diversity and similar programs implemented throughout corporate America.

Ultimately, BP wants to ensure that its future leaders are drawn from the largest possible pool of talent on the basis of proven ability. As expressed by Group CEO John Browne, the true test of BP's success in this area will come when that leader's appointment is "celebrated without reservation throughout the company by a community of people which has moved beyond prejudice and which has become genuinely inclusive". BP and other U.S. businesses should therefore be permitted to continue to develop and refine programs designed to facilitate the achievement of diversity in the workforce.

CONCLUSION

To be successful in the global marketplace, multinational energy companies like BP must cultivate and maintain a diverse workforce comprised of the most talented and skilled people. University recruiting is an important element in achieving this success. However, because BP acknowledges that it and the industry must go further to achieve diversity, numerous initiatives have been developed by BP and other global businesses that strive to foster and enhance the diversity of workforce talent pool on which these business rely to thrive. BP believes the University of Michigan and other institutions of higher education in the U.S. should have the discretion to shape admission policies that promote the achievement of diversity so that global companies can continue their efforts to compete and thrive in the marketplace by assembling a diverse and highly skilled workforce there from. BP also urges the Court to reaffirm the legitimacy of the important diversity initiatives implemented by BP and other global companies that are essential to achievement and growth in the multinational marketplace they operate in today.

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Nos. 02-241 and 02-516

IN THE

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BARBARA GRUTTER,
Petitioner,

v.

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Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OUT OF TIME AND BRIEF OF MTV NETWORKS IN SUPPORT OF RESPONDENTS

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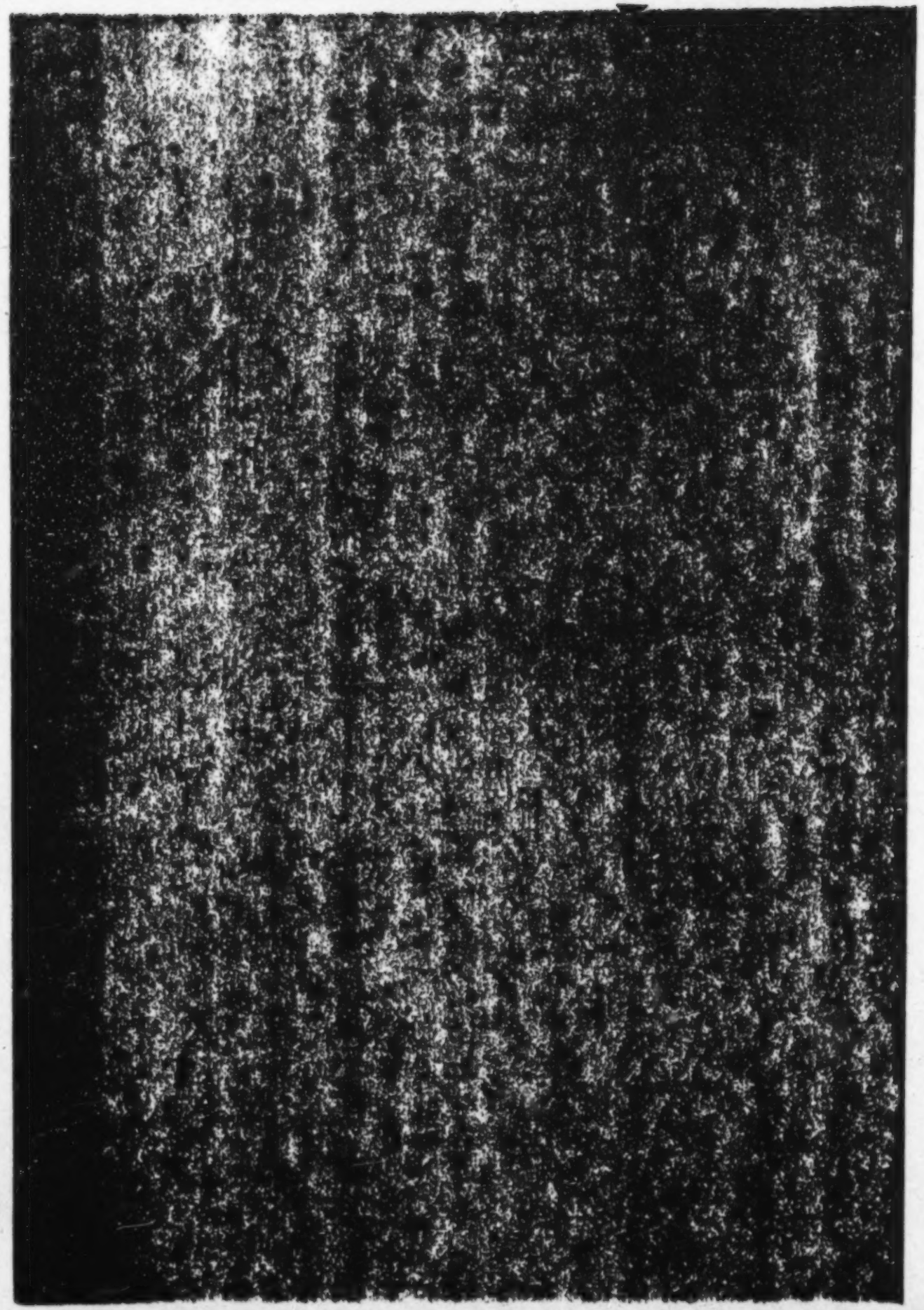

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OUT OF TIME

MTV Networks, by its counsel and pursuant to Rule 37, moves for leave to file out of time *amicus curiae* brief in support of Respondents in these cases. As a multinational entertainment company contributing ideas to the marketplace that shape the attitudes of millions of viewers in its global and domestic audiences, MTV Networks has an interest in these cases that has not been adequately addressed by other *amici*.

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David Orgon Coolidge & William C. Duncan, *Reaffirming Marriage: A Presidential Priority*, 24 HARV. J.L. & PUB. POL'Y 623 (2001) 6

Dick Hebdige, *What is Soul?*, in VIDEO ICONS AND VALUES 121 (Alan Olson, Christopher Parr & Debra Parr eds., 1991) 5

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Ellen Neuborne, *Sex harassment suits soar Complaints high from women in blue-collar jobs*, USA TODAY, May 3, 1996, at 1A 9

George S. Peek, *Recent Legislation: Where Are We Going With Federal Hate Crimes Legislation? Congress and the Politics of Sexual Orientation*, 85 MARQ. L. REV. 537 (2001)..... 5

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L. Richard Hoffman & Norman R.F. Maier, *Quality and Acceptance of Problem Solutions by Members of Homogeneous and Heterogeneous Groups*, 62 J. ABNORMAL & SOC. PSYCHOL. 401 (1961) 6

Mark Silverstein & William Haltom, *You Can't Always Get What You Want: Reflections on the Ginsburg and Breyer Nominations*, 12 J.L. & POL. 459 (1996) 5

Marsha Scarbrough, *Recipe for Soul Food: Combine writers from sitcom, drama, and cinema. Mix thoroughly.*, WRITTEN BY, Apr. 2001, *available at* http://www.wga.org/aboutwriters_index.html..... 8

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Sino-U.S. Relations In The 21st Century, 6 J. INT'L L. & PRAC. 229 (1997) 4

Steven W. Bender, *Will the Wolf Survive?: Latino/a Pop Music in the Cultural Mainstream*, 78 DENV. U. L. REV. 719 (2001) 4

Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovation Ideal*, 84 CAL. L. REV. 953, 1024 (1996)..... 6, 7

Sumita Raghuram & Raghu Garud, *The Vicious and Virtuous Facets of Workforce Diversity, in* SELECTED RESEARCH ON WORK TEAM DIVERSITY 155 (Marian N. Ruderman et al. eds., 1995)..... 6

The Future of Affirmative Action: Reclaiming the Innovation Ideal, 84 CAL. L. REV. 953 (1996) 6, 7

STATEMENT OF INTEREST[1]

MTV Networks (MTVN), a division of Viacom International, is the world's most-watched group of television networks, reaching 384 million households around the globe. MTVN is composed of MTV: Music Television (MTV); MTV2; VH1: Music First; Nickelodeon; TNN (The National Network); CMT (Country Music Television); and others. MTVN television networks are seen in 164 countries and 18 languages, via locally programmed and operated TV channels and websites. The MTV International brands include MTV Asia, MTV Australia, MTV Brasil, MTV Europe, MTV Latin America, and MTV Russia, all of which combine MTV's overall style with local cultural tastes and musical talent. The company's varied holdings also include interests in television syndication, publishing, home video, radio, recorded music, licensing and merchandising, and two feature film divisions—MTV Films and Nickelodeon Movies.

MTVN has grown, and its programming has been so successful largely because of the company's commitment to creating and maintaining an inclusive work environment that reflects the make-up of its domestic and global audience. MTVN has established Diversity Goals as well as Global Diversity/Inclusion Councils to help organize and achieve recruiting and retention goals. For example, MTVN annually participates in a Minority Workshop and Multicultural Advertising Internship Program, and also recruits at schools with traditionally large populations of minority students,

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1 Under Rule 37.3(a) of the Rules of the Court, the parties lodged letters consenting generally to the filing of briefs of *amici curiae*. Pursuant to S. Ct. R. 37.6, *amicus curiae* states that counsel for a party did not author this brief in whole or in part and that no one other than *amicus*, its members, or counsel made a monetary contribution to the preparation or submission of this brief.

fax machine and MTV are probably the greatest proponents of human rights in China today.").

MTV's effectiveness in cultivating alternative view points and dismantling societal stereotypes and biases should not be underestimated. *See* James Bernard, *A Newcomer Abroad, Rap Speaks Up*, N.Y. TIMES, Aug. 23, 1992, sect. 2 ("From small clubs in Moscow to the favelas of Rio de Janeiro to MTV in Tokyo, rap has begun to elbow its way onto the world's stage....[I]ncreasingly, rappers in other countries are using [the music of American rappers] to reflect on and grapple with their own local realities, adding their own flavor to an American art form."); LISA A. LEWIS, GENDER, POLITICS, AND MTV: VOICING THE DIFFERENCE 223-24 (1990) (describing how women musicians used "MTV and music video" as "a site for social struggle over gender oppression in the 1980s"); Pedro A. Malavet, *Reparations Theory and Postcolonial Puerto Rico: Some Preliminary Thoughts*, 13 BERKELEY LA RAZA L.J. 387, 421 (2002) (the year 2000 was marked by the "Latin Music Craze," in which Latina/o artists became the darlings of MTV and U.S. mass media); Steven W. Bender, *Will the Wolf Survive?: Latino/a Pop Music in the Cultural Mainstream*, 78 DENV. U. L. REV. 719, 744 (2001) ("In identifying positive attributes of the LatPop explosion, what stands out is the status of these Latino/as as role models, particularly for youth. Given the invisibility of Latino/as in America, these artists have also emerged as a source of cultural pride for Puertorriqueno/as and other Latino/as....Moreover, the English fluency of LatPop artists helps to dispel the impression that Latino/as are unwilling or unable to learn English."); George S. Peek, *Recent Legislation: Where Are We Going With Federal Hate Crimes Legislation? Congress and the Politics of Sexual Orientation*, 85 MARQ. L. REV. 537, 572 (2001) (noting that, in January

2000, MTV suspended its regular programming to air, commercial free, hate crime victims' names and stories).

The criticisms that have been lodged against MTV over the past 20 years underscore its vital need for capable decision makers that are receptive to creative movements in different cultures and are open-minded to new trends as well as criticisms. *E.g.*, Dick Hebdige, *What is Soul?*, in VIDEO ICONS AND VALUES 121-33 (Alan Olson, Christopher Parr & Debra Parr eds., 1991) (discussing the absence of African-American rap from MTV in the 1980s).

MTV's ability to shape attitudes and reach new audiences has transformed it into a powerful platform for political figures. *E.g.*, Mark Silverstein & William Haltom, *You Can't Always Get What You Want: Reflections on the Ginsburg and Breyer Nominations*, 12 J.L. & POL. 459, 460 (1996) (noting Bill Clinton's appearance at an MTV "town hall meeting" before the 1992 Democratic National Convention where he opined on the kind of judge he would like to appoint); Iqbal Z. Quadir, *A New Era of Development? The Bottleneck is at the Top of the Bottle*, 26-FALL FLETCHER F. WORLD AFF. 69, 85 (2002) (noting that after September 11, U.S. Secretary of State Colin Powell used MTV as a platform from which to reach 350 million young people worldwide); David Orgon Coolidge & William C. Duncan, *Reaffirming Marriage: A Presidential Priority*, 24 HARV. J.L. & PUB. POL'Y 623, 624-26 (2001) (discussing Vice-President Gore's appearance on MTV during the 2000 Presidential campaign, in which he supported "civil unions" of same-sex couples).

B. A Well-Trained Workforce With A Diverse Background Is Essential To The Innovation Of Eclectic Programming.

In the practical experience of MTVN, the need for diversity in higher education—which feeds its workforce is

compelling. A well-educated and savvy workforce with a diverse background and perspective is absolutely essential to the development of the unique brands of MTVN and other entertainment media. MTVN's goal is to *create* popular culture—not merely reflect it—through the development of programming that challenges convention and resonates with MTVN's highly diverse audiences.[2] The continual innovation required for success in the industry depends on heterogeneity in MTV's creative work-teams. Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovation Ideal*, 84 CAL. L. REV. 953, 1024 (1996) [*hereinafter* Sturm & Guinier, *Reclaiming The Innovation Ideal*] ("Studies have shown that work-team heterogeneity promotes more critical strategic analysis, creativity, innovation, and high-quality decisions. Recent mathematical work suggests that participation of groups with different prior beliefs or predispositions in decision making improves the quality of the decision for everyone.") (citing, *e.g.*, L. Richard Hoffman & Norman R.F. Maier, *Quality and Acceptance of Problem Solutions by Members of Homogeneous and Heterogeneous Groups*, 62 J. ABNORMAL & SOC. PSYCHOL. 401 (1961); Sumita Raghuram & Raghu Garud, *The Vicious and Virtuous Facets of Workforce Diversity*, *in* SELECTED RESEARCH ON WORK TEAM DIVERSITY 155, 156 (Marian N. Ruderman et al. eds., 1995) (finding that heterogeneous teams bring multiple perspectives to tasks and thereby outperform homogeneous teams in generating ideas)).

In addition to innovation, MTVN's programming and other creative-driven initiatives require an understanding of

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[2] For a company developing intangible creative brands—like MTV and VH1—diversity in the workforce is arguably even more essential than for multi-national companies producing standard products like cars, computers, or pharmaceuticals.

the racially and culturally diverse audiences that MTVN serves. Cultural communities constitute distinctive market niches. Sturm & Guinier, *Reclaiming The Innovation Ideal*, 84 CAL. L. REV. at 1025. MTV and other American companies have sought to address these niches by diversifying their workforces. This is not an espousal of the view that Hispanics or African-Americans should be recruited as "spokespersons" for their "cultures" or "races." An Hispanic director may not be essential to producing successful "Hispanic" programming; an African American talent scout may not have been needed to recognize the artistic value of rap music. But it cannot be doubted that membership in a racial or ethnic minority in this society entails experiences and perspectives that would be valuable to the entertainment industry. It seems self-evident that a person from a Puerto Rican community, who speaks Spanish, and grew up listening to Puerto Rican-influenced music likely will add value to the process of developing authentic programming and effective marketing to the "Latin" niche. *Cf.* Steven W. Bender, *Will the Wolf Survive?: Latino/a Pop Music in the Cultural Mainstream*, 78 DENV. U. L. REV. 719, 730 (2001) ("Marc Anthony has complained that while he is often represented in the media as a 'hot jalapeno,' as a Puerto Rican he has never tasted one."); *see also* Media Cos. Br. at 5-10. Moreover, minority employees can add fresh perspectives to themes marketed primarily to majority cultures.[3] It seems equally obvious that greater diversity in

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[3] *See* Marsha Scarbrough, *Recipe for Soul Food: Combine writers from sitcom, drama, and cinema. Mix thoroughly.*, WRITTEN BY, Apr. 2001, *available at* http://www.wga.org/aboutwriters_index.html (quoting Charles D. Holland, co-executive producer of television show *Soul Food*) ("There is no reason why you can't have minorities running shows, and those shows don't have to be about minorities. ...I think minorities have interesting points of view about the world anyway because minorities are already outsiders."); Sharon Johnson, *Behind Closed Doors, Roundtable:*

television programming will, in turn, affect how millions of Americans see their world.

C. To Build And Retain Diverse Workforces, MTVN Depends On Universities To Teach Cross-Cultural Competencies.

To meet the challenge of retaining a diverse workforce and fostering the innovative atmosphere that is so essential to MTVN's success, managers and employees increasingly must understand people from diverse backgrounds. They must be skilled in recognizing and addressing interracial and multicultural issues. The pitfalls of employing managers without these skills have been detailed by other *amici*, with whom MTVN fully concurs. *See* GM Br. at 11-18; 65 Leading Am. Businesses Br. at 5-10 Like other businesses, MTVN depends on universities to teach cross-cultural competencies and foster an environment where those competencies can be practiced regularly.

A diminution in diversity at public universities would mean that many graduates would leave their homogeneous cocoons for the first time when they enter the workplace. At the University of Michigan Law School, for example, evidence in the Grutter litigation indicated that if the school could not consider race, minority students would have dropped to only 16 (or 4%) of the entering class of 400

Where Do We Go From Here? Black Writers in the New Millennium, WRITTEN BY, December 1999/January 2000, *available at* http://www.wga.org/ aboutwriters_ index.html [hereinafter *Black Writers Roundtable*] (quoting filmmaker Carole Oligario) ("I think that black writers, when they're good, are more qualified to write different kinds of people because we live in two worlds all the time. We live in our own world and we're living in the bigger world, and we know how the various racists think and feel because we have to interact with them. Whereas the Caucasian persuasion, oftentimes, can isolate themselves. We have not been able to.").

students compared to the actual enrollment of 58 (or 14.5%) With only 16 minority students, the opportunity fo meaningful interaction with the other 384 students would b slim. *See* Br. Resp. No. 02-241 at 6 n.7. The upshot is tha graduates will arrive in the workplace ill-equipped to do thei jobs. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 312 n.48 (1978) (opinion of Powell, J.) (students surrounde "only by the likes of themselves" are likely to hold parochia and limited perspectives). And employers, in turn, are ill equipped to alter behaviors and perceptions accumulate over a lifetime. *Cf.* Ellen Neuborne, *Sex harassment suit soar Complaints high from women in blue-collar jobs*, USA TODAY, May 3, 1996, at 1A (quoting an industria psychologist who opined that most corporate training programs are still in their infancy and are not sufficient t undo a lifetime of behavior and social experience).

MTVN's unique mix of eclectic shows and edg attitude was invented—and is being reinvented daily—by th most dynamic and eclectic people in the industry. This unique mix, in turn, is feeding the marketplace of ideas an shaping national and global attitudes. The future of America business and the quality of message communicated throug the media "depends upon leaders trained through wid exposure to the ideas and mores" as diverse as the nation' people. *See Bakke*, 438 U.S. at 313 (opinion of Powell, J.) The nation's universities thus have a compelling interest i taking effective steps to produce both highly-trained an diverse workforces with cross-cultural competencies. Suc workforces are critical for the creative success of influentia broadcast entertainment companies like MTVN.

CONCLUSION

For these reasons, the Court should hold that diversity in higher education is a compelling government interest, and the University of Michigan's admissions programs are narrowly tailored to serve this compelling interest.

Respectfully Submitted,

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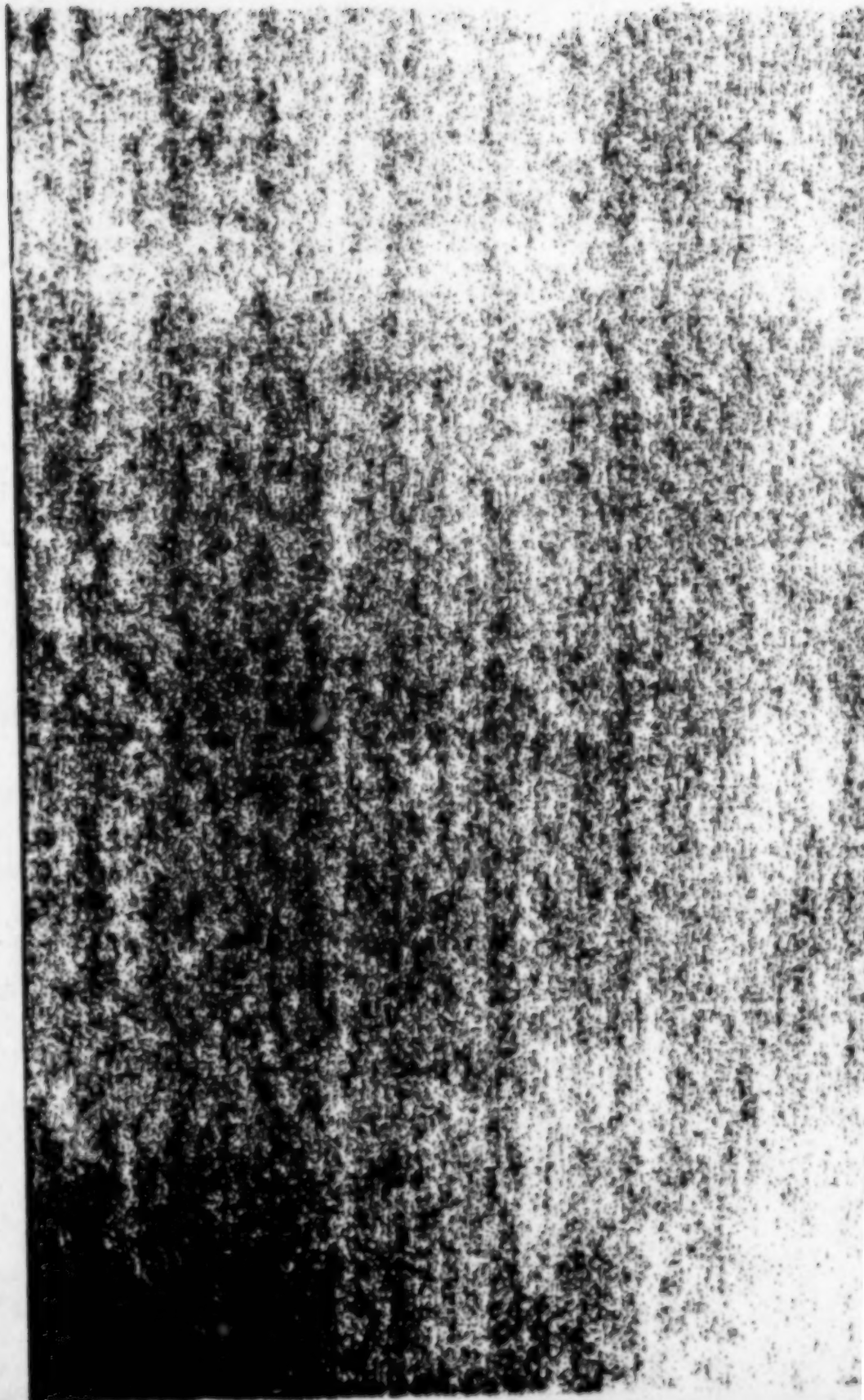
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